# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Blatch* [2003] QCA 483 |
| PARTIES: | **R**<br>v<br>**BLATCH, Brett Edward**<br>(appellant/applicant) |
| FILE NO/S: | CA No 365 of 2002<br>CA No 90 of 2003<br>SC No 289 of 2002 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction<br>Application for Extension (Sentence) |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 7 November 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 October 2003 |
| JUDGES: | Davies and Williams JJA and Wilson J<br>Judgment of the Court |
| ORDER: | **1. Appeal against conviction dismissed**<br>**2. Application for an extension of time within which to apply for leave to appeal against sentence allowed**<br>**3. Application for leave to appeal against sentence granted**<br>**4. Amend the sentence by deleting therefrom the words: "Pursuant to section 156A of the *Penalties and Sentence Act*, that sentence will be served cumulatively on the sentences you are presently serving"** |
| CATCHWORDS: | CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE EVIDENCE CIRCUMSTANTIAL - where appellant and another convicted of murder - where prosecution case circumstantial - where co-accused present at scene - where appellant not sighted at scene - where jury invited to infer that appellant shot deceased - whether verdict unreasonable having regard to the evidence |

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - JOINT TRIAL OF SEPARATE PERSONS - where jury directed that evidence about conversations not involving appellant not admissible against appellant - where similar direction given in trial judge's summing up - whether trial judge sufficiently directed jury as to evidence admitted in joint trial which was not admissible against appellant

CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - HOMICIDE - MURDER - PRACTICE AND PROCEDURE - SENTENCING - LIFE IMPRISONMENT - where appellant sentenced to life imprisonment - where trial judge ordered sentence to be served cumulatively upon sentence appellant already serving - where murder not listed in Schedule of serious violent offences in *Penalties and Sentences Act* 1992 (Qld) - whether trial judge erred in imposing cumulative sentence

*Criminal Code* 1899 (Qld), s 302(1)(b)
*Penalties and Sentences Act* 1992 (Qld), s 156A

COUNSEL: Appellant/applicant appeared on his own behalf
C W Heaton for respondent

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

[1] **THE COURT:** After a trial by jury, on 25 October 2002 the appellant was convicted of the murder of Peter Joseph Davies on 13 July 2001. He appeals against that conviction. He has also sought an extension of time within which to apply for leave to appeal against the sentence of life imprisonment imposed cumulatively on sentences which he was then serving. That application was filed on 1 April 2003. This appeal was heard together with an appeal by Wayne David Carmody who was also convicted of the same murder. However it is necessary to give separate judgments.

**Blatch's appeal against conviction**
**The case against the appellant**

[2] By their verdict the jury must have concluded that the appellant fired the gun which killed the deceased and that he did so intending to kill or do grievous bodily harm. The Crown's case to prove this was a circumstantial one. No witness gave evidence of having seen the appellant at the murder scene. Before turning to that circumstantial case it is necessary to say something about the undisputed facts of the killing of Davies.

[3] Shortly prior to 11.00 pm on 13 July 2001 the appellant's co-offender Carmody's Suzuki car drove to the front gate of Davies' house. Present in the house at that time were Davies, his wife Kerry, his son Ryan then aged about 15 and two other

children. Kerry and Ryan gave evidence at the joint trial of the appellant and Carmody at which Carmody was also convicted of murder.

[4] Davies went out to Carmody's car and both Kerry and Ryan observed him having a conversation with Carmody who was sitting in the driver's seat (Kerry) or partly standing beside the driver's door (Ryan) of that vehicle the door of which was open. A conversation ensued between Davies and Carmody in which Davies did most of the talking and which lasted some minutes. Although neither witness could hear what was said fully, it is plain from what they heard that Davies was making derogatory statements about the appellant; that he was dangerous. Davies also said "We'll all be in gaol tomorrow and we'll see who comes out on top". Carmody appeared to be merely acknowledging what Davies said. Davies then commenced to turn around to come back inside the house. Almost immediately they heard a shot and saw that Davies was dead. He had been shot in the head.

[5] Both Kerry and Ryan ran towards the car. Kerry smashed the passenger side window of the car apparently with a piece of wood which she was carrying. Both Kerry and Ryan had been carrying such weapons, anticipating the possibility of some physical confrontation. Both observed Carmody in the car and that no other person was in the front of it. Neither looked in the back. It then drove off. Neither saw any other person get into the car and Ryan said that, after it commenced to drive away it did not stop.

[6] At the same time as she heard the shot Kerry saw a flash. It commenced from a point behind where Carmody was. Ryan, who was looking towards his father, did not see the flash. Neither saw any weapon in Carmody's hands at any time.

[7] The circumstantial case that it was the appellant who fired the shot was as follows. The evidence of Megan McDougall, who was Carmody's girlfriend, established that the appellant was in Carmody's company that night in their home. Carmody had expressed an intention of going to Davies' house to talk to him. McDougall heard them making an arrangement, at the appellant's suggestion, that the appellant would go with Carmody to Davies' residence as "back up" and that he would "hide in the bushes".

[8] McDougall went to bed whilst Carmody and the appellant were still in the house. She was wakened, she said, some time later by the sound of the Suzuki coming fast through the paddock, a short cut between their residence and that of Davies. She got up immediately because she wanted to know why the car was coming so fast through the paddock. She then heard the front door open and the appellant call out "Get up, get up. We've got to get out". He appeared agitated when she saw him. So did Carmody when she saw him shortly after this. She then got dressed and they all left the house.

[9] Davies was killed by a shot from a firearm more powerful than a .22 calibre. Carmody owned a firearm of large calibre, a "30/30" which he always kept loaded and which, during the evening of the killing, was in the lounge room against a wall next to a seat upon which the appellant was sitting. It was usually kept in the bedroom and had been moved to that position. Carmody had shown McDougall the bullets which he had for use in that gun which were of a kind which could spread on impact. The injury which caused Davies' death was consistent with an injury from such a firearm.

[10] According to McDougall, there had been some prior discussion between the appellant and Carmody as to when Carmody would go to Davies' house. Carmody had expressed the opinion that he should go there after the football (there was a football match which ended shortly prior to the events we have related) rather than waiting until next day because, if he waited, it might give Davies the opportunity to organize some "clubbies", apparently a reference to bikies, to assist him in some way.

[11] Some time prior to the night of the killing, Davies told Carmody that the appellant was stealing cannabis from him. Davies and Carmody were in partnership growing cannabis and, it seems, Carmody also had a crop of his own. Davies was also concerned that, because the appellant was an escaped prisoner, his presence could cause the police to discover the cannabis operations of Davies and of Carmody and had expressed that concern both to Carmody and to McDougall. It was Davies' intention to inform the police of the appellant's whereabouts. Either he or Kerry had done so on a previous occasion at the Ettamogah Pub but the police had arrived too late. The appellant admitted in his evidence that he knew Davies was accusing him of stealing cannabis from Carmody. The Crown case was that the general effect of Davies' complaints and, on the night of the shooting, Davies' threats to go to the police, together provided the appellant with a motive for murdering Davies.

[12] When the appellant, Carmody and McDougall left the house that night after the shooting, McDougall said that she, on Carmody's instructions, drove a utility owned by Carmody with the appellant as a passenger. When she got into it she saw the shine and the silhouette of the gun which she had seen in the lounge room. She drove the utility out of the property onto the road. Carmody drove the Suzuki. Shortly after they reached the road Carmody signalled for them to stop and instructed McDougall to transfer to the Suzuki, leaving the appellant alone in the utility. Shortly after this she and Carmody then drove towards Brisbane in the Suzuki.

[13] By arrangement between Carmody and the appellant they met the appellant at the toll gates on the Gateway Bridge. According to McDougall Carmody asked the appellant "Did you get rid of the bang stick?" (a reference, she said, to the gun). The appellant replied that he did. Carmody then asked "Was it nice and deep?" and the appellant replied that it was. Carmody then said "Oh fuck, I forgot the shells" to which the appellant replied "Don't worry. There's no gun to tie it to".

[14] If McDougall's evidence was believed by the jury it established a strong circumstantial case, together with the evidence of Kerry and Ryan, that the appellant had intentionally shot the deceased. The appellant gave evidence to the contrary. He said that he fell asleep in the lounge room of Carmody's house and that he, like McDougall, was woken by Carmody's return. However his evidence was plainly disbelieved which, after reading the transcript of it, we find quite unsurprising.

**His grounds of appeal**

[15] The grounds of appeal, which the appellant sought and was granted leave to argue, are as follows:

> "1. The evidence is incapable in law of proving that the appellant 'Blatch' was ever at the scene, 'Lot 90 Spanner Rd Glass House Mountains'.

2. The evidence is incapable in law of proving that the appellant 'Blatch' committed the offence of the sole count of Murder.
3. The appellant was misrepresented at Trial.
4. The verdicts are:-
   (a) Unsafe and Unsatisfactory
   (b) Unreasonable
   (c) Against the weight of evidence
5. I would ask that the Court amend the notice of appeal to include;
   (d) That the Judge erred in failing to property direct the Jury in relation to evidence throughout the Trial and in summation.
   (e) To enter as new evidence the Police Brief of Evidence, Transcripts from the Committal Proceedings from this case and entered Exhibits."

[16] Grounds 1, 2 and 4 of these proposed grounds cover much the same ground; that the verdict was unreasonable or as it has sometimes been put, unsafe and unsatisfactory. It follows from what we have said that we reject these grounds. The jury were entitled to accept the evidence of Kerry, Ryan and McDougall and reject that of the appellant. There was nothing unsafe or unreasonable in their doing so and, if their evidence was accepted, it was reasonably open to the jury to infer that the appellant shot the deceased intending to kill him.

[17] We should add that the case against the appellant was also put on an alternative basis; that the appellant deliberately discharged the gun in the direction of the deceased in the prosecution of an unlawful purpose and that that was of such a nature as to be likely to endanger the deceased's life: *Criminal Code* s 302(1)(b). We do not think it necessary to explore that alternative.

[18] Ground 3 appears to be a contention that the appellant was not adequately represented by his counsel at the trial. No particulars of this were given in the appellant's quite extensive written outline (nor in his oral submissions). Perhaps it is related to ground 5(e), the appellant's contention that we should admit as new evidence the police brief of evidence and evidence from the committal proceedings.

[19] The statements of Crown witnesses to police and the transcript of the committal proceedings were plainly available to the appellant at his trial and his counsel cross-examined Crown witnesses on such statements and on their evidence in committal proceedings. There is no reason to believe that the appellant's counsel did not make the best possible use of this evidence at trial. Even if this evidence was admissible at trial, for the above reasons it is not now admissible. There is no substance in this ground and we have already refused to admit such evidence. Nor is there any substance in the ground of incompetent or inadequate representation, in any other respect, on the part of the appellant's counsel at the trial. On the contrary, a reading of the transcript shows that he was adequately represented.

[20] We turn now to the final ground of appeal against conviction, that the learned trial judge erred in failing to properly direct the jury in relation to evidence during the trial and in his summing up. It appears from his written outline and his oral submissions that the appellant's complaint is that the learned trial judge did not or

did not sufficiently direct the jury as to the evidence admitted in the joint trial which was not admissible against him.

[21] The complaint is misconceived. It relates primarily to the evidence of McDougall. When McDougall gave evidence about conversations she had with Carmody when the appellant was not present, the jury were told that that evidence was admissible only against Carmody and not against the appellant. His Honour then gave a similar direction during his summing up. However when speaking of evidence of the deteriorating relationship between Carmody and the deceased, primarily due to the continual presence of the appellant, his Honour said that the fact that the evidence with respect to this was only admissible against Carmody was not as critical as it might be in a lot of cases because the appellant said that he was generally aware of the same sort of things without necessarily being involved in the details. As it appears to have been common ground that the appellant was generally aware of Davies' complaints about him, that was an accurate and sensible statement to make.

[22] In summary therefore there is no merit in our opinion in any of the grounds of appeal and we would dismiss the appeal against conviction.

**The application for extension of time**

[23] This application seeks to argue that the learned trial judge erred in sentencing the appellant by imposing the life sentence which he imposed cumulatively upon the sentence he was then serving. His Honour did this because he was told that this was required by s 156A of the *Penalties and Sentences Act*. That was not correct. The offence of murder is not an offence listed in the schedule of serious violent offences in the *Penalties and Sentences Act*. The sentence imposed by his Honour should therefore be amended to correct this error. It may have been possible, pursuant to s 156, to impose this sentence cumulatively but that is not what his Honour intended and no basis has been suggested for doing so.

[24] We would therefore allow the application for an extension of time within which to apply for leave to appeal against sentence, grant the application for leave to appeal against sentence and amend the sentence by deleting therefrom the words:

> "Pursuant to section 156A of the *Penalties and Sentences Act*, that sentence will be served cumulatively on the sentences you are presently serving."