

SUPREME COURT OF QUEENSLAND

CITATION: *R v Felsman, Baker, Baker & Baker* [2005] QCA 453

PARTIES: **R**
v
FELSMAN, Cindy Louise
(applicant/appellant)

R
v
BAKER, Neil Russell
(applicant)

R
v
BAKER, Russell Keith
(applicant/appellant)

R
v
BAKER, Joshua Ian
(applicant/appellant)

FILE NO/S: CA No 308 of 2005
CA No 309 of 2005
CA No 310 of 2005
CA No 311 of 2005
DC No 40 of 2005

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 7 December 2005

DELIVERED AT: Brisbane

HEARING DATE: 7 December 2005

JUDGES: McMurdo P, White and Helman JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. In CA No 308 of 2005 the application for leave to appeal against sentence is granted and the appeal is allowed but only to the extent of substituting a period of six months for the operational period of two years**
2. In CA No 309 of 2005 the application for leave to appeal against sentence is refused
3. In each of CA No 310 of 2005 and CA No 311 of 2005

the application for leave to appeal against sentence is granted, the appeal is allowed, the sentence imposed at first instance is vacated and instead the applicant is ordered to perform 120 hours community service under the requirements set out in s 103 *Penalties and Sentences Act 1992 (Qld)*. It is directed that a conviction is recorded

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - where each of the applicants pleaded guilty to one count of rioting - where threats of violence and actual violence - where minor injuries sustained by one of the complainants - where property damage to dwelling house - where applicants aged between 17 and 49 at the time of the offence - where one of the applicants the father of two of the applicants - weight to be given to deterrence and other factors - whether custodial sentence justified - whether sentence manifestly excessive

Criminal Code Act 1899 (Qld), s 63

Penalties and Sentences Act 1992 (Qld), s 103

R v McCormack & Ors [1981] VR 104, cited

R v Toby [1998] QCA 452; CA No 374 of 1998, 2 December 1998, cited

COUNSEL: C W Heaton for applicants
P F Rutledge for respondent

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

- [1] **McMURDO P:** The applicants pleaded guilty on 23 November 2005 in the District Court at Hervey Bay to one count of rioting on 18 February 2005 at Warwick. The applicant Neil Baker was sentenced to six months imprisonment. The remaining applicants were each sentenced to six months imprisonment suspended after serving three months with an operational period of two years. They each contend that the sentence was manifestly excessive in all the circumstances.
- [2] The applicant Ms Felsman was 26 years old at sentence and 25 at the date of the commission of the offence. In 2001 she was convicted of seven counts of fraud and placed on 12 months probation. In 2002 she was convicted and fined for being drunk and disorderly and fined without conviction for common assault. In 2004 she was convicted and fined for minor drug offences.
- [3] The applicant Neil Baker was 49 at the time of the offence and 50 at sentence. In 1993 he was convicted and fined for producing a dangerous drug and in 1995 for unlawfully taking shop goods away.

- [4] The applicant Russell Baker was 19 at the time of the offence and 20 at sentence and had no previous convictions.
- [5] The applicant Joshua Baker was 17 at sentence and also had no criminal history.
- [6] The maximum penalty for the offence of riot is three years imprisonment.
- [7] The facts placed before the learned sentencing judge were as follows. On Friday 18 February 2005 the phone at the Warwick Police Station was running hot with emergency calls complaining about the conduct of a large number of people congregating outside 107 Dragon Street where 19 year-old Troy Hippi lived with his partner and children. An off-duty police officer who lived nearby was disturbed by loud yelling and racist remarks including "You are all fucked, you black cunts. How do you like it now, you dog fuckers". He saw about 10 people outside the Hippi house. Five males ran around the side of the house, three carrying baseball bats or pick handles. These men threw items at the house and he heard the sound of breaking glass. People ran from along the side of the house from the back to the front waving weapons and yelling abuse. Other neighbours saw the group throw bottles at the house.
- [8] Troy Hippi gave police the following background to the incident. He and his brother Neville had fallen out with the applicants a month or two earlier. Since that time the applicants had targeted the Hippi family. Joshua Baker had publicly said to Troy "Black cunt, black mother, we're going to get you and break your legs". Joshua had thrown a punch at him which failed to make contact. Troy retaliated by punching Joshua knocking him to the ground. Troy then ran away. A week later Neil Baker drove a car containing all the applicants onto the footpath and pursued Troy who sought refuge in a relative's house. The applicants pulled up outside the house and yelled out abuse like "Fuck you, we're going to kill you black cunts. Just wait till next Friday". Later that day the protagonists had a further exchange of abusive words culminating in Neil Baker again driving his car onto the footpath and chasing Troy and his cousins. Neil Baker's car and another car driven by Russell Baker continued the chase. People in the cars yelled out "Black cunt . . . we'll get you, we'll kill you. We're going to get you Friday night".
- [9] At about 8.00 pm the following Friday evening the offence occurred. Mr Hippi, his family and guests were sitting on their verandah. There were five children aged between two and eight years at home. Two cars, one driven by Neil Baker, pulled up in front of 107 Dragon Street. People in the cars shouted out "We're here now. Come out, you black cunts". Troy and Neville Hippi recognized Cindy Felsman, carrying a pick and a blue bottle, and Neil and Joshua Baker, each carrying sticks. Another male present had a knife and there were other men unknown to them carrying sticks. Another neighbour also recognized Joshua and Neil Baker. There were about 15 people outside. Troy Hippi ushered the women and children inside his home. Neil Baker threw something at Troy which hit the door. Cindy Felsman walked towards him with the pick over her shoulder and swung it at him. Troy fled inside and closed the door. He heard people bashing on the door and lent against it to keep it closed. He heard windows of the house smashing. Cindy Felsman yelled out "We're going to get you badly". Neil Baker yelled out "You black cunts. We're going to kill you". Joshua Baker said "That's what you get. That's what you get, you mongrel cunts". Troy yelled out that he was phoning police. The cars drove

- off. A two year old child had broken glass down her back and suffered some small cuts.
- [10] When police arrived they found broken bottles, weapons made from lengths of wood with misspelt racist remarks painted on them and a kitchen knife on the roadway.
- [11] Troy was understandably frightened for the safety of his family and his partner who said she thought she was going to die. His neighbours also understandably expressed concern for the safety of those in the Hippi household and for their own safety.
- [12] The next day Cindy Felsman and Joshua Baker continued their aggressive behaviour towards Troy's partner. The Bakers again challenged Troy to a fight when they saw him in the Warwick streets.
- [13] Police interviewed the applicants. Each admitted that they had driven to 107 Dragon Street on the evening of the offence and that they shouted out that they wanted to fight the occupants. They agreed that others present were carrying weapons but they each denied carrying a weapon. Whilst they admitted that others damaged the house, they denied their own responsibility for that damage. They denied their involvement in the riot and said they did not know the persons responsible.
- [14] The committal proceeded by way of tendered witness statements without cross-examination. The applicants pleaded guilty at an early stage.
- [15] The prosecutor at sentence emphasized that the riot was pre-meditated and preceded by threats. The applicants were the prime instigators of the riot which involved at least 12 other persons armed with makeshift but dangerous weapons. During the riot property was damaged and the personal safety of individuals was threatened; indeed, a two year old child received minor injuries. The applicants expressed no remorse or insight into their serious conduct, which include a concerning racist element. He submitted that in all the circumstances deterrence was an important factor. A custodial sentence of three to six months imprisonment was warranted in respect of the three younger applicants and a sentence of six to nine months was appropriate for Neil Baker who was older and should have acted responsibly in respect of his sons.
- [16] Defence counsel at sentence made the following submission. Joshua Baker lived at home with his parents. Russell Baker and Cindy Felsman lived together in a de facto relationship. Neil Baker, the father of Russell and Joshua, had been on a disability support pension since 1993 after suffering a severe car accident. Cindy Felsman had part-time work as a waitress whilst Russell and Joshua Baker were unemployed.
- [17] In early February 2005, Neville Hippi attended uninvited at Joshua's 17th birthday party. He was asked to leave, notwithstanding that he had been Joshua's friend, because Neville had a reputation for becoming aggressive when intoxicated. It seems Neville took offence because he threatened to return and did so with Troy and 14 other family members in a number of cars. These people pulled down the paling fence outside the Baker family home screaming "Come out you white trash, scums". Unfortunately for other members of the Warwick community, antagonistic

and aggressive episodes between the Baker and Hippi families and their respective supporters continued throughout early February. Joshua was approached by five of the Hippi clan and punched by Troy. On another occasion Troy punched Joshua through a car window. Cindy was assaulted at Centrelink in Warwick by three girls friendly with the Hippi clan. There were regular drive pasts of the Baker family house by Neville and Troy Hippi when people would yell out words like "White dogs" and "White trash" and throw bottles. Mrs Baker made a number of complaining phone calls to the police on the night of Joshua's birthday party. The Baker family claimed to be living in fear when they went to confront the Hippi family at Dragon Street on the night of the offence in what they believed was an invitation to a consensual family fight. Following the riot the Baker family decided to relocate from Warwick to Wide Bay.

- [18] Defence counsel urged the judge to impose a wholly suspended sentence on Neil Baker, submitting that such a sentence adequately reflected his mature age and poor leadership role. He contended that community based orders without conviction should be imposed on Russell and Joshua Baker and that Ms Felsman should be fined.
- [19] The learned sentencing judge was rightly concerned by the offending which he regarded as intolerable. His Honour stated that society cannot allow individuals to take the law into their own hands by gang rioting. His Honour considered that this type of conduct "can only attract a custodial sentence". He reflected the youth of the three younger offenders by suspending their sentence after serving three months.
- [20] Mr Heaton on behalf of each applicant contends that his Honour erred in considering that the applicants' conduct necessarily warranted a custodial sentence.
- [21] The facts before the primary court did not suggest that all members of the Hippi family were entirely blameless in the deteriorating relationship with the applicants. The law, however, would have provided some protection to the applicants, for example, by granting domestic violence orders or through charges of stalking. The particularly serious aspects of this offence were that the applicants acted outside the law and planned revenge by behaving in a violent, offensive and racist manner causing alarm, not only to the Hippi family, but also to other members of the public who were rightly concerned for both the safety of the Hippi family and friends and also their own safety. It is fortunate that the applicants' violent and threatening behaviour did not escalate and cause further personal injury and property damage. All members of the Queensland community are entitled to live peaceably without being frightened and disturbed by such completely unacceptable behaviour. The applicants' conduct warranted a salutary deterrent penalty.
- [22] Neil Baker was a mature man with some minor previous convictions. He drove one of the two cars containing rioters to the Hippi home and was armed with a stick during the riot. He clearly took a leadership position in respect of the other offenders. Taking into account his early plea of guilty, a six month term of imprisonment was certainly warranted in his case and was in no way manifestly excessive.
- [23] The position is more complex in respect of the other applicants. Joshua Baker was only 17 years old and his involvement in the offence was no doubt influenced by the actions of his father, older brother, and his brother's girlfriend. His youthfulness,

lack of prior convictions, prospects of rehabilitation and his relationship with his co-offenders combined with his early plea of guilty mean that even a short custodial sentence was manifestly excessive. He can adequately be punished by the imposition of a community service order.

[24] Russell Baker also pleaded guilty and at 19 was only a little older than Joshua. He, too, has no prior convictions and his involvement in the offence was no doubt influenced by the shocking example and poor leadership set by his father and his brother's older partner. In these circumstances the learned primary judge erred in sentencing him to even a short term of imprisonment rather than ordering that he perform community service. Because both Russell and Joshua have now served a short period of imprisonment I would reduce the period of community service I would otherwise have imposed from 200 hours to 120 hours. Both these applicants have indicated their consent and willingness to perform such orders.

[25] Ms Felsman, the partner of 19 year old Russell Baker, was, at 25, considerably older than both Joshua and Russell. She should have demonstrated some maturity and moderation. She had a somewhat concerning criminal history including a conviction for being drunk and disorderly and an entry for common assault. In those circumstances I am not persuaded that a six month term of imprisonment suspended after three months was manifestly excessive. Some parity should however be maintained between the sentence imposed on her and that imposed on Neil Baker, in respect of whom there was no operational period. The operational period of her suspended sentence should be reduced to six months.

[26] I would refuse Neil Baker's application for leave to appeal against sentence. I would grant Ms Felsman's application for leave to appeal against sentence and allow her appeal but only to the extent of ordering that the operational period of two years be replaced by one of six months. I would also grant the applications for leave to appeal against sentence brought by Russell Baker and Joshua Baker, allow their appeals, vacate the orders imposed at first instance and instead order that they perform 120 hours community service under the requirements set out in s 103 *Penalties and Sentences Act 1992* (Qld) and direct that a conviction be recorded.

[27] **Orders**

1. In CA No 308 of 2005 the application for leave to appeal against sentence is granted and the appeal is allowed but only to the extent of substituting a period of six months for the operational period of two years.
2. In CA No 309 of 2005 the application for leave to appeal against sentence is refused.
3. In each of CA No 310 of 2005 and CA No 311 of 2005 the application for leave to appeal against sentence is granted, the appeal is allowed, the sentence imposed at first instance is vacated and instead the applicant is ordered to perform 120 hours community service under the requirements set out in s 103 *Penalties and Sentences Act 1992* (Qld). It is directed that a conviction is recorded.

[28] **WHITE J:** I have read the reasons for judgment of the President and agree with her Honour as to the orders which ought to be made.

[29] Fortunately rioting of this type is quite rare in Australia so that there are few comparable cases available for consideration. Mr Heaton for the applicants referred

to *R v Toby* [1998] QCA 452; CA 374 of 1998 to support his submission that the learned sentencing Judge ought to have wholly suspended the sentences of imprisonment imposed on each of the applicants.

- [30] The applicant in *Toby* was a person with a severe physical disability who had earlier been assaulted by another member of the Camooweal community where he lived. When members of his family came to town for a festival he incited them to join with him in seeking revenge against his assailant. About 70 people gathered outside the hotel containing the assailant and his followers. Police attempted to calm the situation by brokering a reconciliation between the applicant and the assailant but the applicant said it was too late and his family wanted to fight. As many as 200 people became involved in the tumult which consisted of brawling throughout the streets of Camooweal. No one was seriously hurt and no property was damaged. Reinforcements arrived from the Northern Territory and Mt Isa and it was only then that the riot was quelled.
- [31] The applicant pleaded guilty to unlawful assembly, an offence which carried a maximum penalty of imprisonment for one year. He was sentenced to a term of three months imprisonment wholly suspended for nine months. This court regarded the sentence as not manifestly excessive but noted that a co-offender who had pleaded guilty to the more serious offence of taking part in a riot was given the particularly lenient sentence of a good behaviour bond.
- [32] There is nothing in *Toby* which would make manifestly excessive the sentences imposed upon Neil Baker and Cindy Felsman by the learned sentencing judge bearing in mind the maturity and position of authority which Neil Baker must have had and the age, previous convictions and conduct of Cindy Felsman.
- [33] I agree with the observations of the President that conduct of the kind demonstrated by the applicants and those who supported them must be strongly deterred, *R v McCormack and Ors* [1981] VR 104.
- [34] **HELMAN J:** I agree with the orders proposed by the President and with her reasons.