

SUPREME COURT OF QUEENSLAND

CITATION: *R v Stallan* [2010] QCA 68

PARTIES: **R**
v
STALLAN, Bronson Terrence
(applicant)

FILE NO/S: CA No 250 of 2009
DC No 364 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 26 March 2010

DELIVERED AT: Brisbane

HEARING DATE: 4 March 2010

JUDGES: McMurdo P, Muir JA and Daubney J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **The application for leave to appeal against sentence is refused**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – the applicant and three co-offenders were found guilty of assault occasioning bodily harm whilst armed and in company – the applicant was also found guilty of breaking and entering premises and stealing and to contravening a requirement of a police officer by stating a false name – the applicant was sentenced to a total of three years imprisonment with an order that he be released on parole after serving a further 12 months – the applicant was armed during the assault – the applicant had a more extensive criminal history than co-offenders – whether sentence was manifestly excessive having regard to the sentence imposed on his co-accused

CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCING – GENERALLY – primary judge determined that the applicant used the initial weapon on the complainant – whether primary judge sentenced on a factual basis not reasonably open on a consideration of the evidence and the findings of the jury

Evidence Act 1977 (Qld), s 132C

Cheung v The Queen (2001) 209 CLR 1; [2001] HCA 67,
cited

R v Stallan [2003] QCA 62, cited

COUNSEL: S L Kissick for the applicant
M B Lehane for the respondent

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

- [1] **McMURDO P:** The applicant, Bronson Terrence Stallan, pleaded not guilty to one count of doing grievous bodily harm with intent and to an alternative count of assault occasioning bodily harm whilst armed and in company. He was charged jointly with Travis Michael Douglas, Wade Morris Douglas, Craig Darren Mark Thompson and Shannon James Thompson. After a 10 day trial, the jury acquitted Craig Thompson on both counts. The jury found the remaining defendants not guilty of doing grievous bodily harm with intent, but guilty of the alternative count of assault occasioning bodily harm whilst armed and in company. Stallan also pleaded guilty to breaking and entering premises and stealing in June 2005 and to a summary offence of contravening a requirement of a police officer by stating a false name.
- [2] The judge sentenced Travis Douglas to 18 months imprisonment with an order that he be released on parole after six months; Wade Douglas to two years imprisonment with an order that he be released on parole after eight months; Shannon Thompson to two and a half years imprisonment with an order that he be released on parole after 10 months; and Stallan to three years imprisonment with an order that he be released on parole after serving a further 12 months. In Stallan's case, 66 days of pre-sentence custody was deemed time already served under the sentence. He was sentenced to six months concurrent imprisonment for the break and enter offence and not further punished for the summary offence.
- [3] Stallan applies for leave to appeal against his sentence on two bases. He first contends that the judge sentenced on a factual basis that was not reasonably open on a consideration of the evidence and the findings of the jury. His second contention is that his sentence was manifestly excessive having regard to the sentence imposed on his co-accused, Shannon Thompson.

The prosecutor's submissions at sentence

- [4] The prosecutor provided the following information to the Court.
- [5] Travis Douglas was 26 at the time of the offence and 28 at sentence. Wade Douglas was almost 29 at the time of the offence and 31 at sentence. Stallan was 28 at the time of the offence and 31 at sentence. Shannon Thompson was 32 at the time of the offence and 35 at sentence. All had criminal histories, but those of Travis and Wade Douglas were not as serious as those of Stallan and Shannon Thompson.
- [6] Stallan's offending commenced as a juvenile with convictions for offences of dishonesty, including break, enter and steal. In the Toowoomba District Court he

was convicted and sentenced to 120 hours community service for "rioters injuring building". His offending continued as a young adult with property offences, offences of violence and street offences. In 2002 he was convicted and sentenced to four months cumulative imprisonment for serious assault. Later that year he was sentenced for two counts of assault occasioning bodily harm in company to two years imprisonment suspended after nine months with an operational period of three years. This sentence was reduced on appeal to suspension after six months with an operational period of two years.¹ Stallan subsequently committed an offence during the operational period which was then extended for 12 months. The present offence occurred about 12 months after that operational period expired.

- [7] Shannon Thompson's criminal history also commenced when he was a juvenile. As a young adult, he was sentenced to community based orders for property offences and he later breached those orders. In 1996 he was sentenced to 18 months imprisonment wholly suspended for three years for robbery with personal violence. In 2002 he was also convicted, together with Stallan, of two counts of assault occasioning bodily harm in company.
- [8] The prosecutor tendered the complainant's victim impact statement. The complainant referred to his continuing headaches, insomnia, nightmares, depression and physical pain in his arm during the two years since the offence. His substance abuse problems had increased as a result of the offence and had negatively impacted on his personal relationships.
- [9] After referring to a number of Court of Appeal decisions, the prosecutor emphasised the serious aspects of the offending. Weapons were used, ranging in description from baseball bats to didgeridoos. The use of those weapons continued when the complainant was effectively unconscious on the ground. There was punching, kicking and stomping. The victim was minding his own business, leaving a hotel at closing time when he was attacked. The assault was vicious, protracted and unrelenting. In the course of the fracas a woman was punched in the face. Another woman who tried to assist the complainant was chased and threatened. The melee only ended when the sound of sirens, either from the police or the ambulance, caused the offenders to scurry from the scene. There may have been a background of ill will between the protagonists but, on any view, the complainant was in no way the cause of his assault. It "was an example of stark, gratuitous, protracted violence by mature aged men all of whom have criminal histories". The criminal histories of all offenders were serious, but Stallan's was deplorable. As Travis Douglas had the least serious criminal history, a sentence of two years imprisonment was appropriate in his case. Wade Douglas had some history for offences of violence so that in his case a sentence of two and a half years imprisonment was appropriate. Shannon Thompson had a criminal history including robbery and another episode of violent offending in which he was jointly involved with Stallan. In his case a sentence of three years imprisonment was appropriate. In Stallan's case, bearing in mind the maximum penalty of 10 years imprisonment, a sentence of between three and four years imprisonment was appropriate.

Submissions on behalf of Stallan at sentence

- [10] Stallan's counsel submitted that the appropriate sentence was one of 18 months to two years imprisonment with release after six to eight months. He exhorted the

¹ *R v Stallan* [2003] QCA 62.

judge to find the following facts. The most reliable evidence was from the independent witness, Letissa Murphy; she had a good view of the assault; and was the least intoxicated of all witnesses. On her version, Stallan was merely "a low-grade party" to the offence. The judge should not accept the evidence of the complainant or his cousin, Mark Dodds.

- [11] He submitted that whilst Stallan had a serious criminal history, he had no significant entries since 2002 and he played a minor role in the present offending. He had become a father, and, together with his mother, cared for his five year old daughter. Since her birth, his offending had minimised. He had employment available through a traineeship with the Goupong Ugarapul Aboriginal Corporation. He had made real efforts at reform and had now curbed his marijuana and alcohol abuse which had involved him in past offending. Later, counsel added that Stallan had made an offer prior to his conviction to plead guilty to doing grievous bodily harm simpliciter, an offence more serious than the offence of which he was convicted.

Submissions on behalf of Shannon Thompson at sentence

- [12] Shannon Thompson's counsel made the following submissions at sentence.
- [13] Shannon Thompson had been in a steady relationship for about 18 years and had four children aged from 16 to seven years with his partner, including the acquitted defendant, Craig Thompson. Shannon Thompson was a devoted father and remained close to his mother and extended family. He had a solid work history, although he was presently unemployed and caring for his children as a result of health problems. The complainant had placed threats against his attackers on his Facebook page so that Shannon Thompson may be in danger whilst in custody.
- [14] Counsel invited the judge to accept the evidence of Lyndell Storey, Laverne Murphy and Letissa Murphy and to find that Shannon Thompson did not return to the melee until after the complainant had suffered his most serious injuries. Shannon Thompson had earlier offered to plead guilty to the offence of grievous bodily harm simpliciter, but that offer was not accepted by the prosecutor. He should be given some consideration for that indication of an early plea of guilty to a charge more serious than that of which he was convicted.
- [15] Counsel encouraged the judge to impose a sentence of between 18 months to two years imprisonment with parole fixed after six to eight months.

The judge's sentencing remarks

- [16] The judge adjourned the sentencing of all offenders until the following Monday. Her Honour's sentencing remarks included the following.
- [17] The complainant and all offenders belonged to well-known Aboriginal families in the Ipswich district. There had been ill feeling amongst the families, although there was no reason for the attack on the complainant. He had been at a hotel drinking with two family members and a friend. He was intoxicated, probably loud, but not particularly aggressive. He was about to leave the hotel in a cab when a number of cars pulled up containing the offenders and probably others. Travis Douglas, Wade Douglas and Shannon Thompson initially approached the complainant and insulted him. He returned the insults. He took off his thongs and shirt and "shaped up" to Shannon Thompson. Shannon Thompson took the lead in the assault. When the

complainant appeared to be getting the better of the encounter, he was set upon by others in numbers. Travis Douglas chased the complainant's cousin, Mark Dodds, up the street and then returned to the group assault on the complainant. Wade Douglas stayed in the group. The judge continued:

"...Stallan, who was in possession of a stick of some sort, hit [the complainant] in the back of the head. He was stunned and upon receiving another hit, fell to the ground. Once upon the ground he was set upon by a number of people, including one or more of the accused. Once weapons were produced, Letissa Murphy ran up to the units at the back of the hotel to arm herself. She came back with a weapon and started to try to help [the complainant]. Shannon Thompson chased her into the alleyway.

By this stage, [the complainant] and the assault had moved over to the tint shop, or outside the tint shop, which was very close to where [Shannon] Thompson and Letissa Murphy were. Once Laverne Murphy came between Letissa and Shannon [Thompson], he then returned to [the complainant] and continued to assault him.

Travis Douglas by this stage had also returned and was also assaulting [the complainant]. There were other unidentified men who were also involved in the assault. It was a joint effort and a concerted act designed to overcome resistance. It was also clearly designed to attack one person only as no-one else was injured on the night.

In sentencing all of you I have come to the view that you came to the hotel with the plan to assault [the complainant] but not to cause grievous bodily harm consistent with the jury's verdict. I accept you all alighted from the vehicles looking to assault [the complainant] and that a number of people armed themselves once [the complainant] showed he was willing to defend himself.

[The complainant] was seriously injured. I accept that none of you caused grievous bodily harm to [the complainant], but your actions led to a situation where he did in fact at the end of the day, suffer a serious injury to his arm which amounted to grievous bodily harm, and in any case, he suffered significant injuries to his head, some loss of consciousness and abrasions to his face. He has, as a result, suffered from depression since this event and has been medicated to deal with that depression since."

[18] The judge accepted that the offenders offered a guilty plea to a more serious charge at the beginning of an earlier trial which was aborted. Although the plea was not offered at an early stage, the judge took it into account in imposing sentence.

[19] In sentencing Stallan, the judge noted his age and criminal history including his offences of violence. The judge accepted that he was:

"...the person who had the initial weapon and caused the initial hit to [the complainant], although it seems from the evidence that [Stallan was] not as involved when [the complainant] was down on the ground and that may be because [Stallan] ran back to the car for another weapon."

Her Honour also took into account his job offer and his five year old daughter.

- [20] In respect of Shannon Thompson, the judge recited his personal details; referred to his significant criminal history; and took into account the suggestion that he may be a victim of violence whilst in prison.
- [21] The judge noted that principles of general and personal deterrence were paramount in sentencing in this case. Family feuds cannot be allowed to fester into violence. Terms of actual imprisonment had to be imposed on all offenders and particularly on Stallan and Shannon Thompson, both of whom had previous convictions for violence. There was little to distinguish between the offenders in their roles except that Stallan was armed. The differing criminal histories were significant in determining the appropriate sentences.
- [22] The sentences imposed on each offender are set out in [2] of these reasons.

The submissions in this appeal

- [23] Counsel for Stallan contends that the judge erred in determining that Stallan used the initial weapon on the complainant. That determination was based on the evidence of the complainant and his cousin, Mark Dodds, who was a prisoner at the time he gave evidence and was declared hostile. Mark Dodds's witness statement and depositions at committal were tendered at trial. Although that aspect of Mark Dodds's evidence supported the judge's findings, during cross-examination he accepted he may have been mistaken when he saw Stallan using a stick to hit the complainant. Mark Dodds also said that he had been drinking and smoking cannabis on the evening of the fracas and ran off during it. The jury did not accept Mark Dodds's evidence which put Craig Thompson at the scene and they acquitted him. The fracas arose out of a dispute between the families of the offenders and Dodds's family, so that Mark Dodds was not an independent witness. The nature of the fracas meant that it was difficult for witnesses to say what had happened. In these circumstances, the judge could not have been satisfied that Stallan had first wielded the weapon and hit the complainant.
- [24] Counsel for Stallan conceded that the sentence imposed on Stallan was not in itself excessive. But he submitted that, despite Stallan's extensive criminal history which included offences of violence, considerations of parity mean that he should have received the same sentence as, and no more than, Shannon Thompson.

Conclusion

- [25] In Queensland, a sentencing judge may make findings in respect of disputed allegations of fact if satisfied on the balance of probabilities that the allegations are true: s 132C *Evidence Act 1977* (Qld). A judge is obliged to sentence on a factual basis not inconsistent with the jury's verdict: *Cheung v The Queen*.² In determining whether the judge erred in her approach, it is necessary to briefly refer to some of the relevant evidence at trial.
- [26] The complainant gave evidence that, early in the fracas, Stallan hit him with a hard object like an iron bar; it was not a fist. He remembered receiving another blow to his head from Stallan's weapon and then he "went blank ... seen stars".
- [27] Mark Dodds, in his original statement to police, gave clear and unequivocal evidence that Stallan pulled out from under his shirt a stick "like an Aboriginal

² (2001) 209 CLR 1; [2001] HCA 67.

weapon which was sort of a like a police night stick. It was short but thicker than a night stick. It had evil style carvings on it." Stallan later hit the complainant with it.

- [28] The jury's verdict of acquittal in respect of Craig Thompson did not mean that the jury rejected all of the complainant's evidence or all of the evidence of his cousin, Mark Dodds. Craig Thompson gave and called alibi evidence to show he was not at the scene. The jury may have thought the witnesses were mistaken as to Craig Thompson's identity but reliable as to Stallan's role in the offence. The judge was not obliged to reject Mark Dodds's evidence because of the jury verdicts. Nor was her Honour obliged to reject his evidence because he was subsequently declared hostile; agreed that he had been drinking alcohol and smoking cannabis prior to the attack; and in cross-examination was unsure whether Stallan actually hit the complainant with the stick. The evidence of the complainant and Mark Dodds, that Stallan was armed and used his weapon to assault the complainant, was given some support from other witnesses. Lyndell Storey gave evidence that Stallan, as well as others, was armed with a weapon of some sort. Laverne Murphy gave evidence that she saw Stallan armed with a stick, although she saw this after the complainant was on the ground.
- [29] Stallan did not give or call competing evidence.
- [30] It is clear from this discussion of the evidence at trial that it allowed the judge to find that Stallan was in possession of a stick of some sort and that he hit the complainant twice to the head before he fell to the ground. Stallan's first contention, that the judge's fact-finding on sentence was flawed, is not made out.
- [31] Stallan's second contention is that his sentence of three years imprisonment with release on parole after serving 12 months and 66 days, when compared to the sentence imposed on Shannon Thompson of two and a half years imprisonment with parole after 10 months, was manifestly excessive and gives him a justifiable sense of grievance.
- [32] I note the correctness of the concession made by Stallan's counsel that his sentence was not in itself in any way excessive. The maximum penalty was 10 years imprisonment. Stallan's conduct as a mature man with previous convictions for violence made this a serious example of this offence. A heavier penalty would have been within range. But, even when compared to the sentence imposed on Shannon Thompson, the sentence imposed on Stallan could not cause him a justifiable sense of grievance. There are three sound reasons for imposing a heavier sentence on Stallan than on Shannon Thompson. First, the primary judge found, as she was entitled, that Stallan's role in the offence was concerning as he was actually armed and struck the blows with a weapon after which the complainant fell to the ground. Second, Stallan's criminal history was even worse than that of Shannon Thompson. Third, Stallan, unlike Shannon Thompson, had also pleaded guilty to a significant property offence (break, enter and steal) and to a minor summary offence. These reasons in combination justified the imposition of a heavier penalty on Stallan than on Shannon Thompson. The applicant's second contention is not made out.
- [33] It follows that the application for leave to appeal against sentence must be refused.
- [34] **MUIR JA:** I agree with the reasons of McMurdo P and with the order she proposes.
- [35] **DAUBNEY J:** I respectfully agree with the reasons for judgment of the President and with the order proposed by her Honour.