SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hanlon* [2003] QCA 75
PARTIES:	**R** **v** **HANLON, Terence George** (applicant/appellant)
FILE NO/S:	CA No 416 of 2002 CA No 361 of 2002 DC No 1986 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2003
JUDGES:	McMurdo P, Jerrard JA and Cullinane J Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – OTHER CASES – where appellant convicted of arson – whether verdict was unreasonable and unsupported by evidence – whether testimony of witness was so unreliable that no jury could act upon it CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FIRST OFFENDER – GENERALLY – where appellant sentenced to six years imprisonment – where appellant had no prior convictions – whether sentence imposed is within an appropriate range for racially or religiously motivated arson of an unoccupied building causing substantial damage – whether learned trial judge erred in finding that the arson was racially motivated *R v Clarke* [1995] QCA 423; CA No 270 of 1995, 25 August 1995, applied

R v Gaunt [2001] QCA 256; CA No 382 of 2000; 29 June 2001, applied
R v Smith [2001] QCA 476; CA No 207 of 2001, 2 November 2001, applied

COUNSEL: C F Wilson for the appellant
D L Meredith for the respondent

SOLICITORS: Bell Miller for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** On 10 October 2002 the appellant was convicted after a three day trial of arson of the Kuraby mosque on 22 September 2001. The appellant appeals against that conviction on the grounds that the verdict was unreasonable and unsupported by the evidence; the testimony of Natalie Demillo Evans was so unreliable that no jury could act upon it and it was not sufficiently bolstered by independent evidence to render it reliable.

[2] The consideration of this ground of appeal requires a review of the evidence. Ms Evans gave evidence that she was the appellant's girlfriend. During the afternoon before the Kuraby mosque fire the appellant said he wanted the mosque, situated about a five minute walk from his home, to be burnt down. That night they went to Rogues Nightclub at about 7 pm. Ms Evans gave evidence that she consumed a few drinks but "Wasn't drunk, just a little tipsy." They left the nightclub at about 12.30 am and walked home; this takes about 30 minutes. They sat for a time on the school oval next to the appellant's home. The appellant yelled out to a woman near the mosque, "Let the war begin" and "The place is going to be burnt down."

[3] They then went into his bedroom where he changed into green tracksuit pants, a singlet top and a red beanie with the logo "Bacardi Breezers". He put on black gloves, fetched a torch from the kitchen and entered the garden shed where he poured petrol and methylated spirits into a large McDonald's paper cup. He told her to go back inside and she did. She watched him running towards the mosque. He returned after about ten minutes or a bit longer. He was out of breath and she could smell petrol on him. He took her into the kitchen and showed her smoke coming from the area of the mosque. He changed his clothes and they drove to McDonald's Springwood drive-through, purchased some food, and then returned home. On the way home they could see the mosque was on fire and the appellant said he had "done that". When they returned home he woke up his mother and all three walked to the mosque. They watched the fire for about ten minutes and then returned home.

[4] The appellant kept some newspaper cuttings about the fire in a Tupperware container under his bed; he said he wanted to keep them to see what he had done. Included in these was a letter to the editor by Sarah Fisher, which described the conduct of the mosque arsonist as "cowardly". The appellant looked up Ms Fisher's phone number in the White Pages, wrote it down on the newspaper cutting and said he would phone her. Ms Evans identified that marked newspaper cutting.[1] The appellant phoned that number in her presence using a SIM card, which did not

1 Ex 3.

belong to him, in a phone brought home by his father, who worked in a dry cleaning business. During the call, which lasted about 30 seconds, he said either that he knew who burnt the mosque down or that he burnt the mosque down (she was unsure which) and he was going to burn the receiver of the call's place next. He disguised his voice by covering or blocking his nose. This phone call lasted about 30 seconds. He made a second phone call not long afterwards,[2] although she was unsure whether it was the same day or night; she thought he used the same SIM card. Although she also used that SIM card to make some phone calls, she did not make these calls.

[5] Some time later, she was hospitalised recovering from injuries received in a car accident when the appellant rang her; he said the police had visited him and he wanted her to "take the wrap" for the phone calls. She refused.

[6] In cross-examination she denied making the phone calls to Sarah Fisher and Mr Fisher and said nothing to contradict her evidence in chief, implicating the appellant in the mosque fire. She agreed she had consumed alcohol and LSD on the night of the fire. It was "20 cent night" at Rogues so that full nip spirits cost only 20 cents until 9.30 pm; she had a few more than five nips of alcohol but did not have a lot; she did not remember the night clearly. The LSD contained on a small square of cardboard, did not have its usual effect; she was "fine" and only minimally affected. She denied the suggestion that the appellant left home later that evening to purchase more LSD for her. She agreed she anonymously rang Crimestoppers and told them that the appellant was the person who burnt down the mosque; she was unsure whether this coincided with when the appellant ended their relationship; she received $550 from Crimestoppers at some period prior to the trial but she was unsure if this was before or after she gave her statement to police. Her relationship with the appellant was renewed for about a week but again broke up after the car accident; it was then she gave police a statement implicating the appellant. Whilst she was hospitalised she sent an SMS message to the appellant saying she had falsely told police that he had burnt the mosque. She did this because she wanted to renew her relationship with him but in fact her statement to police implicating the appellant was true.

[7] On 4 October 2001, Ms Mayfield from Crimestoppers took a call from a female caller who identified herself only as a friend of the appellant. The caller phoned again on 1 December 2001. A reward of $550 was paid to Ms Evans on 4 December 2001.

[8] Mr Burt Henderson spoke to the appellant at the Gold Coast about a week after the mosque fire. The appellant said things like, "they deserved what they got" and "we should nuke them all" and showed anger and aggression about the incident. He seemed very happy that the mosque had burnt down.

[9] Police officer Smith, who has a Bachelor of Science in Chemistry and a Masters degree in Science specialising in forensic science, attended the mosque fire scene. The greatest area of damage was around the open door which was likely to have been the seat of the fire. There were no electrical items within that area. This suggests that it is unlikely that there was an electrical cause of the fire. A report on samples taken from the fire scene did not disclose the presence of flammable

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2 The prosecution case was that this phone call was received by Ms Fisher's father.

liquids. This does not necessarily mean flammable fluids were not used to light the fire as the high temperatures involved may have burnt away any flammable fluids or they may have simply evaporated. The absence of electrical items or inflammable material around the probable seat of the fire and the fact that the building was unguarded, unlocked and accessible prior to the fire lead him to conclude it had been deliberately lit. He could not exclude the possibility that the fire was the result of an electrical fault.

[10] Mr Limbada, a trustee at the mosque, gave evidence that there were single bar heaters on the walls and electrical plugs but no electrical items around the suspected seat of the fire. The bar heaters were not in use during prayer sessions in September.

[11] Mr Ede, an electrical approvals officer, examined the scene and noted that any electrical items were on the periphery of the area of greatest damage and not at its centre; none showed any indications of malfunction. He found no sign that the fire had been started by electrical activity. He could not, however, rule out electrical equipment malfunction as contributing to the ignition of the fire and was unable to form an opinion as to whether the fire had been caused by an electrical fault. Nor was fire brigade officer, Mr Lovell, able to determine the cause of the fire.

[12] Sarah Fisher gave evidence that she wrote letters to the editors of two newspapers, expressing her concern about the Kuraby mosque arson. Her letter to "The Southern Star" was published on Wednesday, 26 September. At 9.45 pm that night she received a phone call from a person who told her that the caller had read her letter and that she should not have called the arsonist a coward; the caller did not like that; knew where she lived; had burnt the mosque and now her house was going to be burnt down. She thought the voice sounded like a 20 year old male "yobbo" voice, "not very articulated, a breathy … whiney sort of voice, not a strong voice, Australian accent." She did not think it was a deep husky female voice; she agreed this was possible but it sounded like a man's voice to her.

[13] Sarah Fisher phoned her father, Mr Ray Fisher, on 27 September 2001 and he travelled to her home where he stayed for the day. At about 3.15 pm he received a phone call in which just three words were said: "death by fire". A bit of a laugh followed before the caller hung up. He described the voice as a young, gruff, scary male voice, aged about 18-20; it was possible the call was from a deep husky voiced woman but he thought it was a male voice.

[14] The appellant, through his counsel, admitted that he had possession of a SIM card with phone number 0421 542 201 prior to 22 September 2001 and still had possession of it when police interviewed him on 9 October 2001. Records demonstrated that two phone calls were made from that phone number to Sarah Fisher's phone on 26 and 27 September 2001.

[15] Police officer O'Keefe went to the appellant's home with other police officers and executed a search warrant. He located items which included newspaper in a cardboard box under the appellant's bed and some SIM cards. The newspaper cuttings related to the events of September 11 and the burning of the mosque and included Ms Fisher's letter to "The Southern Star" marked with her phone number in black pen.[3] He agreed there were many other boxes and folders in the room and it

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[3] Ex 3.

was possible there may have been newspaper clippings relating to other matters. Petrol but not methylated spirits was found in the shed. Black gloves were found, but testing did not reveal traces of flammable liquid.

[16] Ms Priscilla Kearns had known the appellant for about five and a half years and he had once been her boyfriend; he was studying Justice Studies and kept newspaper clippings of many police investigations.

[17] Police officer Chittick took a statement from a Mr Yasin, who had observed teenagers inside the fence line of the mosque throwing rocks at the burning building.[4]

[18] The appellant was interviewed by police in a taped record of interview on 9 October 2001. He denied involvement in the fire and Ms Evans' allegations, including making the phone calls to Ms Fisher. He accepted he wrote the telephone number on the clipping of Ms Fisher's letter to the editor and that he made some phone calls using the relevant SIM card but denied phoning or speaking to Ms Fisher or her father. He wrote down her phone number on the clipping because he thought she was foolish to put her name and address on the letter; it made it so easy to locate her. He told Ms Evans it would be funny if someone rang Sarah Fisher and said something to her about the letter, but he did not know that someone did this. Ms Evans also used the relevant SIM card to make calls.

[19] The appellant did not give or call evidence.

[20] The case against the appellant turned on Ms Evans' evidence. There were concerning aspects about her evidence including the fact that she had taken alcohol and drugs on the night of the fire and did not remember the night clearly; that she had received a reward for her statement implicating the appellant; that she had made a subsequent statement to the appellant claiming that she had given the police false information about his involvement in the fire; and that the break down of their relationship may have provided a motive to falsely implicate him. She was not shaken, however, as to her evidence implicating the appellant. Her evidence was supported by other evidence, including the appellant's admission that he had written Ms Fisher's phone number on the clipping of her letter to the editor condemning the burning of the mosque; the physical evidence of that; the threatening phone calls which appear to have been made by a male voice from a telephone number, the SIM card for which was in the possession of the appellant; and the appellant's subsequent animosity towards Muslim people and his delight at the burning of the mosque as explained by Mr Henderson. His Honour pointed out to the jury that the Crown case depended on the evidence of Ms Evans and it was a matter for them whether they accepted her evidence; that it would be helpful if there was any evidence supporting her testimony and that it was a matter for them whether the matters set about above in fact supported her evidence. No complaint was made about his Honour's directions to the jury on this or other matters. In his summing-up, his Honour canvassed the evidence in some detail in an even-handed manner. In summarising the defence case, his Honour referred to the various specific weaknesses in Ms Evans' evidence relied upon by the appellant at trial and again in this appeal.

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[4] It seems this hearsay evidence was admitted at the request of the defence for there is no complaint about it and it does not strengthen the prosecution case.

[21] The case against the appellant, when looked at as a whole, was convincing. There was no evidence to suggest the fire was accidental. Ms Evans gave uncontradicted evidence that the appellant was responsible. The weaknesses relied on in this appeal were canvassed by the defence at his trial and referred to by the judge in his summing up. The issue was for the jury to determine. The verdict demonstrates that the jury accepted Ms Evans' evidence as reliable beyond reasonable doubt, despite its flaws and the warnings given by his Honour. They were entitled to do so. The evidence that the appellant wrote Ms Fisher's phone number on the newspaper clipping was especially damning, despite the appellant's unconvincing explanation. It follows that the appeal against conviction must fail.

[22] The appellant also seeks leave to appeal against his sentence of six years imprisonment which was imposed on 10 December 2002. He was 23 years old at the time of the offence and 24 at sentence. He had no prior convictions. It is common ground that the appropriate range for the arson of an unoccupied building causing substantial damage, by a person with no relevant criminal history and with no aggravating factor of racial or religious hatred is from three to five years imprisonment. See *R v Gaunt*;[5] *R v Smith*[6] and *R v Clarke*.[7]

[23] In his sentencing remarks, the learned primary judge referred to portions of the evidence and concluded: "I am satisfied from your various remarks and your behaviour that this was a racially motivated act on your part." The applicant's primary contention is that his Honour erred in finding that the arson was racially motivated; it was, as psychiatrist Dr A G (Tony) Cook said in his report of 28 October 2002, "motivated more by foolishness and stupidity and also some impulsivity, rather than by a pervasive hatred of people of Muslim descent."

[24] The learned primary judge was undoubtedly correct in his finding that this offence was motivated by hatred of Muslims. That finding is supported by the applicant's comments to his girlfriend before lighting the fire; his phone calls to Ms Fisher and her father; his comments to Mr Henderson after the burning of the mosque and by his very actions in lighting the fire, which are otherwise inexplicable. The maximum penalty for this offence is life imprisonment. The applicant did not have the benefit of remorse of cooperation with the authorities. The loss occasioned was approximately $113,000. The mosque was not in use at the time but the applicant could not have known definitively that no-one was in the building; any fire in a built-up residential area creates a real danger to the lives of fire fighters and the public. During the second half of the 20th century, Australia developed into an homogenous society based on racial and religious tolerance of which we are now justly proud. The offence occurred just 11 days after the terrorist attack on the World Trade Centre and the Pentagon on September 11, 2001. The appellant's actions were a calculated attempt to cause division and confusion in our community at a time when reflective calm, not hysterical violence, was needed. A salutary deterrent sentence was required. Thankfully, the facts of this case are unique and are not repeated in any comparable sentences. Despite the applicant's lack of prior criminal history, the sentence of six years imprisonment was plainly justified.

[25] I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

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5 [2001] QCA 256; CA No 382 of 2000, 29 June 2001.
6 [2001] QCA 476; CA No 207 of 2001, 2 November 2001.
7 [1995] QCA 423; CA No 270 of 1995, 25 August 1995.

[26] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment and orders proposed by the President.

[27] **CULLINANE J:** I agree with the reasons of the President in this matter and with the orders proposed.