SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2017] QCA 45
PARTIES:	**R** **v** **SMITH, Wayne Russell** (applicant)
FILE NO/S:	CA No 343 of 2016 DC No 1267 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 15 November 2016
DELIVERED EX TEMPORE ON:	22 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2017
JUDGES:	Gotterson and Philip McMurdo JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the offender offered to provide a statement under s 13A *Penalties and Sentences Act* 1992 (Qld) but statements were instead obtained from four other co-offenders – where no statement or other assistance was actually provided – where the offer was made solely in relation to the offences before the court and was made relatively late – where the sentencing judge did not refer to the offer of assistance in sentencing remarks – whether the sentencing judge was required to take the offer of assistance into account as a relevant consideration CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant procured a group of men to assault the complainant

following a business dispute – where the applicant did not take part in the attack but nonetheless instigated the offence and provided a means of transport for the co-offenders – where one of the group of co-offenders was sentenced to 18 months' imprisonment with immediate release on parole – where the applicant was sentenced to three years' imprisonment – where the applicant contended that his offending was less serious than his co-offender because he did not participate in the violence – where the applicant was a mature man with a criminal history – where the co-offender participated in the violence but was a young man with no criminal history – whether the sentencing judge failed to properly apply the parity principle between co-offenders

COUNSEL: A J Edwards for the applicant
C W Heaton QC for the respondent

SOLICITORS: Guest Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIP McMURDO JA:** On 15 November 2016, the applicant was convicted, on his plea of guilty, of an offence of assault occasioning bodily harm whilst armed and in company. He was sentenced to three years' imprisonment with an order that he be released on parole on 14 May 2017. There had been no pre-sentence custody. He was ordered to pay $15,000 compensation to the complainant.

[2] He applies for leave to appeal against his sentence now upon two grounds. The first is that the judge erred in failing to take into account attempts made by the applicant to assist investigating authorities. The second is that his Honour failed to take into account parity considerations in relation to a sentence imposed on a co-offender. It is argued that he should be resentenced to a term of 18 months with a release on parole after three months.

[3] The facts of the offence were not disputed. The applicant and the complainant had argued over a business matter. The complainant owned a sawmill and entered into a venture with a man called Tonks. The complainant and Tonks had a number of disagreements. Their venture needed further capital, which they did not have. Tonks recruited the help of two investors, the applicant being one. Without consulting the complainant, Tonks promised the investors a share of the venture. A few days before this offence was committed, the applicant and the complainant met. The applicant became offended that the complainant had questioned his involvement in the business venture. They agreed to meet again at the complainant's sawmill on the following Thursday, 11 December 2015.

[4] The applicant returned to the sawmill on that day, but he went there in the company of a group of five men who were led by a man called Crowden, who the sentencing judge said was the president of an outlaw motorcycle club. The applicant had engaged Crowden to "sort out" the complainant because his investment had gone wrong. Crowden gathered four assistants, and the group made a journey to the complainant's

sawmill, taking one and a half hours, in the applicant's car. They were led by another car driven by the applicant. When he and Crowden's group arrived, the applicant pointed out the complainant to the group and then went to the office area apparently to distance himself from what he had procured the group to do.

[5] The complainant was attacked without warning principally by Crowden. The complainant attempted to crawl under a truck, but one of the group pulled him out by his legs and he was further assaulted. He was punched and kicked whilst on the ground. At one stage, Crowden picked up a piece of wood and hit him on the head.

[6] As the judge observed, it was clear that the applicant's role was as the instigator of this attack. It was the applicant who had procured the participation of the others, although his Honour accepted that Crowden's particular violence with the use of the piece of wood had not been within the applicant's contemplation. His Honour noted that the applicant had pleaded guilty to this offence on the basis that Crowden's violence was a probable consequence of the plan. He said that there was a significant amount of planning involved and that the offence could be correctly described, as it had been by one of the group, as a "standover incident".

[7] The complainant suffered extensive injuries. He spent five days in hospital. Part of a finger had to be amputated. He suffered a fracture of his skull, scalp lacerations and extensive bruising to his face, torso, arms and legs. The lacerations had to be closed with staples. His victim impact statement, the judge observed, indicated "…an ongoing impact, including the diagnosis of post-traumatic stress disorder." The complainant had been unable to work for a period of two years, so the offence has had a significant financial impact. His Honour said that the sentence should recognise the serious nature of the injuries suffered by him.

[8] The applicant was 47 years of age at the time of the offence and 49 when sentenced. He had what the judge described as a dated criminal history, although it contained three previous offences of assault, most recently in 1997. His Honour referred to a number of mitigating factors. The applicant had pleaded guilty "at a relatively early stage". The applicant had health problems. He was under psychiatric care, suffering from a major depressive disorder. There were references speaking highly of his character and his contribution to the sport of basketball as a volunteer. He had been involved in significant community work.

[9] The sentencing judge described the circumstances of this offence as particularly serious. He said that general deterrence in this case was of prime importance, and the case deserved "a significant penalty".

[10] His Honour noted that only one of the co-offenders had been sentenced at that stage. He had been sentenced at the same time upon unrelated offences of arson. He had been sentenced to three years' imprisonment on the arson offences and 18 months' imprisonment for this assault. He was given immediate parole. His Honour said that this offender was aged 21 years, had no previous convictions, had fully cooperated with the authorities and had been sentenced under s 13A of the *Penalties and Sentences Act* 1992 (Qld). In fact, this man was aged 22 years, but nothing comes from that difference.

[11] His Honour expressed the view that a head sentence of three years' imprisonment was appropriate in the applicant's case. He said that he had in mind ordering the applicant's release after nine months to recognise the applicant's personal circumstances as warranting a reduction of what he described as the "usual one-third". He then said he would reduce the period in custody to six months because of the applicant's offer to compensate the complainant.

[12] Although one of the suggested grounds of appeal was that the sentence was manifestly excessive, that ground was abandoned at the commencement of this hearing.

[13] As to the applicant's offer of assistance to the authorities, the sentencing judge was handed a collection of emails which were said to evidence his offer of assistance. The first of these emails was sent in July 2016. It records an indication from the applicant that he would provide a statement under s 13A. The applicant's counsel told the sentencing judge that the material was self-explanatory and that he wished to say nothing more about it except that the proposal "went nowhere" and that police obtained statements from four of the co-offenders. Counsel confirmed that the offer was only in relation to this matter. His Honour commented that the offer was "somewhat late in the piece".

[14] It is unsurprising that the sentencing reasons make no reference to this offer. It was an offer made relatively late ahead of the then scheduled hearing last September. No assistance was actually provided. It could only have mattered for the prosecution of one or more of the co-offenders. Just what the applicant's testimony could have added to the case against them is not apparent. His Honour appears to have given no weight to the offer, but in my view, that was not an error. He had, of course, substantially reduced the non-parole period for mitigating factors which did have weight.

[15] The other proposed ground of appeal is that the sentence offends the parity principle when it is compared with that imposed upon the co-offender of 18 months with immediate release. His Honour was alert to the relevance of that other sentence, but he said that it was of little assistance in the applicant's case because the applicant had been the instigator, he was a mature man and he had some criminal history for offences of assault.

[16] The applicant's submissions in this Court provide information about the sentencing of that other offender which may not have been available to the judge sentencing the applicant. In particular, that other offender had received the benefit of a reduction under s 13A not for his sentence for the present offence, but instead for the sentences for arson; therefore, it is suggested, that distinguishing factor did not exist. It is further submitted that the other offender's participation was relatively more serious because he had been one of those inflicting the violence and because, after this violence, he committed the arson offences, again at the direction of Crowden.

[17] I do not regard the conduct of the co-offender as more serious than that of the applicant. On the contrary, it was the applicant who was the instigator and who enlisted the others through Crowden to attack the complainant. They travelled to the scene in a car provided by the applicant. He was a mature man with a criminal history. The co-offender was a young man with no criminal history. It appears that the co-offender committed this offence in fear of reprisal from Crowden if he did not do so. The co-

offender's case warranted a lower sentence in comparison with the applicant's offence. There is no disparity here which could give rise to any justifiable sense of grievance. It follows that the proposed appeal has no merit. I would refuse the application for leave to appeal.

[18] **GOTTERSON JA:** I agree.

[19] **MULLINS J:** I agree.