SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stallan* [2003] QCA 62
PARTIES:	**R** **v** **STALLAN, Bronson Terrence** (applicant/appellant)
FILE NO/S:	CA No 11 of 2003 DC No 182 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2003
JUDGES:	McMurdo P, Williams JA and Mullins J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed** **3. Set aside the sentence imposed by the learned sentencing judge on 12 December 2002 and substitute a sentence on each count of 2 years' imprisonment to be suspended after 6 months for an operational period of 2 years** **4. Declare that pursuant to s 161 of the *Penalties and Sentences Act* 1992 1 day spent in pre-sentence custody between 11 December 2002 and 12 December 2002 be deemed time already served under the sentence**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERAL PRINCIPLES – where there was a misunderstanding on the part of the sentencing judge as to the significance of a written statement of the applicant handed up by the applicant's counsel – where misunderstanding affected the view formed by sentencing judge of the applicant's character and remorse – whether

misunderstanding amounted to an error which had an effect on the sentencing process

COUNSEL: The applicant appeared on his own behalf
M J Copley for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Mullins J and with the proposed orders.

[2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment prepared by Mullins J. I agree that a misunderstanding at the time of sentencing as to the significance of Exhibit 11 led the learned sentencing judge to draw conclusions which were not reasonably open in light of all the material placed before him. I agree that in consequence the sentence should be varied, and I agree with the orders proposed by Mullins J.

[3] **MULLINS J:** The applicant seeks leave to appeal against the sentence imposed on 12 December 2002 when he pleaded guilty to two counts of assault occasioning bodily harm in company. On each count the applicant was sentenced to 2 years' imprisonment to be suspended after 9 months for an operational period of 3 years. The ground relied on to bring the application is that the sentence is manifestly excessive. The applicant did not dispute the head sentence of 2 years, but submitted that the excessiveness was in requiring him to serve 9 months before the sentence was suspended.

[4] The applicant was charged with two co-offenders. One of them, Robert Lance Parsons, failed to appear. The other, Shannon James Thompson, also pleaded guilty to two counts of assault occasioning bodily harm in company and was sentenced to 15 months' imprisonment to be suspended after 4 months for an operational period of 2 years.

Circumstances of the offences

[5] The offences were committed outside the Shamrock Hotel in Toowoomba late on the evening on 7 November 2001. The applicant and Thompson were drinking with friends at the hotel after being to the funeral of another friend who died from an overdose. A patron had been asked to leave the disco area of the hotel by the complainant James Robert Collins who was engaged to provide security services at the hotel. This patron was unhappy about leaving. Collins decided to close down the nightclub for the evening. Collins and another security officer, Anthony Scott Morriss, then had a verbal altercation with this patron and people associated with him on the footpath outside the hotel.

[6] Peter Raymond Bourke who was an off duty security officer went to support Collins and Morriss. Punches were then thrown by those who had been patrons in the hotel at Collins, Morriss and Bourke. The affray was recorded on a security video which was played during the sentencing hearing. The applicant was identifiable in the video by the stripes down the front of his shirt which also appeared in the photograph taken of the applicant by the police after the incident.

[7] Bourke was the complainant for count 1 to which both the applicant and Thompson pleaded guilty. Collins was the complainant for count 2 to which the applicant pleaded guilty. Morriss was the complainant for count 3 to which Thompson pleaded guilty.

[8] Collins was punched and pulled to the ground and kicked by at least 4 persons. Bourke ended up on the ground and was kicked on a number of occasions. Morriss was also punched to the face and kicked. The incident ended when the police arrived.

[9] Bourke suffered a 3cm laceration to the left eye which was stitched, a swollen and bloody nose and a fractured thumb. Collins suffered a bloody nose, scratches to his face and back and headache and had found that this incident caused him to be apprehensive in performing his role as a security officer.

[10] The prosecutor submitted to the learned sentencing judge that the applicant was involved in punching and kicking Collins and that he entered the affray on at least three separate occasions and engaged in actual violence and was involved in the overall joint criminal enterprise of the assaults.

[11] The video showed the applicant punching and the prosecutor submitted that the video also showed a kick by the applicant. The applicant's counsel submitted to the learned sentencing judge after the relevant part of the video was played for a second time during the hearing:

> "Well, from what I can see there, there certainly was a movement with the leg suggesting a kick, but it is not a kick that was aimed at someone who was on the ground."

[12] After the incident the applicant refused to participate in an interview with the police and told the police that his name was "Brosnan Terry Graham" and provided a date of birth that was one day different from his actual date of birth.

Applicant's antecedents

[13] The applicant was born on 31 August 1978 and was therefore 24 years old at the date of the offences. Prior to these offences, he had a lengthy criminal history for property offences and street offences and three previous appearances and one pending set of charges for offences of violence: on 28 October 1994 one count of rioting injuring the building at Westbrook for which 120 hours community service was imposed; on 19 June 1996 one count of assault occasioning bodily harm in company for which 64 hours' community service was imposed; on 23 September 1997 one count of assaulting police for which he was fined $500; and on 18 January 2002 two charges of serious assault which involved three separate episodes of spitting on a police officer and were committed on 17 June 2001 for which he was sentenced to 4 months' imprisonment. The applicant was therefore on bail for the serious assault offences when he became involved in the affray on 7 November 2001.

Matters relied on by the learned sentencing judge

[14] The applicant's plea of guilty was a late plea in that it was not entered until after his trial was due to start at which he failed to appear when the trial was listed to

commence on 9 December 2002. As a result, a warrant was issued and executed and the applicant brought before the court on 12 December 2002. The learned sentencing judge was satisfied that the applicant had lied in relation to his bail address and/or in relation to why he did not appear on 9 December 2002.

[15] The learned sentencing judge referred to each of the three security officers being outnumbered and that the applicant and Thompson mutually aided others in relation to certain assaults and each other in relation to the two assaults to which each had pleaded guilty. The learned sentencing judge observed:

> "Kicking a person, particularly on the ground, is not only cowardly, it is certainly most un-Australian. It is viewed seriously by the Courts, understandably, and a deterrent element is more than ordinarily important in relation to such matters."

[16] The applicant's counsel tendered a statement of the applicant dated 16 January 2002 which was marked Ex 11. That statement was an attempt by the applicant to explain his problems with alcohol, the effect of his grandmother's illness and death, and his proposals for the future.

[17] It was described by the applicant's counsel as follows:

> "Now, on the night Mr Stallan admits they had been drinking and he actually – and I'll come to that later on – regrets that he got involved in this at all. He did have a drink problem and he wanted me to hand up what he wants to say to your Honour in his own – trying to explain his own actions."

[18] The fifth paragraph of that statement was in the following terms:

> "I still don't remember what happened on the night I was arrested, but however I must have been off my head to end up in the situation I am currently in. I'm certainly sorry for my actions on that night."

[19] The learned sentencing judge observed:

> "Stallan's counsel seemed to submit that he didn't kick at all. When his statement, Ex 11 was tendered, he said, "I don't remember what happened on the night I was arrested". *If that were, in fact, so, he could hardly give instructions that he did not kick.* These two matters that (*sic*) are relevant in relation to his recollection." (Emphasis added)

The learned sentencing judge then dealt with the applicant giving a false name and date of birth to the police when arrested and stated:

> "In the case of Stallan he was sufficiently with it in my view to deliberately give a name he had never used before and to give a false date of birth that would make identification somewhat difficult. Quite ironically, his behaviour was such – the fact that he knew how

> to look after himself or knew the system caused police to check if he had given a false name.
>
> All of this arguably makes it a little more difficult to accept his statement in Ex 11 that he did not know what was going on. However, he wanted Ex 11 placed before the Court. In that situation *it was arguably somewhat difficult to submit that he had not kicked.*
>
> That is a different matter from submitting that when you view the video you may well conclude that you cannot see Stallan kicking thereon and you may sentence on a basis that he did not kick. A viewing of the video, Ex 4 (*sic*) at about 22.44 shows that Stallan did kick." (Emphasis added)

[20] Reference was made by the learned sentencing judge to the need to make a slight allowance for co-operation in the administration of justice by virtue of the plea of guilty, but his Honour drew a distinction between the position of the applicant and that of Thompson. The learned sentencing judge acted on the submission of the prosecutor that in the week preceding the trial, the prosecutor had indicated that the Crown would accept a plea of guilty by the applicant to counts 1 and 2 in full discharge of the indictment (even though the applicant was named as a co-offender in respect of count 3). It was only on the day of sentencing that Thompson was informed that the Crown would accept a plea of guilty to counts 1 and 3 in full discharge of the indictment. The learned sentencing judge also differentiated between the applicant and Thompson on the basis that the applicant's criminal history was more significant and he was on bail for the offences committed on 17 June 2001, when he committed the subject offences.

[21] The learned sentencing judge made limited allowance for the applicant's personal circumstances, his efforts at rehabilitation and his prospects.

Matters raised on application for leave to appeal

[22] The applicant was unrepresented on the application. The applicant attempted to put forward a number of matters by way of submission that were not strictly relevant to the ground of the sentence being manifestly excessive. One of these matters was that his statement which was Ex 11 was prepared for his sentencing in the Magistrates Court on 18 January 2002 and was tendered by his counsel before the learned sentencing judge without instructions from the applicant to do so.

[23] As a result, the respondent's counsel undertook inquiries and the applicant's counsel at the sentencing was called by the respondent to give evidence by telephone. The respondent's counsel conceded that Ex 11 must have been tendered at the summary hearing in respect of the serious assault charges on 18 January 2002 and that the reference to "what happened on the night I was arrested" in the fifth paragraph of that statement was a reference to the events which resulted in the serious assault charges. The respondent's counsel ascertained that those events had commenced to occur at about 2.40 am on 17 June 2001.

[24] The applicant's former counsel gave evidence of having a statement from the applicant comprising two paragraphs dated 9 October 2002 which was the basis of his instructions at the sentencing. That statement included the following:

> "All I can remember is the lights were turned on and I heard someone say that they were kicking us out. I just staggered out the front door. I think I was leaning against the car. I was waiting for the others to come out to – I just wanted to go home. All I can remember is looking at the entrance door and a big fight broke out. I can't remember what happened in the brawl. I remember the police coming and taking out [indistinct] and then me."

[25] The applicant's former counsel had also appeared for the applicant at the summary hearing of the serious assault on related charges on 18 January 2002. He stated that he could only surmise that he received Ex 11 near the date of the sentencing on 12 December 2002 and that he decided to hand it up, because if he did not do so, he would be blamed for not having done so.

[26] The applicant put to his former counsel that he gave Ex 11 to him on the day that the applicant was going to court for the serious assaults. The applicant's former counsel stated that he did not recall that and that he recalled being given instructions by the applicant to give Ex 11 to the learned sentencing judge.

[27] The applicant asserted during the hearing of this application that he had told his counsel that he was punching and kicking in the incident on 7 November 2001. When that was put to the applicant's former counsel in evidence-in-chief, he stated that they were not his instructions.

[28] The applicant did not seek leave to give evidence himself at the hearing of the application.

Whether there was an error in the sentencing process

[29] From the perusal of the record of the sentencing and a consideration of the evidence of the applicant's former counsel, it is clear that the applicant's counsel acted at the sentencing on the basis of the instructions he had from the applicant contained in the statement dated 9 October 2002 which were to the effect that the applicant could not remember what happened in the brawl. The applicant's counsel's submissions were carefully framed in relation to the extent of the involvement of the applicant in the incident and whether the applicant kicked or not. Each one of the applicant's counsel's submissions in relation to whether or not the applicant had kicked were made by reference to what could be seen on the video. That approach was clearly consistent with the written instructions which the applicant's counsel held that the applicant could not remember what happened in the brawl.

[30] The learned sentencing judge's comments set out above in relation to the discrepancy between what the learned sentencing judge treated as the applicant's lack of recollection of the events in question as set out in Ex 11 and his Honour's conclusion that the applicant had given instructions that he did not kick show that the learned sentencing judge acted on the applicant's counsel's submissions, as if they were submissions made on instructions that the applicant did not kick. This was a misunderstanding by the learned sentencing judge of the effect of the applicant's counsel's submissions.

[31] I will deal with the effect of that misunderstanding, after dealing with the use made by the learned sentencing judge of Ex 11.

[32] It is not necessary to resolve what instructions the applicant gave to his former counsel about whether or not to hand up Ex 11, as the submissions made by the applicant's counsel at the sentencing in relation to Ex 11 show that there was a misunderstanding by the applicant's counsel about what events the fifth paragraph of that statement were describing. The applicant's counsel's submissions were made on the basis that the statement explained the applicant's actions relevant to the events on 7 November 2001. The reference in that statement "I still don't remember what happened on the night I was arrested" did not relate to the night of 7 November 2001, but was taken by the learned sentencing judge to be a reference to the applicant's recollection of the night of 7 November 2001. The applicant had a better recollection of the night of 7 November 2001, as his statement dated 9 October 2002 showed. He did recall some aspects of the events, including the police coming and taking him away. What he did not recall about the night of 7 November 2001 was what happened in the brawl.

[33] Because of the giving of the false name and date of birth by the applicant to the police on 7 November 2001, the learned sentencing judge placed some emphasis during the sentencing and in his Honour's sentencing remarks on that statement in Ex 11 about not remembering what happened. If the intention of the applicant and/or the applicant's counsel had been to put forward the other matters in Ex 11 (apart from the fifth paragraph) as an explanation of the applicant's conduct and willingness to be rehabilitated, any benefit was severely restricted, because of the attention given by the learned sentencing judge to the fifth paragraph of the statement.

[34] In the circumstances of this sentencing, the combination of the misunderstanding by the learned sentencing judge of the submission made by the applicant's counsel as to whether or not the applicant had kicked and the misunderstanding by the learned sentencing judge about what the fifth paragraph of Ex 11 related to amounted to an error which did have an effect on the sentencing process. It is clear from the sentencing remarks that these misunderstandings affected the view formed by the learned sentencing judge of the applicant's character and remorse.

Sentence

[35] It is therefore necessary to consider what sentence should be imposed, without the distraction of these misunderstandings.

[36] The applicant's concession that he had no complaint about the head sentence was well made, particularly having regard to the circumstances of the offences and his criminal history. Suspending the sentence after 6 months would be an appropriate reflection of the applicant's guilty plea and personal circumstances including the fact that this sentence has to be served after the applicant completed the total sentence of 6 months that was imposed on 18 January 2002. The operational period would not need to be more than 2 years. Suspending the sentence after 6 months would also maintain the disparity with Thompson's sentence which the learned sentencing judge had concluded was appropriate in the circumstances.

Orders

[37] The orders which I propose are:

1. Application for leave to appeal against sentence granted.
2. Appeal allowed.

3. Set aside the sentence imposed by the learned sentencing judge on 12 December 2002 and substitute a sentence on each count of 2 years' imprisonment to be suspended after 6 months for an operational period of 2 years.
4. Declare that pursuant to s 161 of the *Penalties and Sentences Act* 1992 1 day spent in pre-sentence custody between 11 December 2002 and 12 December 2002 be deemed time already served under the sentence.