SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brown* [2002] QCA 426
PARTIES:	**R** **V** **BROWN, Jason Albert** (applicant)
FILE NO/S:	CA No 4 of 2002 DC No 24 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED EXTEMPORE ON:	9 October 2002
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2002
JUDGES:	McMurdo P, Cullinane and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted** **2. Appeal allowed** **3. Instead of the sentence imposed on counts 29 and 30, the sentences of nine years' imprisonment are substituted** **4. Declaration that those offences are serious violent offences**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - where section 188(1)(c) *Penalties and Sentences Act* (Qld) application to sentencing judge to re-open sentence to take into account material not before the judge at the time of sentencing – where applicant also asked the judge to take into account new material – whether a Court that re-opens a sentence under s 188(1)(c) may take into account new matters – whether sentence manifestly excessive in all the circumstances *Penalties and Sentences Act* 1992 (Qld), s 188(1)(c) *Boyd v Sandercock; ex parte Sandercock* [1990] 2 Qd R 26, cited

R v Davis (1999) 109 A Crim R 314, cited
R v Thorpy [1996] 2 Qd R 77, considered
R v Tommekand [1996] 1 Qd R 564, cited
R v Voss; ex parte A-G[2001] QCA 483, CA No 160 of 2001, 9 November 2001, cited
R v Williams; ex parte Biggs [1989] 1 Qd R 594, cited

COUNSEL: B G Devereaux for the applicant
C W Heaton for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: On 15 February 2001, the applicant pleaded guilty to 32 counts on a 33 count indictment. He was later convicted of the remaining count on 20 February 2001. His sentence on all matters was adjourned until 24 April 2001, when he was sentenced to 12 years' imprisonment on one count of armed robbery in company and one count of grievous bodily harm with intent, and to a lesser concurrent sentence on the remaining offences.

On 13 December 2001, the sentencing proceedings were re-opened before the learned sentencing Judge under section 188 Penalties and Sentences Act 1992 (Qld). It was common ground that the material of the relevant facts before his sentence on 24 April 2001 were not placed before the sentencing Judge, so that the sentence imposed was decided on a clear factual error of substance under section 188(1)(c).

After considering material that was placed before him, the learned sentencing Judge reduced the effective sentence of 12 years' imprisonment to one of 10 years and nine months'

imprisonment, and reduced a number of other concurrent lesser terms of imprisonment.

The first contention has been argued separately and can be dealt with separately. Matters which arose after the applicant's sentence cannot provide grounds for re-opening the sentence under section 188(1)(c) Penalties and Sentences Act 1992 (Qld) because those matters do not constitute a clear factual error of substance at the time of the original sentence proceeding in April 2001. Compare R v. Williams ex parte Biggs [1989] 1 QdR 594, R v. Tommekand [1996] 1 QdR 564, Boyd v. Sandercock; ex parte Sandercock [1990] 2 QdR 26, R v. Davis (1999) 109 A Crim R 314 and R v. Voss; ex parte Attorney General [2001] QCA 483, CA No 160 of 2001, 9 November 2001.

But here the sentence was properly re-opened on another basis. The applicant contends that once the sentence was legitimately re-opened under section 188(1)(c), the sentencing proceedings are re-opened at large and the Court may resentence, taking into account new matters.

Section 188 does not have that effect. It currently provides, relevantly:

> "3. If a Court re-opens a proceedings it...
>
> (b) may re-sentence the offender...
>
> (iii) for a re-opening under subsection 1(c) to a sentence that takes into account the factual error...

and may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b)."

In R v. Thorpy [1996] 2 QdR 77, this Court held that a court which re-opens a sentencing proceedings under section 188 is not empowered to receive evidence of facts which occurred since the original sentence was imposed.

There is no relevant distinction which assists the applicant between section 188 in its current form and its form when Thorpy was decided.

The clear words of section 188 are that in a re-opening the Court is limited to resentencing the offender to a sentence that takes into account the factual error. Whilst the Court has power to amend a sentence to take into account a factual error at the time of sentence, it does not have power under section 188 to take into account new matters which were not in existence at the time of the original sentence.

The new evidence was rightly disregarded by the primary Judge in resentencing the applicant under section 188 Penalties and Sentences Act 1992 (Qld). That disposes of the first ground of appeal.

CULLINANE J: I agree with what the President has said on that issue.

HOLMES J: I agree also.

THE PRESIDENT: Yes, thank you. It will be necessary now to close the Court.

...

THE PRESIDENT: The applicant pleaded guilty to three counts of armed robbery, three counts of stealing, 14 counts of break, enter and steal, four counts of unlawful possession of a vessel, one count of attempted unlawful possession of a vessel, two counts of armed robbery in company, one count of house-breaking, one count of unlawful use of a motor vehicle with a circumstance of aggravation, one count of common assault, one count of entering a premises and assault, and one count of unlawful use of a motor vehicle.

He was then convicted of a further count of doing grievous bodily harm with intent, after a trial in which he denied the element of intent. He was sentenced on 24 April 2001 to 12 years' imprisonment on one count of armed robbery in company and one count of grievous bodily harm with intent, and to lesser concurrent sentences on the remaining offences.

In sentencing the learned primary Judge noted that the offences occurred over an 11-month period, from January to November 1997, and were committed to obtain money to purchase drugs or to pay for past purchases of drugs. The offences involved property in excess of $40,000. The robbery offences mainly involved convenience stores or service stations. On

some occasions a club lock was used as a weapon. Sometimes the applicant entered the premises and, at other times, remained outside as the driver of the getaway vehicle.

The most serious offence was the armed robbery of a pawnbroker's shop, and the doing of grievous bodily harm with intent to disable during the course of the armed robbery. The appellant and another, McDonald, entered the pawnbroker's shop and threatened the victim with a gun. As the victim confronted his attackers, they moved towards him, lowered the gun and shot him in the upper leg or groin area, causing him a serious injury, from which, fortunately, he has medically made a good recovery.

McDonald escaped in a getaway driven by another, but the applicant was stranded and used his gun to hijack a passing motor vehicle driven by a woman, and to threaten a number of workmen in order to escape.

The learned primary Judge unsurprisingly noted that victim impacts statements placed before him demonstrated the serious emotional consequences suffered by a number of victims.

The Judge observed he would ordinarily impose a sentence of 15 years' imprisonment, but taking into account the mitigating factors, including the applicant's age, 27 at the time of the offence, limited criminal history, drug addiction, attempts at rehabilitation, ready admissions, cooperation with the

authorities, pleas of guilty and his expression of remorse, reduced the sentence to 12 years.

His Honour observed that, but for the provisions of part 9A Penalties and Sentences Act 1992 (Qld), he would have imposed a sentence of 14 years' imprisonment, with a recommendation for parole after about one third. The Judge observed the applicant's cooperation represented the only evidence against him in all but two of the offences with which he was charged, and involved not only admitting his own responsibility but in identifying others involved. No details of his cooperation were given at sentence.

The applicant applied for leave to appeal from that sentence but abandoned that application so that the sentencing Judge would re-open the sentence under section 188 Penalties and Sentences Act 1992 (Qld). The judge refused to do so whilst there was an appeal pending. On 13 December 2001 the sentencing proceedings were re-opened. It is common ground that this course was warranted. It is not appropriate to set out the matters raised in the re-opening but those matters distinguish this case from many others.

During the re-opened sentence the learned sentencing Judge resentenced the applicant to an effective sentence of 10 years and nine months' imprisonment. The applicant contends both the sentence at first instance and after the re-opening was manifestly excessive. Both parties agree that in the circumstances this application for leave to appeal should be

treated as an application for leave to appeal from both the original sentence and the re-opened sentence.

The applicant has also asked the Court to take into account new material, which this Court has held was rightly rejected by the learned sentencing Judge on the sentence re-opening. In the circumstances of this case, there is no justification to receive that new material.

The applicant contends that the sentence is manifestly excessive because the discount for cooperation with the authorities and rehabilitation was insufficient.

The applicant's cooperation with the authorities prior to sentence was significant and warranted a very substantial discount. In addition, the applicant, although not in the category of youthful first offenders, at 27 was still a young man when he committed these offences. He did not have an extensive criminal history and, importantly, had made successful efforts at rehabilitation after the last of these offences was committed in 1997. It was accepted at sentence that he was no longer a drug user and he was in a stable relationship and had two small children. A large number of references, confirming his rehabilitation and good character since his commission of these offences, was tendered at sentence.

On the other hand, the applicant was involved in a very significant and lengthy bout of serious criminal behaviour,

including a number of armed robberies, some of which were in company and armed. Most seriously, on one occasion a loaded weapon was discharged, intentionally injuring the victim in the course of a robbery.

Despite these most serious aspects of the applicant's offending, overall I am satisfied that the sentence imposed did not sufficiently recognise or encourage the importance of the applicant's cooperation with the criminal justice system and the extent of his successful rehabilitation prior to sentence.

I would grant the application, allow the appeal and, instead of the sentence imposed on counts 29 and 30, impose a sentence of nine years' imprisonment and declare those offences to be serious, violent offences.

CULLINANE J: I agree.

HOLMES J: I agree.
