

SUPREME COURT OF QUEENSLAND

CITATION: *R v Alvin* [2004] QCA 422

PARTIES: **R**
v
ALVIN, Shane Bradley
(applicant)

FILE NO/S: CA No 274 of 2004
SC No 203 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 4 November 2004

DELIVERED AT: Brisbane

HEARING DATE: 4 November 2004

JUDGES: McMurdo P and Fryberg and Mullins JJ
Separate reasons for judgment of each member of the Court, McMurdo P and Mullins J concurring as to the orders made, Fryberg J dissenting in part

ORDERS: **1. Grant the application for leave to appeal against sentence**
2. Allow the appeal
3. Set aside that part of the order recording the conviction
4. Instead of ordering that the offender serve the whole of the suspended imprisonment, order that he serve nine months of it

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – RECOGNISANCES, PROBATION AND OTHER NON-CUSTODIAL ORDERS – PROBATION ORDERS AND SUSPENSION OF SENTENCE – GENERALLY – applicant convicted of assaulting a person 60 years of age or more – applicant had been convicted in 2002 of attempting to procure murder and sentenced to five years imprisonment suspended forthwith – assault involved a push to the chest and complainant did not sustain any injury – applicant sentenced to serve full period of suspended sentence for breach – whether it was unjust to require the applicant to serve the whole period of the suspended sentence

in the circumstances

Penalties and Sentences Act 1992 (Qld), s 147(3)

COUNSEL: A J Moynihan for the applicant
S G Bain for the respondent

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

THE PRESIDENT: On 13 May 2002 Mr Alvin pleaded guilty in the Supreme Court at Brisbane to one count of attempting to procure murder. A pre-sentence report was ordered and Mr Alvin was remanded in custody. On 23 August 2002 he was sentenced by Mr Justice Ambrose to five years imprisonment suspended forthwith with an operational period of five years.

On 6 August 2004 he was dealt with by a different judge for committing an offence during the operational period of the suspended sentence and ordered to serve the whole of it. He contends in his sole ground of appeal that this was manifestly excessive but in fact his contention is that the Court should have decided that it was unjust to make such an order under s 147(3) *Penalties and Sentences Act 1992 (Qld)* ("the Act") and imposed a lesser consequence.

The offence that was committed during the operational period of the suspended sentence was one of assaulting a person 60 years of age or more on 12 November 2003. Mr Alvin was convicted and fined \$300 in default six days imprisonment and recommitted to the Supreme Court, Brisbane to be dealt with for this.

The facts of that assault are as follows. The complainant, the partner of Mr Alvin's mother, had done some gardening work for Mr Alvin and they were in dispute over a payment of \$50. Mr Alvin, his mother and the complainant were all pensioners. The complainant, aware of Mr Alvin's suspended sentence, telephoned him demanding payment and threatening to otherwise contact police. Mr Alvin was anxious, went to the complainant's home and confronted him on his verandah, saying, "Don't threaten me and don't call the police." Mr Alvin then pushed the complainant to the chest. The force used was not sufficient to push over the complainant but the assault was in law serious because the complainant was 63 years old.

Mr Alvin's criminal history is as follows. He was convicted and fined for stealing in the Bundaberg Magistrates Court in 1990. In 1994 he was placed on 18 months probation for three charges of false pretences and three charges of stealing. He breached that probation in 1995 by committing a further seven charges of false pretences and one count of imposition by false representation. No action was taken on the breach and the order continued. He was sentenced to two and a half years probation and ordered to pay restitution of \$1,769.05 without the recording of any convictions. In 1997 he was sentenced to eight months imprisonment wholly suspended for two years for five counts of false pretences and five counts of misappropriation of property. Later that year he was fined \$300 for breach of probation. Later again that year he was convicted of one count of false pretences and one count of

stealing and ordered to serve 120 hours community service and to pay compensation of \$200. In June 1998 he was convicted and fined for breach of his 1995 probation order. The next month he was convicted and fined for breach of a domestic violence order and dealt with for the suspended sentence imposed in 1997 by extending the operational period for eight months. On 9 January 2002 he was convicted and fined \$180 for possession of a knife in a public place. In August that year, as recorded earlier in these reasons, he was sentenced to five years wholly suspended imprisonment for attempting to procure murder. The next month he was sentenced to six months imprisonment wholly suspended for stealing a vehicle between 28 April and 1 November 2001, that is before his conviction for the offence of attempting to procure murder.

Mr Alvin is now 34 years old.

In sentencing Mr Alvin on the offence of attempting to procure murder, Mr Justice Ambrose referred to the following facts. Mr Alvin attempted to procure an undercover policeman to murder the former de facto husband of a woman to whom he was attracted. She was in dispute with her former partner about custody arrangements for their children. Mr Alvin believed the woman was fond of him, although she denied this. He decided to ingratiate himself with her by having somebody murder her estranged de facto husband before the hearing of the custody dispute. Mr Alvin contacted an acquaintance whom he believed may know those who would kill others for reward. This person contacted the police. An undercover police

officer then met with Mr Alvin and pretended to agree to kill the man for \$5,000. Mr Alvin did not have \$5,000 but hoped to borrow \$250 from a relative as a down-payment. The relative was not forthcoming without knowing what the money was for. Mr Alvin was arrested before obtaining or paying any money. The psychological and pre-sentence reports indicated that Mr Alvin had lived for a long time in a semi-fantasy world and that he needed assistance, guidance and counselling and perhaps some sort of drug therapy to distract him from some of his fantasy ideas. He had no prior convictions for violence and had pleaded guilty at an early stage.

The learned judge specifically declined to order that the 286 days Mr Alvin had already served in prison was deemed to be part of imprisonment.

In his sentencing remarks, his Honour told Mr Alvin on no less than four occasions that if he committed an offence punishable by imprisonment during the suspended five year term of imprisonment he would be brought back to Court to show why the balance of the sentence should not be imposed. Mr Alvin, on more than one occasion, indicated to the judge that he understood this.

The Crown Prosecutor at the breach proceedings urged the sentencing judge to impose at least part of the suspended sentence but because of the special circumstances in this case that should only be a "short matter of months" and perhaps to extend the operational period. Ms Bain for the respondent

today resiles from that position and says the matter was so serious that it warranted a substantial period of service of the suspended term of imprisonment.

Mr Alvin's defence counsel at sentence urged the judge to sentence him to the rising of the Court. His counsel emphasised that the complainant was his mother's de facto partner of some 15 or 16 years and held the issue of the suspended sentence over his head like a guillotine as a controlling strategy in their every domestic dispute. Mr Alvin was unhappy with the quality of the complainant's work and they had been in dispute for about three weeks prior to the assault. During that time the complainant continually reminded Mr Alvin that he was an ex-prisoner. As a result of Mr Alvin's assault on the complainant, his relationship with his mother has broken down. References were tendered from an apparently respectable older couple who had befriended Mr Alvin and from his casual employer who attested to his honesty and willingness to work hard. His counsel emphasised that he had remained in a relationship with and planned to marry the woman mentioned to Mr Justice Ambrose. He has had some counselling at the Inala Mental Health Centre and paid privately to see a psychologist, a significant impost on him as he was a disability pensioner because of functional illiteracy and intellectual impairment. His pension is supplemented by casual employment. He had also recently worked as a volunteer fire fighter with the Rural Fire Service. He recognised that he had a problem with anger which he has made efforts to address through counselling and

medication. At sentence he was on a waiting list for anger management counselling with the Salvation Army.

The learned sentencing judge in her comments to defence counsel during the sentencing process was clearly concerned that she could not impose a sentence which offered Mr Alvin the degree of community support and supervision that she thought he clearly needed.

Her Honour received telephone evidence from social worker and counsellor, Mr Ward. Mr Ward had completed three sessions with Mr Alvin, initially about his relationship with his partner. Whilst Mr Alvin was building a good rapport and towards the end of the sessions was becoming more transparent and honest, Mr Ward remained concerned about Mr Alvin's levels of anger in the relationship. He was confident that Mr Alvin would benefit from further counselling.

In her sentencing remarks, the learned judge noted Mr Alvin's many failures to successfully complete community based orders and her concern about his lack of anger control. Her Honour expressed grave concerns that should he be released into the community he may be at risk of committing another violent offence. Her Honour recommended that the Community Corrections Board consider Mr Alvin's early release on post-prison community based release so that he had adequate supervision in the community.

Under s 147 of the Act, the sentencing court must order an offender who has committed an offence punishable by imprisonment during the operational period of a suspended sentence to serve the whole of the suspended imprisonment, unless it is of the opinion that it would be unjust to do so.

Section 147(3) of the Act requires the Court in deciding whether it would be unjust to so order to have regard to:

"(a) whether the subsequent offence is trivial having regard to -

- (i) the nature of the offence and the circumstances in which it was committed; and
 - (ii) the proportion between the culpability of the offender for the subsequent offence and the consequence of activating the whole of the suspended imprisonment; and
 - (iii) the antecedents and any criminal history of the offender; and
 - (iv) the prevalence of the original and subsequent offences; and
 - (v) anything that satisfies the court that the prisoner has made a genuine effort at rehabilitation since the original sentence was imposed, including, for example -
 - (A) the relative length of any period of good behaviour during the operational period; and
 - (B) community service performed; and
 - (C) fines, compensation or restitution paid; and
 - (D) anything mentioned in a pre-sentence report; and
 - (vi) the degree to which the offender has reverted to criminal conduct of any kind; and
 - (vii) the motivation for the subsequent offence; and
- (b) the seriousness of the original offence, including any physical or emotional harm done to a victim and the damage, injury or loss caused by the offender; and

- (c) any special circumstance arising since the original sentence was imposed that makes it unjust to impose the whole of the term of the suspended imprisonment."

The offence committed during the operational period was perhaps not trivial but it was certainly at the lower scale of offences of violence involving no more than a push, albeit of a 63 year old man, in the context of a minor domestic dispute in which the complainant was not entirely faultless.

To activate the whole of the suspended imprisonment of five years for such conduct was an unjustifiably disproportionate consequence. Mr Alvin's antecedents do not suggest that he was truly a violent offender but rather that he was prone to fantasy and that it was this character flaw that was responsible for his commission of the original very serious offence of attempting to procure murder.

The material before the Court suggested that he had made some genuine efforts at rehabilitation since the original sentence. He had completed fifteen months of the 5 years of operational period without breach. Although a disability pensioner with only casual employment, he had paid for three lots of counselling sessions and had made some efforts to obtain other counselling. He had maintained his relationship with the woman considered by Mr Justice Ambrose to be a positive influence on him. Favourable references, including a reference from his casual employer, were tendered and he had joined the Rural Fire Service as a volunteer.

I am satisfied her Honour failed, however, to give sufficient weight to matters listed in s 147(3), and especially to those matters listed in s 147(3)(a). Whilst the Court must have regard to the matters listed in s 147(3)(a) to (c), it is not precluded from taking into account other matters. Although not a consideration under s 147 of the Act, the fact that Mr Alvin had already served 286 days in pre-sentence custody before the original sentence was imposed was also relevant.

These facts in combination demonstrate that it would be unjust to order Mr Alvin to serve the whole of the suspended imprisonment arising out of his commission of the minor assault offence during the operational period. In all these circumstances, a just order is one requiring him to serve nine months of the suspended imprisonment. The operational period will then continue until 23 August 2007. Mr Alvin will have the threat of serving a further four years and three months imprisonment hanging over his head like the Sword of Damocles should he commit a further sentence punishable by imprisonment during that operational period.

The learned judge recorded a conviction for the breach of a suspended sentence but the commission of an offence punishable by imprisonment during the operational period of a suspended sentence is not a discrete criminal offence. It triggers the operation of s 146 and s 147 of the Act. That part of the order recording a conviction for the breach of the suspended sentence must be set aside.

I would grant the application for leave and allow the appeal, set aside that part of the order recording the conviction and instead of ordering that the offender serve the whole of the suspended imprisonment, order that he serve nine months of it.

FRYBERG J: For the reasons expressed by the President, I agree that the orders made below should be set aside.

However, in my view, the order which ought now to be made is one for the applicant to serve 12 months of the suspended imprisonment.

When a sword of Damocles is hanging over an offender's head as it was in this case, I see nothing wrong with members of his family from time to time reminding him of that fact.

MULLINS J: I agree with the reasons of the President and the orders proposed by the President.

THE PRESIDENT: Those are the orders of the Court.
