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| IN THE SUPREME COURT OF VICTORIA | Not Restricted |

AT MELBOURNE

CRIMINAL DIVISION

No. 1682 of 2008

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| THE DIRECTOR OF PUBLIC PROSECUTIONS | Plaintiff |
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| v |  |
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| ANASTASIA NESTOROWYCZ | Defendant |

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| JUDGE: | HARPER J | |
| WHERE HELD: | MELBOURNE | |
| DATE OF HEARING: | 22 SEPTEMBER 2008 | |
| DATE OF JUDGMENT: | 29 SEPTEMBER 2008 | |
| CASE MAY BE CITED AS: | DPP v NESTOROWYCZ | |
| MEDIUM NEUTRAL CITATION: | [2008] VSC 385 |  |

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CRIMINAL LAW – Sentence – Attempted murder – Stabbing of husband who was suffering from dementia – Plea of guilty – Sentenced to 2 years and 9 months’ imprisonment wholly suspended – Exceptional circumstances - Offender suffering from major depressive disorder at time of offence – Reduced capacity to make appropriate decisions - Offender attempted to kill herself - Effect of s 6AAA of *Sentencing Act 1991*.

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| APPEARANCES: | Counsel | Solicitors |
| For the Crown | Mr C. Ryan SC | Stuart Ward, Acting Solicitor for Public Prosecutions |
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| For the Defendant | Mr D. McKenzie | Victoria Legal Aid |

HIS HONOUR:

# Anastasia Nestorowycz, on 24 June this year you pleaded to a charge that, on 14 June 2007, you attempted to murder Paul Nestorowycz. He is your husband. You stabbed him once, in the stomach. You were aiming for his heart. You intended to kill him. You almost succeeded. Your husband was very badly injured, and required intensive medical care over a long period before he recovered.

# Attempted murder is, of course, a very serious crime. Parliament has decided that the maximum penalty for it is 25 years’ imprisonment. That penalty, however, is reserved for the very worst examples of the crime; a really evil case of attempted murder, committed by someone with no remorse and who did not plead guilty.

# You do not fall into that category. At the same time, you took it upon yourself to make a decision which had the gravest possible consequences for someone else – your husband. You decided that there was no point in your husband continuing to live, and that therefore he should die, and that you should kill him.

# Judges do not have the right to decide whether someone else should live or die. Neither do you. Life – any life – is too important for that. So the Court cannot ignore the fact that you made a decision you had no right to make; that it was the wrong decision; that it resulted in your attempting to murder your husband; and that it caused him to endure much suffering.

# I am, of course, required to sentence you according to law. An important part of that law is to be found in an Act of the Parliament of Victoria. That Act is called the *Sentencing Act*. It says that attempted murder is one of a class of offences that it describes as serious offences. It also says, in effect, that even those who commit serious offences can be made the subject of a sentence of imprisonment that is wholly suspended.

# Such a sentence can only, however, be imposed in exceptional circumstances and when to do so is in the interests of justice. One of the circumstances is that the sentence of imprisonment, if unsuspended, would be appropriate having regard to the provisions of the Act. I am satisfied that this condition is made out in your case. In other words, what you did to your husband warrants a sentence of imprisonment which, unless the circumstances were exceptional, would not be suspended.

# In deciding whether, in your case, exceptional circumstances exist, I must have regard to the need, considering the nature of your attack upon your husband and its impact upon him, to ensure that your sentence adequately manifests the denunciation of the Court of the type of conduct in which you engaged. I must also ensure that the sentence adequately deters you and others from committing offences of the same or similar character, and reflects the gravity of the offence.

# Having considered each of these matters, I am satisfied that in your case a sentence of imprisonment for a period of 2 years and 9 months is appropriate, but that that sentence should be wholly suspended. Accordingly, at the conclusion of the sentencing remarks, I will so order.

# The *Sentencing Act* says that, if I propose to make an order suspending the whole of a sentence imposed for a serious offence (of which attempted murder is one) I must, at the time of imposing the sentence, announce in open court my reasons for doing so. I must also cause those reasons to be noted in the records of the Court. I accordingly order that they be so noted.

# My reasons for proposing to make an order that the whole of your sentence be suspended begin with an examination of your personal circumstances. You were born in Greece on 9 March 1932. You are therefore now 76 years of age. You had no formal education. Despite this, you taught yourself to read Greek. You were employed as a process worker in a textile factory before you migrated to Australia in about 1970, some 38 years ago. You continued as a process worker after arriving here, but two years later obtained a job as an overlocker machinist. You were married in 1972, and ceased employment in 1973. Your only child, your son, was born in 1975 or 1976. He is 32 years old.

# You were one of eight children. Your childhood was spent, in part, in Greece when it was occupied by Nazi Germany. This made life very difficult, especially for children. But your shared experience of adversity no doubt brought you and your siblings together. A sister who came to Australia to live, and with whom you enjoyed a close friendship, died in October 2003. This was very upsetting for you, especially since by that time your husband had been moved into a nursing home. Your other siblings live in Greece or Germany. Contact with them is infrequent. Your mother died in about 1964, and your father in 1984. Your mother suffered from chronic depression, although she did not commit suicide.

# It seems that there were some problems in your marriage, but you nevertheless remember it as being a very happy one until your husband was admitted into nursing care. Certainly, there is no suggestion of physical violence. Difficulties arose, however, when your husband’s diabetes resulted in his losing the use of his legs. Your inability to compensate for this, because he was too heavy for you to assist with his mobility, meant that he had to be placed in a nursing home.

# This caused you considerable, and increasing, distress. You saw yourself as having continuing responsibility for his care. But you became unable to strike an appropriate balance for his need for your continuing assistance, and your own need to look after yourself. So, for example, you undertook exhausting travel on different forms of public transport to visit him when he was living in a nursing home far from your own home.

# You also formed a distorted opinion of the standard of care being given to your husband at the various nursing homes to which, from time to time, he was admitted. This distortion indicated a degree of paranoia on your part. You became distressed, and felt overwhelmed by your perception that you were unable to meet what you saw as your husband’s needs, and your responsibility to meet them.

# By April 2006, your general practitioner, Dr Kartsogiannis, was sufficiently concerned to refer you to a psychiatrist, Dr Mouratides. You had by then been treated for a year or so for depression and other health concerns, including chest pains, insomnia and unstable diabetes. Moreover, your depression was difficult to treat because you did not respond positively to the antidepressants that were prescribed for you. There is no doubt, on the medical evidence available to me, that in June last year you were suffering from a major depressive disorder.

# I am also satisfied that this was accompanied by a degree of intellectual impairment, accentuated by the depression. The psychiatrist who treated you when, after the attempt on your husband’s life, you were placed in Normanby House at St. Georges Hospital, Kew, said in a report dated 17 August 2007 that your already compromised mental state was further complicated by a reduced ability to plan, to organise and to cope with complex tasks. In addition, your capacity for making appropriate decisions about, for example, what assistance you should give to your husband, was reduced. You found it hard to avoid acting impulsively, and to avoid placing yourself in situations in which you became overwhelmed. In medical terms, your capacity to conceptually discriminate between what may be crucial and what is incidental became less effective than 90 percent of the general population of people of a similar age to yours.

# I am satisfied that your reduced capacity to make appropriate decisions explains, in large part, if not completely, your decision to end the life not only of your husband but also of your own. After attacking him, you made a similar attack upon yourself. Again, only medical intervention prevented you from committing suicide.

# At the time you committed these acts, you knew what you were doing. As you told the consultant psychiatrist Dr Lester Walton, you believed that you had inflicted a fatal wound on your husband, and intended that he would die. You held the same intention for yourself. But, as Dr Walton also records in his report of 3 June 2008, you believed that your husband was suffering by being kept in a nursing home. He had pleaded with you often over the eight years since his initial admission to take him home. His pleas caused you a great deal of distress because you wanted to have his wish fulfilled, but it could not be. So, feeling very sorry for him, you decided (as you told Dr Walton) to end his life and yours. You continued:

I didn’t do it out of hatred or because I didn’t want him around any more.

# I accept this evidence. I also accept, as another consultant psychiatrist, Dr Anthony Cidoni, says in a report dated 13 August 2007, that in the weeks leading up to the incident of 14 June 2007, a deterioration in your mental state had a disinhibiting effect, and that there is no indication of any history of conduct, difficulties or aggression. This was an isolated act that would not have occurred had your mental faculties not been impaired by circumstances quite beyond your control.

# In these exceptional circumstances, I am satisfied that a sentence of immediate incarceration would be quite inappropriate. For these reasons, I have decided that your sentence of 2 years and 9 months’ imprisonment should be wholly suspended.

# In fixing upon this sentence, I have taken into account your plea of guilty. Had you pleaded not guilty, I would have imposed a sentence of 3 years’ imprisonment. Because I would, in those circumstances, have nevertheless wholly suspended your sentence, there is no need for me to refer to any non-parole period.

# The *Sentencing Act* requires me to explain to you, before I make an order suspending your sentence, the purpose and effect of the proposed order, and the consequences that may follow if you commit, whether in Victoria or elsewhere, another offence punishable by imprisonment during the next 2 years and 9 months. If this Court is satisfied that you have been found guilty of an offence punishable by imprisonment, and that that offence was committed in that period of 2 years and 9 months, the Court may order that you go to prison for 2 years and 9 months, or some other lesser period, or extend for up to 12 months the period of the order suspending the sentence. If the Court made such an order extending that period, you might have to serve in prison the whole or part of the 2 years and 9 months if you commit, during that extended period, an offence punishable by imprisonment.

# I now make the orders which I have foreshadowed in these sentencing remarks. I sentence you to imprisonment for a period of 2 years and 9 months, and declare that that period be the operational period. I order that that sentence be wholly suspended. I declare that the period of 4 days be reckoned as already having been served under this sentence, and direct that this declaration and its details be entered in the records of the Court.

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