

<u>IN THE SUPREME COURT OF VICTORIA</u>		Not Restricted
<u>AT MELBOURNE</u>		
<u>CRIMINAL DIVISION</u>		

No. 1524 of 2006

THE QUEEN	
v	
ROBERT DONALD WILLIAM FARQUHARSON	

<u>JUDGE:</u>	LASRY J
<u>WHERE HELD:</u>	Melbourne
<u>DATES OF HEARING:</u>	16 September 2010
<u>DATE OF SENTENCE:</u>	15 October 2010
<u>CASE MAY BE CITED AS:</u>	R v Farquharson
<u>MEDIUM NEUTRAL CITATION:</u>	[2010] VSC 462

CRIMINAL LAW - Sentence - Three counts of murder - Victims being the prisoner's children - Facts consistent with jury verdict - Facts which need to be determined - Facts adverse to the prisoner - Prisoner continues to deny guilt - Life Imprisonment - Minimum term - s 11 of the *Sentencing Act* - Factors relevant to fixing a minimum term - Serious violent offender - s 6C *Sentencing Act* - Whether protection of the community required - Minimum term fixed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Mr A Tinney SC with Ms A Forrester	Office of Public Prosecutions
For the Accused	Mr P Morrissey SC with Mr C Mylonas	Victoria Legal Aid Geelong

HIS HONOUR:

Robert Donald William Farquharson, on 22 July 2010, after a trial lasting some 10 weeks, you were found guilty by the jury of three counts of murder. Each of the three counts represents one of your children being Jai, aged ten years, Tyler aged seven

years and Bailey aged two years. On 16 September 2010 I heard submissions from both the prosecutor, Mr Tinney SC and your counsel, Mr Morrissey also of senior counsel, as to the sentence that I should impose on you for these three crimes of murder. In some respects sentencing you for these offences is straightforward but in others more difficult.

I have been involved in the practice of the law for 38 years and yet the tragedy of this case almost defies imagination. As Mr Tinney has submitted, and as is obvious, these were crimes committed against three vulnerable, helpless and wholly innocent children.

In addition, the case now has a five year history which includes the commission of these crimes by you on 4 September 2005, a subsequent Homicide Squad investigation resulting in you being charged with three counts of murder, committal proceedings, a trial in this Court in 2007 resulting in your conviction on each offence, and then an appeal to the Court of Appeal resulting in an order that you be re-tried. The retrial concluded with the three guilty verdicts to which I have just referred.

Your crimes have devastated a significant number of people. Primary among them is your ex-wife Cindy Gambino, the mother of these three children. Also, her now husband Stephen Moules, her family, your family and to a broader extent, many people in the township of Winchelsea who knew you and your family and in particular who knew your children. Some of them gave evidence on your trial and I am sure there are others who did not who are significantly affected.

You and Cindy Gambino lived together for ten years between 1994 and 2004. In 2000, after the births of Jai and Tyler, you and she married notwithstanding that there were some difficulties in the relationship. In December 2002, Bailey was born.

The relationship ended in separation in November 2004, and that occurred at the instigation of Cindy Gambino. The result of her unilateral ending of the marriage was that you moved out of the home in which you were both living and then resided with your father in Winchelsea. The evidence before the jury suggested that the early stages of

the separation were difficult, and you were understandably upset and angry that your family seemed to you to be falling apart. However, such things happen to many, many people and despite the anger and the hurt, they do not end in the kind of tragedy that befell this family at your hands.

After you and Cindy Gambino separated, there were arguments between the two of you and some of them, at least, concerned the fact that your wife had commenced a relationship with Stephen Moules. He had children from a previous relationship, and had originally come into contact with your family as the person who poured the concrete slab for a house that you and your wife were building at the time the separation occurred.

There was evidence to demonstrate that, despite the separation, your relationship with your three children was good and that you were making some effort to ensure that those relationships survived and would survive the inevitable divorce.

During 2005, there were several conversations which indicated that you were very unhappy with your circumstances. They included conversations with Stephen Moules himself and with the witness, Susan Hatty, during the course of which you told her that you were going to “take the kids off Cindy”. Ms Hatty then enquired about whether that meant going for custody, and she described in her evidence that you just shrugged your shoulders. In your evidence on your trial you said you did not remember that conversation.

A significant part of the evidence concerning your attitude and state of mind, and the allegation that you intended to exact revenge on Cindy Gambino, was the description given on your trial by the witness Greg King of the conversation that he said he had with you in June 2005 at the fish shop in Winchelsea. You did not deny that such a conversation occurred, or that in the course of it you stated your intention was to “pay [Cindy Gambino] back big time”. However, you denied the interpretation on those words for which the prosecution argued.

Mr King claimed in his evidence that there was more to that conversation than you were

prepared to admit. During the course of the conversation, King alleges that you claimed your circumstances were all Cindy Gambino's fault and that you resented that she was driving a recently acquired motor vehicle whilst you drove a substantially older one. He also alleged that you complained about the likelihood that she would marry Stephen Moules and then said "I'm going to pay her back big time". When King asked how that would occur, he alleges you said that you would take the children from her by killing them because you hated them. That would happen, King claims you said, by accident in a dam on Father's Day. This is a summary of what became known as the "extreme" version of this conversation.

The prosecution case against you was put to the jury on the basis that a verdict of guilty against you did not depend on the jury being satisfied that this conversation occurred in the terms that Mr King described it. It therefore becomes necessary for me to separately decide whether or not you said the things that Mr King claims you said. To have identified the method by which you proposed to kill your three children three months before these murders took place in the detail that Mr King claims would inevitably be a fact which would be used adversely to your interests in sentencing you, and therefore before such evidence could be used in that way I would be required to be satisfied about those facts beyond reasonable doubt.

I am not satisfied beyond reasonable doubt that what Mr King gave evidence you told him was actually said by you in the terms that he described. There are several reasons for this. First, whatever you said to him was not of sufficient interest or seriousness to warrant Mr King telling his wife about it when he saw her shortly after this conversation. Although he said he did tell her, his wife, Mrs Mary King, has no memory of any disturbing aspect of anything you reported. Second, after these offences were committed by you, Mr King was asked by the police to secretly tape record conversations with you which he agreed to do. The clear purpose of that exercise was to obtain information and evidence and, if this conversation had occurred in the way Mr King described it, having agreed to assist the police it would have been central to his efforts. However in the course of two conversations

between King and you in September and October 2005, he failed to put this version of the conversation at the fish shop to you as something that had occurred and about which he was worried. Third, having given different versions of the conversations, Mr King first formulated a written statement which contained this extreme version of the conversation some three months after you murdered your three children. Fourth, having observed Mr King giving his evidence, although I did not come to the conclusion that he was in any way deliberately dishonest in the evidence he gave, I did not consider him to be particularly reliable given the trauma he suffered. I am sure he now honestly believes the conversation occurred as he described it but I am not satisfied to the requisite standard that it did.

I therefore do not sentence you on the basis that you informed Mr King that you proposed to kill your children because you hated them and that you proposed to do it by staging an accident in a dam on Father's Day. I am therefore also left in the position where I am unable to say when you decided to commit these crimes although the nature of the crimes themselves compels the conclusion that some appreciable thought had been given to how they might be committed. You chose the location at which to drown your children and I am satisfied there must have been a degree of contemplation and planning but the extent of it, when and over what period, I am unable to say.

However, as I observed to Mr Morrissey during his plea on your behalf, whatever the circumstances in which you decided to commit these crimes and whenever you decided to commit them, the enormity of what you have done is not significantly diminished by my inability to resolve those issues. Further, I do not have any doubt that the reason or reasons why you determined to murder your three children were connected with the separation between you and your wife in November 2004. In my opinion, you continued to believe that your financial and emotional circumstances were significantly adversely affected by that event, including by the fact that your wife had commenced a new relationship with Mr Moules, a factor which, in my opinion, you particularly resented.

On 4 September 2005, which was Father's Day, further to an arrangement that Cindy Gambino had made with you on the previous Friday night, she brought the children to your father's house at 3.00pm on the Sunday afternoon. After the giving of Father's Day presents, she left and the plan was that the children would remain with you for dinner until 7.30pm that night.

The evidence suggests that you and the children went from there to the home of a friend of yours, Michael Hart, who also gave evidence on the trial, to see whether he wished to join you for dinner, and then you drove to Geelong where you saw your sister Kerri Huntington, who was working at the K-Mart store in Belmont. Her evidence was that she saw you and your children at around 6.00pm. You also saw Norbert Bell, a man with whom you worked, and saw him by chance in the K-Mart store, and your brother-in-law Garry Huntington, whose home you visited on the way back home to Winchelsea, staying there for only about 10 minutes or so.

You then commenced the drive from Garry Huntington's place to Winchelsea.

In the course of that driving you were seen by the witness Dawn Waite, who was at the time driving home to Warrnambool after a shopping trip in Melbourne.

Mrs Waite said in her evidence that she was driving along the Princes Highway towards Winchelsea travelling at 100 kilometres per hour and came up behind a vehicle which I am satisfied was your vehicle. She noticed that your vehicle was braking, and she saw that happen about three times. In her evidence she described it as being "brake, release, brake, release." She said she could not say why that was occurring. She estimated that your vehicle was travelling at a far slower speed than hers, and that the vehicle was veering on the roadway. When she came up behind your vehicle she estimated that your vehicle was travelling at between 50 and 60 kilometres per hour on the approach to the overpass near the dam into which your vehicle was eventually driven.

Significantly, in her evidence she said that when your vehicle moved to the left hand side of

the road as it did occasionally, she could see the driver's head turning to the right.

It is, I consider, an inevitable consequence of the jury's verdict that they were satisfied that at this point you were preparing to drive your car into the dam and were looking for an appropriate place to make an approach to the dam. Mrs Waite said she passed your vehicle, and having passed it she looked in the rear vision mirror and saw your vehicle turn right into the dam, although she did not realise that it was a dam at the time.

There was a significant dispute about what she was able to observe about the interior of your car, and whether your children were sitting with one in the front passenger seat and two in the back or all in the back seat. I make no finding about that, and do not consider that for the purpose of sentencing you such a finding is necessary.

It is beyond doubt that the vehicle then drove into the dam and began to sink in the water, and that at an early stage after the vehicle entered the water you got out of the vehicle through the driver's side door. The jury's verdict makes it plain that they are satisfied beyond reasonable doubt that when you left the vehicle you did so with the knowledge and intention that your three children would be drowned and they were. For them it must have been a terrifying death.

You then left the water and flagged down passing vehicles. Your immediate reaction to what had occurred was described by the witnesses Shane Atkinson and Tony McClelland. Atkinson and Mc Clelland were driving from Winchelsea towards Geelong, and the vehicle in which they were travelling stopped as a result of you being in effect on the carriageway of the Princes Highway. You told them that you had killed your children. You said to Atkinson "Oh fuck, what have I done"? You provided what clearly was an invented excuse for the incident, referring either to a coughing fit or a failed wheel bearing as a cause of the accident. Your overwhelming desire at that stage was not to enlist the assistance of Mr Atkinson and Mr McClelland to help you save your children from the dam, but rather to help you to be transported to Winchelsea where you could inform your wife that your

children were dead. Mr Atkinson gave evidence that he offered you a telephone, and that at one stage an offer was made for them to get into the dam to try to assist. You refused both offers.

Atkinson and McClelland complied with your request that you be taken to Winchelsea and took you to Cindy Gambino's house. You told her in the opening parts of the conversation that you had killed the children and that they had gone into a dam. Ms Gambino became immediately traumatised and a most horrible odyssey in her life began.

There was substantial evidence given about what occurred at the scene of this tragedy, after an increasing number of people had arrived including your wife, Stephen Moules, his children, other people from Winchelsea, the Country Fire Authority, the ambulance service and of course the police. Your reactions to what had occurred were described by a number of people, and the overwhelming impression given to those who observed you at the scene on this night was an attitude of indifference. That was sought to be explained in the course of the trial by evidence from a psychologist, Dr Gordon, as being a reaction to trauma. As that witness said in answer to a question from the jury, you may well have been traumatised, but only by a realisation of the magnitude of these appalling criminal acts which you had just committed. You were devoid of any interest or concern for your children, or even for the recovery of their bodies.

You were interviewed by police and later charged with three counts of murder. Your position from the time of the incident onwards was that you had had a coughing fit and lost consciousness, a condition known as cough syncope, and that was cause of this terrible tragedy. In brief your explanation for not retrieving your children from the car when you regained consciousness and before the car sank was that you got out to go around to the other side of the car to do so. You claimed not to have realised that the vehicle was in such deep water. Your explanations were clearly rejected by the jury and obviously did not raise a reasonable doubt as to your guilt in

their minds.

Thus the issue in both this trial and the earlier trial in 2007 which was most central for the jury's consideration, was whether or not you drove the vehicle into the dam deliberately with the intention of killing your three children, or whether you were afflicted by a sudden coughing fit resulting in a cough syncope involving a loss of consciousness and then a terrible accident. The jury clearly rejected your defence and were satisfied beyond reasonable doubt that you intentionally murdered your children, so your explanations for what occurred must be discarded for the purpose of sentencing you.

Victim Impact Statements

During the hearing of submissions on sentence two Victim Impact Statements were tendered in evidence and read to the Court by Mr Tinney. They are the Victim Impact Statements of Ms Gambino and Mr Moules. No challenge is made on your behalf to what is contained in those statements. Those statements cannot be adequately paraphrased because they contain the devastated emotions of both of those people. The effect on them, particularly the mother of these three children, is momentous and will last for the rest of their lives.

Ms Gambino was not able to be present when her Victim Impact Statement was presented to the Court due to illness and those kinds of difficulties are likely to remain with her for the rest of her life.

Mr Stephen Moules went to the dam on the night of 4 September 2005 and spent a significant time in the water searching for these children. He was also called upon to formally identify each of the three children. In his Victim Impact Statement he has vividly described the manner in which his life has been fractured by these events.

Again, it is not possible to adequately summarise the emotional effect on these people set out in those statements. The trauma they have suffered will be with them indefinitely.

I have taken these Victim Impact Statements into account in the sentence I will impose on you. I also accept the submission by Mr Tinney that although only two Victim Impact Statements have been filed many other people have been dramatically affected by your crimes including Ms Gambino's parents, Mr and Mrs Gambino, and many others as I have earlier noted.

Personal Circumstances

You are aged 41 years. You have been connected with Winchelsea all your life having grown up and gone to school there. You have two sisters and a brother and you are the youngest of the siblings. Your sisters have both been witnesses in this case and have supported you through all the proceedings against you. They both strike me as loyal, caring people who have also suffered considerably through this case and all that went before it.

Your education was in Winchelsea and in Geelong and finished at Year 11 level. As the evidence revealed your employment history began with the Shire of Winchelsea and apparently began when you were 17 years of age. You were there from 1987 to 1995. You left the Shire and then, as I understand it, after a period of time at Lidgerwood Seeds, you took up a lawn mowing franchise which it would seem was anything but successful and cost you and your family money to the extent of some \$40,000. According to Ms Gambino that franchise was surrendered in 1999 and shortly after that you obtained employment as a cleaner at the Cumberland Resort in Lorne and, the time of these incidents in September 2005, you were working there.

Within the Winchelsea community you were involved in the football club and junior football particularly. Between 2000 and 2002, your mother had become ill with a degenerative disease and died as a result. Your mother's death apparently had a significant effect on you. I also understand that earlier this year your father died after having cancer for some two or more years.

There is no question but that the break up of your marriage caused you anxiety as I have earlier noted. During your first trial there was evidence suggesting that you were

suffering from a moderate level of depression that seemed to be resolving. I excluded that evidence from the jury's consideration because I rejected the manner in which it was proposed to be used by the prosecution.

As part of the material put on your behalf I received a number of letters from members of your family and friends who have supported you and continue to do so.

There is, therefore, no question that until 4 September 2005, you were a person of good character, a law-abiding citizen and a committed family man. The incongruity between that and what occurred that day is almost inexplicable. Apart from some treatment for depression arising either from the death of your mother or your deteriorating family circumstances you have not otherwise suffered from any mental illness.

You have already served a significant time in custody and I am not aware that your conduct in prison has been anything but compliant and satisfactory. I realise that given the circumstances of the crimes of which the jury has found you guilty, serving your sentence is going to be onerous and I assume you will be a person at risk for a significant part of your time in custody if not all of it.

Conclusions

I have no hesitation in coming to the conclusion that the appropriate sentence for you in relation to each of these three counts is a sentence of life imprisonment. Your counsel frankly acknowledged that such a sentence was within the range open to me.

Whenever you made the decision to commit these crimes, the stark reality is that you have murdered your three children who were young and vulnerable and in respect of whom you had an overwhelmingly strong obligation to protect. You have shown no remorse for what you have done, implicit in the fact that you have maintained your innocence. I am satisfied that the reason why these crimes were committed was connected with your hostility, antagonism, frustration or dissatisfaction with the consequences of the collapse of your marriage.

Nothing less than life imprisonment would, in my opinion, be a sufficient sentence given the circumstances of this case. Such a sentence is necessary to punish you and to denounce your conduct as well giving effect to the need for general deterrence for such dreadful conduct. Therefore, for the murder of Jai Farquharson, you will be sentenced to life imprisonment. For the murder of Tyler Farquharson, you will be sentenced to life imprisonment, and for the murder of Bailey Farquharson, you will also be sentenced to life imprisonment.

A Minimum Term

The question then arises as to whether or not in respect of these sentences I should fix a minimum period of imprisonment, after which you would be eligible for release on parole. Mr Tinney has urged me not to fix a minimum term and submitted that your crime has such a degree of seriousness attached to it that such a course would be justified. Mr Morrissey on your behalf has urged me to fix a minimum term.

Section 11 of the *Sentencing Act* effectively provides that the court must, as part of a sentence, fix a period during which you would not be eligible to be released on parole unless I consider that the nature of these offences or your past history makes the fixing of such a period inappropriate. Your past history has no role to play in that consideration, other than by reference to your lack of remorse. Centrally, I am concerned with the nature of these offences. In addition, it is clear from the authorities that s 11 of the *Sentencing Act* does not make other considerations such as your age, irrelevant. Indeed, your age is an important consideration.

On 16 November 2007, after the first trial in this matter, Cummins J sentenced you to life imprisonment and declined to fix a minimum term to be served before you would be released on parole. With all due respect I have come to a different conclusion. On a careful analysis of the circumstances I have come to the view that I should fix a minimum term.

Ordinarily, when a person is convicted of the crime of murder, even when a trial has been held and criminal liability denied, it will be appropriate to fix a minimum term to be

served before the prisoner becomes eligible for release on parole. Even in cases where there are multiple killings, perpetrators are not necessarily denied the opportunity to earn release on parole at some stage before their life ends.

I realise that the Court of Appeal of this State does not hold to the view that it will be scarcely ever appropriate to refuse to fix a minimum term. Indeed, the Court has specifically reminded judges that our increasing familiarity with horrendous crimes such as yours should not conceal the need, in appropriate cases, that they be punished with the utmost severity. However considerations which bear upon the fixing of a head sentence, in this case life imprisonment, are different in important respects from those which bear upon the question of whether to fix a minimum term before eligibility for parole. As the High Court has noted the severity of the head sentence of life imprisonment may make it more appropriate to impose a minimum term.

An important purpose of punishment is, of course, protection of the community from a person who is a continuing danger to the community. Though in the circumstances of this case I am deprived of any expert assistance from psychological or psychiatric witnesses which might explain the processes that led you to commit these offences, it seems to be common ground that you are no danger to the community. You are also without prior convictions. Until these events in 2005 you could properly be described as a person of good character who was committed to your family. Further, prior to your first trial you were on bail though the trial judge saw fit to revoke that bail when that trial commenced. No conduct of yours caused that to occur. After your successful appeal to the Court of Appeal against your conviction in that trial, you were granted bail. You remained on bail without objection until the jury's verdict in this trial and, so far as I am aware, complied with all the conditions that were imposed on you.

Thus in determining whether or not to fix a minimum term in your case, I regard the following factors as being relevant to the issue. First, until the commission of these offences you were a person of apparently good character. Secondly, it is not

suggested you have ever been or would be in the future a threat to the community. Third, I consider the seriousness of your crimes is appropriately reflected in the sentence of life imprisonment for each count. Fourth, it is likely that given the nature of your crimes you will serve your sentence under onerous conditions.

You are 41 years of age and apparently in reasonable health. Providing you do not develop any serious health problems in the future, a life sentence without parole could result in you serving as much as approximately another 40 or more years in addition to time you have already served. As I have noted, on all the evidence, you are not a threat to the community as best as I can tell and are without prior convictions.

Having said that I will fix a minimum term, it will be a very substantial one. I direct that you serve a minimum period of 33 years before you are eligible for release on parole.

Pursuant to s 6C of the *Sentencing Act 1991* on counts 2 and 3 you are sentenced as a serious violent offender and I direct that that fact be entered in the records of the Court. Pursuant to s 6D of the Act I am required to regard the protection of the community from you as the principal purpose for which the sentence is imposed. I am satisfied the sentence I impose on you will achieve that purpose.

I declare that the time you have already served as pre-sentence detention 958 days including today. I direct that those declarations and their details be entered into the records of the court.

I will make the disposal order sought by the prosecution under s 78 of the *Confiscation Act 1997*. I will also order that the forensic sample provided by you be retained pursuant to s 464ZF(2) of the *Crimes Act*.

I will adjourn the application by Ms Cindy Gambino pursuant to s 85B of the *Sentencing Act* to a date to be fixed.

Mr Farquharson may now be removed.