SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dean; R v Selmes; R v Phillips* [2018] QCA 124
PARTIES:	**In CA No 259 of 2016:** **R** **v** **DEAN, Dallas Glenn Kincaid** (applicant) **In CA No 271 of 2016:** **R** **v** **SELMES, Michael Robert** (applicant) **In CA No 287 of 2016:** **R** **v** **PHILLIPS, Douglas Allan** (appellant/applicant)
FILE NO/S:	CA No 259 of 2016 CA No 271 of 2016 CA No 287 of 2016 SC No 235 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Convictions: 4 May 2016; Dates of Sentences: 12, 14 and 16 September 2016
DELIVERED ON:	15 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2018
JUDGES:	Sofronoff P and Flanagan and Brown JJ
ORDERS:	**In CA No 259 of 2016:** **1. Dallas Glenn Kincaid Dean's application for leave to appeal against sentence is refused.** **In CA No 271 of 2016:** **1. Michael Robert Selmes' application for leave to appeal against sentence is granted.** **2. The appeal is dismissed.** **In CA No 287 of 2016:** **1. Douglas Allan Phillips' appeal against conviction is dismissed.**

2. Douglas Allan Phillips' application for leave to appeal against sentence is refused.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the applicants, following a joint trial, were each found not guilty of the offence of murder but guilty of the alternative offence of manslaughter – where it was uncontroversial at trial that the applicants had participated in a "vicious" assault upon the deceased – where the appellant, Phillips, submits that the Crown failed at trial to prove beyond reasonable doubt that he foresaw the deceased's death as a possible or probable consequence of the assault, or that an ordinary person would reasonably have foreseen the deceased's death as a possible consequence of the assault, pursuant to sections 7 and 8 of the *Criminal Code* (Qld) – whether it was reasonably open to the jury, upon the whole of the evidence, to be satisfied beyond reasonable doubt that the appellant was guilty of manslaughter

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – DISMISSAL OF APPEAL WHERE NO SUBSTANTIAL MISCARRIAGE OF JUSTICE – GENERAL PRINCIPLES – where the trial judge distributed diagrammatic question trails or flow charts to the jury, setting out factual issues relevant to sections 7 and 8 of the *Criminal Code* – where the appellant submits that the trial judge did not adequately explain the subjective nature of "common intention" for the purposes of section 8 – whether the trial judge misdirected the jury on section 8, occasioning a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the sentencing judge erroneously described the applicant Phillips as having previously been convicted of the offence of rape – where the applicant had in fact been convicted of the offence of unlawful carnal knowledge – whether the sentencing judge held an inflated view of the applicant's criminal history, resulting in a manifestly excessive sentence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicants Phillips and Dean had made pre-trial offers to plead to a charge of manslaughter – where the Crown had rejected those offers – whether the sentencing judge failed properly to take the offers into account, or to attach sufficient weight to them, resulting in

manifestly excessive sentences

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – whether the sentencing judge failed to give the applicant Dean "appropriate credit" for a number of factors weighing in his favour, resulting in a manifestly excessive sentence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the sentencing judge fixed the applicant Selmes' parole eligibility date beyond the halfway mark of the head sentence, without adverting to that possibility during the sentencing hearing or providing the parties with an opportunity to make submissions about it – whether the sentencing judge fell into error in failing to provide that opportunity, requiring the applicant to be re-sentenced

Criminal Code Act 1899 (Qld), s 7, s 8
Penalties and Sentences Act 1992 (Qld), s 161A, s 161B

R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, considered
R v Bargenquast, Davis & Holmes [2005] QCA 476, considered
R v Cobb [2016] QCA 333, considered
R v Hedlefs [2017] QCA 199, considered
R v Kitson [2008] QCA 86, applied
R v Latemore [2016] QCA 110, applied
R v McDougall & Collas [2007] 2 Qd R 87; [2006] QCA 365, considered

COUNSEL: C Reid for the applicant in CA No 259 of 2016 (pro bono)
J J Allen QC for the applicant in CA No 271 of 2016
S Bain for the appellant/applicant in CA No 287 of 2016 (pro bono)
J A Wooldridge for the respondent

SOLICITORS: No appearance for the applicant in CA No 259 of 2016
Legal Aid Queensland for the applicant in CA No 271 of 2016
No appearance for the appellant/applicant in CA No 287 of 2016
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Flanagan J and the orders his Honour proposes.

[2] **FLANAGAN J:** On 4 May 2016 after an 11-day trial in the Supreme Court of Queensland Anthony Phillips, Douglas Phillips, Dallas Dean and Michael Selmes

were found not guilty of the offence of murder but guilty of the alternative offence of manslaughter.

[3] On 12 September 2016 the learned trial judge sentenced Anthony Phillips to 14 years imprisonment. By operation of s 161A(a) and s 161B(1) and (2) of the *Penalties and Sentences Act* 1992 (Qld) he was convicted of a serious violent offence and required to serve 80 per cent of his sentence before being eligible for parole. A period of 1,352 days was declared as pre-sentence custody. Anthony Phillips does not appeal against his conviction for manslaughter nor does he seek leave to appeal against his sentence.

[4] On the same day Douglas Phillips was sentenced to 12 and a half years imprisonment, which also had the effect of requiring him to serve 80 per cent of his sentence before being eligible for parole. A period of 1,351 days was declared as pre-sentence custody. Douglas Phillips appeals against his conviction and seeks leave to appeal against his sentence. An extension of time in which to appeal against conviction and to apply for leave to appeal against sentence was granted by this Court on 12 May 2017.[1]

[5] Only one ground of appeal was identified in his appeal against conviction, namely that "the verdict is unreasonable or cannot be supported having regard to the evidence".[2] In his amended outline of submissions, the appellant sought leave to add a further ground:

> "That a misdirection on sections 7 and 8 (of the *Criminal Code* (Qld)) caused a miscarriage of justice."

At the hearing of the appeal his counsel submitted that this ground is better framed as a misdirection on the issue of foreseeability.[3] The Court granted leave to add a ground of appeal that "a misdirection on the issue of foreseeability caused a miscarriage of justice".[4] Leave to appeal against sentence is sought by Douglas Phillips on the ground that the sentence is, in all the circumstances, manifestly excessive.

[6] Dallas Dean was sentenced on 14 September 2016 to 11 years imprisonment with a serious violent offence declaration which required him also to serve 80 per cent of his sentence. A period of 1,355 days was declared as pre-sentence custody. He seeks leave to appeal against his sentence on the ground that it is manifestly excessive.[5]

[7] Michael Selmes was sentenced on 16 September 2016. He received a sentence of nine years imprisonment. A period of 1,358 days was declared as pre-sentence custody. A court ordered parole eligibility date was fixed at 26 December 2018. This was beyond the automatic halfway point and resulted in Selmes being eligible for parole after serving six years of his nine year sentence. Her Honour did not however, make a serious violent offence declaration. Such a declaration would have required Selmes to serve 80 per cent of his nine year sentence, that is, seven years and two months. His application for leave to appeal against sentence identifies one ground,

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1 *R v Phillips* [2017] QCA 88.
2 RB 214-215.
3 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-15, lines 39-41.
4 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-16, lines 16-17.
5 RB 209-210.

namely that the sentence is manifestly excessive in all of the circumstances.[6] At the hearing of his application the Court granted leave to add three further grounds:

(a) the learned sentencing judge erred in fixing a parole eligibility date beyond the halfway mark of the head sentence without adverting to that possibility and providing the parties with an opportunity to make submissions about it;

(b) the learned sentencing judge erred in failing to give adequate reasons for fixing a parole eligibility date beyond the halfway mark of the head sentence; and

(c) the learned sentencing judge erred in fixing a parole eligibility date based upon considerations of parity with the sentences imposed on co-offenders which carried with them declarations of serious violence offences and thus non-parole periods of 80 per cent of the head sentences.[7]

[8] The sentences were imposed across three dates. The sentencing of each of the three applicants and the co-accused Anthony Phillips was however, part of the one sentencing proceeding that commenced on 8 September 2016. Another co-offender, Brendan Tavella, was charged on a separate (ex officio) indictment and sentenced by P Lyons J in the Supreme Court at Brisbane on 17 September 2014. He pleaded guilty to an offence of manslaughter. He was sentenced to three years and four months imprisonment which was wholly suspended. That sentence took into account 616 days for time already served but which was not declarable. There was an *in-camera* component of the sentencing proceedings before P Lyons J.[8] Tavella was a Crown witness at trial.

Douglas Phillips' Appeal Against Conviction

[9] The ground that a verdict of guilty is unreasonable requires the Court to conduct an independent assessment of the sufficiency and quality of the evidence at the trial and decide whether upon the whole of the evidence it was reasonably open to the jury to be satisfied beyond doubt that the appellant was guilty of the offence.[9] Although such an assessment is primarily relevant to Douglas Phillips' appeal against conviction, it is also of assistance in identifying the circumstances of offending for each applicant in respect of the applications for leave to appeal against sentence. The indictment contained one count of murder in the following terms:

> "that on the twenty fifth day of December, 2012 at Morayfield in the State of Queensland, Anthony David Joseph Phillips, Douglas Allan Phillips, Dallas Glenn Kincaid Dean, and Michael Robert Selmes murdered Robert Allan Jordan."

Mr Jordan was known as "Jesse" Jordan.

[10] Before I consider the trial evidence in detail, it is helpful to first set out a summary of the facts taken from the Crown's submissions on sentence which is uncontroversial.[10] This summary of facts usefully informs the submissions of

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6 RB 211-212.
7 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-5, lines 30-33.
8 RB 188-193.
9 *SKA v The Queen* (2011) 243 CLR 400; *M v The Queen* (1994) 181 CLR 487 and *MFA v The Queen* (2002) 213 CLR 606.
10 RB 102-104; Outline of Submissions on Behalf of the Applicant, Douglas Phillips (sentence), [12].

counsel for Douglas Phillips as to the primary issue for the Court in considering the unreasonable verdict ground of appeal:

> "The defendants Anthony and Douglas Phillips are brothers. Dallas Dean was the de-facto partner of their sister, Tara Phillips, and Michael Selmes is a distant relative by marriage. A fifth co-offender, Brendan Tavella, was the de-facto partner of a cousin of the Phillips.
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> On Christmas Day 2012, the defendants and other family members had gathered for Christmas at their mother Julie's home at 87 Ruby Street, Caboolture. Michael Selmes and his partner Emily Flanjak were the last to arrive at about 2pm. The defendants consumed alcohol throughout the afternoon, drinking beer and spirits into the night.
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> During that family gathering Tara Phillips had a discussion with Anthony Phillips concerning allegations she had made against the deceased Robert Allan Jordan of sexual misconduct towards her when she was young child and he was in a brief relationship with their mother. This was not the first time that Tara Phillips had revealed the allegations to her family.
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> The defendants and Tavella left Ruby Street in Anthony Phillips' distinctive white Mercedes. They travelled first to visit some relatives and family friends at Peggy Road. Whilst at that address Dallas Dean approached Kyel Ross. At Dean's request Kyel Ross telephoned Mikayla Sherman using the mobile phone of his girlfriend, Taylor Norman at 6.45pm. Sherman was known to be a close family friend of the deceased. Dean requested Ross to ask Sherman for the deceased's address, which he did, however Sherman refused to provide it. Dean became angry, took the phone from Ross and spoke to Sherman directly demanding the deceased's address and making threats that the deceased was 'going to die' and so would she unless she provided the address. The call was terminated without the address being provided.
>
> Sherman exchanged a series of text messages with a mobile phone number used by Tara Phillips and Dallas Dean. The messages related to the childhood abuse alleged by Tara Phillips and the location of the deceased. Sherman provided false information as to the deceased's whereabouts. The deceased was in fact at Sherman's house at 6 Nina Court with some other residents of that address.
>
> After leaving Peggy Road, the defendants and Tavella returned for a short time to Ruby Street before leaving again to visit a girlfriend of Anthony Phillips at Kallangur. On departing Kallangur and travelling up the Bruce Highway the mood of Dean noticeably changed. He became angry and was talking about the allegations made by Tara against the deceased in the car. He said to Tavella that his partner had also been abused by the deceased. Anthony Phillips also became angry and indicated they were going to look for the deceased.

> They stopped at an address at Morayfield where Anthony Phillips left the car alone for a short time and then returned and indicated that the person they were looking for was not there but he knew where he was.
>
> Offending
>
> Anthony Phillips drove the group to Nina Court where the deceased was present. During the car ride Anthony Phillips said to Tavella words to the effect of '*you can throw him in the back and hold him in a headlock*'. There was other conversation indicating an intention to assault the deceased. When they arrived at the address at about 9pm, Anthony and Douglas Phillips left the car and went to the house at 6 Nina Court. They went inside and asked whether the occupant or her son were at home. When they were advised neither was home they asked for the deceased and invited him to go outside to speak to them.
>
> The deceased walked out of the house with Anthony and Douglas Phillips. There is no evidence the deceased was agitated or that anything was said between the deceased and the Phillips brothers. Without warning the deceased was grabbed and his head slammed into the fence along the side of the property. This caused blood to be left on the fence and the deceased to fall to the ground. The deceased was assaulted in an area near the front yard of the house. Soon after Anthony and Douglas Phillips commenced the assault Dallas Dean and Michael Selmes ran over from the car and joined. The deceased was struck by a number of blows whilst prone and defenceless.
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> All four defendants were seen around the deceased on the ground while blows and kicks were struck. Douglas Phillips at one stage lifted his leg high and bent at the knee before bringing it down and stomping on the deceased in the area of his head. The deceased, already bleeding, was forcibly dragged down the driveway towards the road where the assault continued. The word 'paedophile' was said at least once during the assault on the deceased.
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> When a neighbour, Robert Jacka, came out of his house and started to approach the assault, he was intercepted by Michael Selmes and told events were 'none of his business' and the victim had 'touched a child'. Michael Selmes re-joined the assault on the deceased and kicked him in the area of the side of the body.
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> The assault continued for some time. It was ferocious and involved all four defendants punching and kicking the defenceless deceased. It occurred in a public place in the presence of witnesses. …"

[11] Counsel for the appellant submits that the two grounds of appeal "overlap".[11] The primary issue, as identified by counsel, is that on the evidence the appellant could not have foreseen that the death of Jesse Jordan was a possible or probable consequence of the assault upon him. Similarly, in respect of the s 7 path to the

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11 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-16, lines 19-20.

manslaughter conviction, the issue is whether the Crown proved beyond reasonable doubt that an ordinary person would reasonably have foreseen the death of Jesse Jordan as a possible consequence of the assault on him.[12] The two grounds of appeal "overlap" as ground 2 seeks to identify errors in the directions given by the learned trial judge concerning foreseeability in the context of her Honour's directions in respect of s 7 and s 8 of the *Criminal Code*.

[12] The Crown identifies the primary issues that the jury had to consider in relation to the appellant as specific intention and "accident",[13] each to be considered in the context of the possible application of s 7 and/or s 8 of the *Criminal Code*.[14] Counsel for the respondent put it this way:

> "In considering their verdicts for the alternative offence of manslaughter the primary issues for the consideration of the jury were the same issues which it is contended on this appeal would lead the court to conclude that the verdict of guilty was not open; that is, as concerns section 7 liability whether the Crown had rebutted the operation of section 23 and as concerns section 8 liability, whether the Crown had satisfied the jury beyond reasonable doubt that a blow causing death, or effectively an unlawful killing, was a probable consequence of the carrying out of the common intention to assault the deceased."[15]

[13] The verdict of manslaughter is consistent with the jury not having been satisfied beyond reasonable doubt that the appellant held a specific intention to kill or cause grievous bodily harm to the deceased. In considering the issue of foreseeability however, it may be accepted that there was no dispute at trial that the appellant was one of four participants in an assault upon Jesse Jordan which resulted in his death.

[14] The Crown called 39 witnesses at trial. A number of these witnesses either saw or heard the assault. Dr Nathan Milne gave evidence as to the injuries inflicted upon the deceased and the cause of death. There was also forensic evidence from Scenes of Crime Officer Melissa Airlie as to the blood stains found at the scene.

(a) Brendan Tavella

[15] Tavella's evidence was that upon arrival at Nina Court the Phillips brothers left the motor vehicle. He also had to alight having spilt beer over himself. He removed his shirt and wiped himself off. He then commenced a conversation with a man sitting out the front of his house.[16] Tavella was talking to this man about Christmas when he heard a commotion and saw Dean and Selmes also alight from the car and head in the same direction as the Phillips brothers.[17] According to Tavella the conversation he had with the man was not a short conversation.[18]

[16] Tavella did not witness the assault but after Dean and Selmes had also left the car, he heard yelling and screaming and noises which sounded "like a car panel getting kicked in".[19]

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12 Amended Outline of Submissions for the Appellant, Douglas Phillips (conviction), [1].
13 *Criminal Code* (Qld) s 23.
14 Outline of Submissions on Behalf of the Respondent (conviction), [7].
15 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-19, lines 25-33.
16 SRB 162, lines 16-20; SRB 163, line 8.
17 SRB 163, lines 25-31.
18 SRB 163, lines 20-21.
19 SRB 163, line 41.

[17] Tavella observed a "big gentleman" from across the road come running out and saw Selmes telling this man to go back inside.[20] Tavella described the mood in the car after the assault as "just adrenalin and then rage".[21] He could not give a time estimate as to the duration of the incident.

[18] In cross-examination Tavella accepted that although there was talk of putting the deceased in a headlock there was no plan to "bash him".[22] Tavella could not recall whether the other defendants were wearing thongs but he was able to state that they were not wearing shoes.[23] None of the defendants were carrying weapons or anything like a weapon.[24]

(b) Robert Jacka

[19] Mr Jacka was at the time of the assault living at Nina Court with his partner, Katara Murison. At around 9 to 9.30 pm he heard a man's voice yelling out, "Stop hitting me".[25] He went to his front door where he saw five males assaulting another male. The assault occurred in an alleyway where they had the victim against a fence before dragging him down towards a driveway.[26]

[20] Mr Jacka gave the following evidence of what he witnessed:

> "They were punching him in the head. When he would hit the ground, they were stomping on him on the upper torso, back and head area, as well as bending over and repeatedly hitting him in the head."[27]

When Mr Jacka sought to intervene one of the assailants approached him and said, "[I]t's none of your fucking business. He's touched a child."[28]

[21] Mr Jacka returned to his house and Ms Murison rang the police. They both went to a bedroom window in their house where they had a clear view. They observed the assailants repeatedly stomping on the head and body of the victim and bending down and physically punching him.[29] They could hear someone yelling out, "You're a paedophile". This was said "a couple of times".[30]

[22] Once the defendants had left, Mr Jacka went to check on the victim and realised it was Jesse Jordan. Mr Jacka knew the deceased as a person who would frequently visit 6 Nina Court and had been acquainted with him for a number of years. Mr Jacka observed that there was blood coming out of Mr Jordan's mouth and nose and some from his ears.[31] Mr Jordan was unable to speak, "just rolling around gurgling and moaning".[32] Mr Jacka thought that the assault was over in a couple of

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20 SRB 164, lines 18-20.
21 SRB 164, line 45.
22 SRB 183, lines 10-32.
23 SRB 183, lines 42-45.
24 SRB 183, line 40.
25 SRB 89, lines 1-6.
26 SRB 89, lines 15-19.
27 SRB 89, lines 40-43.
28 SRB 90, lines 9-10.
29 SRB 90, lines 34-35.
30 SRB 90, lines 41-42.
31 SRB 92, lines 11-12.
32 SRB 92, lines 14-15.

minutes.[33] His best estimate of the number of punches and/or kicks which he witnessed was "at least 50".[34]

(c) Katara Murison

[23] Ms Murison described the assault as "[a] fellow getting – absolutely getting the snot ripped out of him".[35] According to Ms Murison there were four assailants who were kicking and punching the victim. She observed one of the assailants lift his leg up and stomp on the victim, connecting to the side towards the victim's back near the elbow/hip area.[36]

[24] She went to the assistance of the victim and observed a cut on the top of his head and one above his eyebrow. Ms Murison observed "heaps of blood", including blood coming out of the victim's nose and mouth.[37]

(d) Oliver Fourez

[25] Mr Fourez also was living in Nina Court at the time of the incident. He heard rather than saw the assault. He heard "a lot of noises, a lot of stomping and a lot of loud noises – vicious noises".[38] He recalls speaking to one of the males who "said something about raping children".[39]

(e) Jill Rushton

[26] At the relevant time Ms Rushton lived near Nina Court. She was able to see part of the assault through gaps in her fence. She observed a man on the ground and several men kicking him. She described the assailants as being in their early to mid-20s. She thought that each of the assailants kicked the victim.[40] She only remained at the fence for a minute or so.[41]

(f) Sergeant Melissa Airlie

[27] Sergeant Airlie is a Scenes of Crime Officer. She located bloodstains on the driveway and on the footpath next to the driveway.[42] One of the bloodstains was from a bleeding victim who was either lying on or in contact with the ground at that area, likely with his head in contact with the northern edge of the path in the alleyway.[43] There was evidence of some projected blood in the same area, which indicated that there had been an application of force to someone who was already bleeding.[44] The projected bloodstains were quite elongated, suggestive of a great amount of force.[45] Sergeant Airlie accepted however, that such elongated bloodstains could have resulted from the administering of medical treatment by ambulance officers.

(g) Dr Milne

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33 SRB 94, lines 18-19.
34 SRB 98, lines 43-44.
35 SRB 77, lines 16-17.
36 SRB 82, lines 3-22.
37 SRB 84, lines 34-36.
38 SRB 107, lines 1-2.
39 SRB 108, lines 17-18.
40 SRB 219, lines 29-30.
41 SRB 219, lines 44-45.
42 SRB 287, lines 5-12.
43 SRB 295, lines 10-17.
44 SRB 299, lines 1-7.
45 SRB 304, lines 34-37.

[28] Dr Milne is a specialist forensic pathologist who conducted a post-mortem examination on Jesse Jordan. The deceased was 180 centimetres tall and 91 kilograms. He had a body mass index of 28 which placed him in the overweight category. He was 43 years of age.

[29] Dr Milne marked a number of diagrams showing the position of both external and internal injuries.[46] There were 31 external injuries to the deceased's head and neck, including bleeding beneath the transparent membrane of the right eye, bruises, abrasions and lacerations. According to Dr Milne most of the scalp and face had bruising and swelling.[47] The types of mechanisms that would result in these injuries included punches, kicks and stomping.[48]

[30] Dr Milne also identified some fractures to a part of the base of the skull. There was also an injury to the brain on the left side. This injury was to that part of the brain located on top of the fractures which had been identified.[49] Dr Milne opined that there had been an impact causing a laceration to the left side of the face region and the skull fracture and that fracturing had been associated with some bruising to the brain. The larger laceration above the left eyebrow, the fracture to the base of the skull and the brain injury could all have been the product of a single application of force.[50] While one impact could cause multiple injuries, the injuries to the face and head, according to Dr Milne, were caused by multiple applications of force.[51] He further opined that these injuries, although significant, were on their own insufficient to cause death.[52] The injury to the brain could cause confusion or loss of consciousness, which potentially could have some contribution to death.[53]

[31] Dr Milne also identified 16 external injuries to the torso, being bruises and abrasions, some of which were sizeable. Internal injuries to the torso included fractures to the lower four left ribs, two lacerations to the liver and an area of haemorrhage to the deceased's abdomen. In the abdominal cavity there was a large amount of blood loss, lacerations to the mesentery of the bowel and the liver, involving arteries and veins and superficial lacerations to the soft tissue of the liver. According to Dr Milne, it was the injury to the mesentery which caused the vast majority of bleeding into the abdomen. The mechanism identified by Dr Milne to cause a laceration to the mesentery was stomping where the victim was lying on a firm surface and a large area of pressure is applied to the abdomen.[54]

[32] Dr Milne identified 27 external injuries to the deceased's arms and hands being bruises and abrasions. There were a further 10 external injuries to the legs of the deceased.

[33] As to the cause of the death, Dr Milne identified both the main cause of death and other conditions that may have contributed to death. He attributed the cause of death to "multiple injuries", noting that the most significant was the bleeding in the abdomen.[55] If the deceased had not sustained the injury to the mesentery Dr

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46 SRB 308, lines 20-45; SRB 645, Exhibit 11 (diagrams A to I).
47 SRB 312, line 4.
48 SRB 312, lines 38-40.
49 SRB 313, lines 24-25.
50 SRB 313, lines 31-42.
51 SRB 313, line 44 to SRB 314, line 2.
52 SRB 313, lines 30-32.
53 SRB 313, lines 34-36.
54 SRB 322, line 39 to SRB 323, line 6.
55 SRB 326, lines 25-28.

Milne's expectation was that the deceased would not have died.[56] For a person who is bleeding, being unconscious and having injuries to the ribs could also contribute to death. This is why Dr Milne described the cause of death as "multiple injuries".[57] Dr Milne also considered that as the deceased suffered from heart disease that may have also played a role in expediting death.

[34] Dr Milne accepted in cross-examination that the swelling to the brain was mild and one would have expected Mr Jordan to have recovered from the injuries to his head.[58] He also accepted that the degree of force for ribs to fracture is not as great as for other bones.

[35] The appellant relies on the following evidence given by Dr Milne in cross-examination:

> "And, indeed, as far as the internal abdominal injuries again, looking at the outside of somebody, you couldn't possibly tell – a lay person couldn't possibly tell they've got internal injuries of that nature?---That's right.
>
> Indeed, until you've got some sort of medical equipment to be able to look internally from outside, like an ultrasound or a CT, or you can cut somebody open, you wouldn't be able to tell that they had those injuries?---You would need that to confirm it. Interestingly, the ambulance staff noted in the report that the abdomen was distending and they queried the possibility of internal bleeding based on the context.
>
> All right. So by the time they examined him, there was some commencing distension of the abdomen?---Yes.
>
> All right. But in a fairly overweight fellow, at least for a lay person, that wouldn't be something that was obvious?---No.
>
> The injuries, the abdominal injuries, the internal abdominal injuries, you think they might have all been caused by the one application of force?---That's possible.
>
> That is, whatever happened was a fairly spread area along the abdomen, you thought, maybe it could have been a fist but more likely a foot or an elbow or something like that?---Yes, I don't think a fist could do it. I would think it needs to be a large area. So a forearm, a knee, foot - - -
>
> All right. So it's consistent with one stomp in that area?---The internal injuries?
>
> Yeah?---Yes.
>
> To call cause that – those tears inside the mesentery and the liver?---Yes.
>
> And, indeed, is it also possible because those lower ribs overhang that area that it's the – that it could be one application of force that caused those lower rib fractures and the internal abdominal injuries?---Yes."[59]

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56 SRB 327, lines 15-20.
57 SRB 326, lines 30-34.
58 SRB 330, lines 34-45.
59 SRB 333, lines 4-37.

In re-examination however, Dr Milne explained that there could potentially have been five, rather than one, separate applications of force resulting in the external injuries which included two lacerations to the liver, lacerations in the mesentery and rib fractures.[60]

(h) Douglas Phillips record of interview

[36] The appellant participated in an interview with police on 26 December 2012,[61] in which he denied any involvement in the assault on Mr Jordan. The Crown relied on these denials as consciousness of guilt evidence of the appellant's involvement in the unlawful killing of the deceased. The learned trial judge directed the jury as to how these lies could be used.[62]

The summing-up

[37] The learned trial judge provided the jury with five handouts. The first set out the definitions of murder, grievous bodily harm and manslaughter.[63] The second set out the provisions of s 7 and s 8 of the *Criminal Code*. The remaining three handouts were question trails for the jury in considering the appellant's liability pursuant to s 7 for murder[64] and manslaughter[65] and the appellant's liability pursuant to s 8 for murder and manslaughter.[66]

[38] Her Honour explained that the question trails were designed to incorporate "all the law you need to know into the questions that are asked, and take you through the parties' provisions".[67] Her Honour further explained to the jury that they were to start at the top of the first question trail (s 7 Murder) and work through the question trails in order to arrive at their verdict. This direction had the effect that before considering the liability of the appellant pursuant to s 8, the jury were first required to consider his liability under s 7.

[39] As to the element of intention either to cause death or grievous bodily harm, her Honour discussed Dr Milne's evidence. Her Honour explained that the Crown case was not that any one particular defendant inflicted the fatal blow or blows, but that all four were criminally responsible for the fatal injury or injuries. Her Honour stated:

> "[A]s I'm sure you were aware after listening to it, there's really only pretty sketchy evidence of what blows were delivered by what defendant. So as I say, you have no way of knowing beyond reasonable doubt who of the four defendants inflicted the fatal injury or injuries; no one will ever know that."[68]

[40] Her Honour's directions concerning s 7 and s 8 commence at SRB 587. Her Honour summarised the evidence of the assault so that the jury could consider it in

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60 SRB 340, lines 1-15.
61 Exhibit 24; SRB 974-1020.
62 SRB 609, line 19 to SRB 612, line 10.
63 SRB 1198.
64 SRB 1216.
65 SRB 1217.
66 SRB 1218.
67 SRB 602, lines 1-4.
68 SRB 587, lines 23-26.

the framework of s 7 and s 8.[69] There was no suggestion that any of the defendants were carrying a weapon. Her Honour's description of the assault included relevant evidence concerning the footwear worn by the defendants. Instructing the jury in relation to intention, her Honour made specific reference to the defendants not being armed and only wearing thongs:

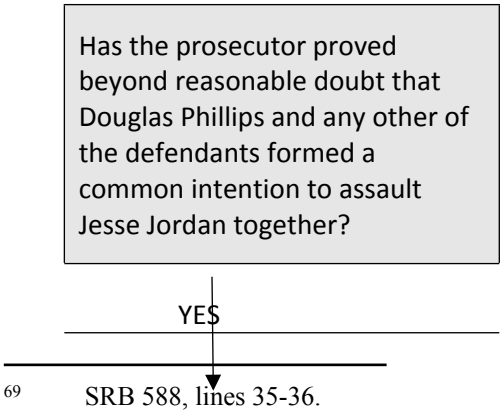
> "The defendants rely on the fact that they were not armed. They could easily have taken bottles with them, you might think, had they wished. They had no shoes on – only thongs at the most. They made no attempt to disguise their actions. The assault took place in the front yard, not the backyard, and it took place right under one of only two streetlights in the cul-de-sac."[70]

[41] As to the duration of the assault her Honour suggested to the jury that various witnesses' estimates of time may not be reliable, and that by reference to various things that people were doing during the assault a more reliable feel for the length of time that the assault lasted could be ascertained. Her Honour reminded the jury that the assault occurred at least in two main places; over near the fence under the streetlight and then at the bottom of the driveway.[71]

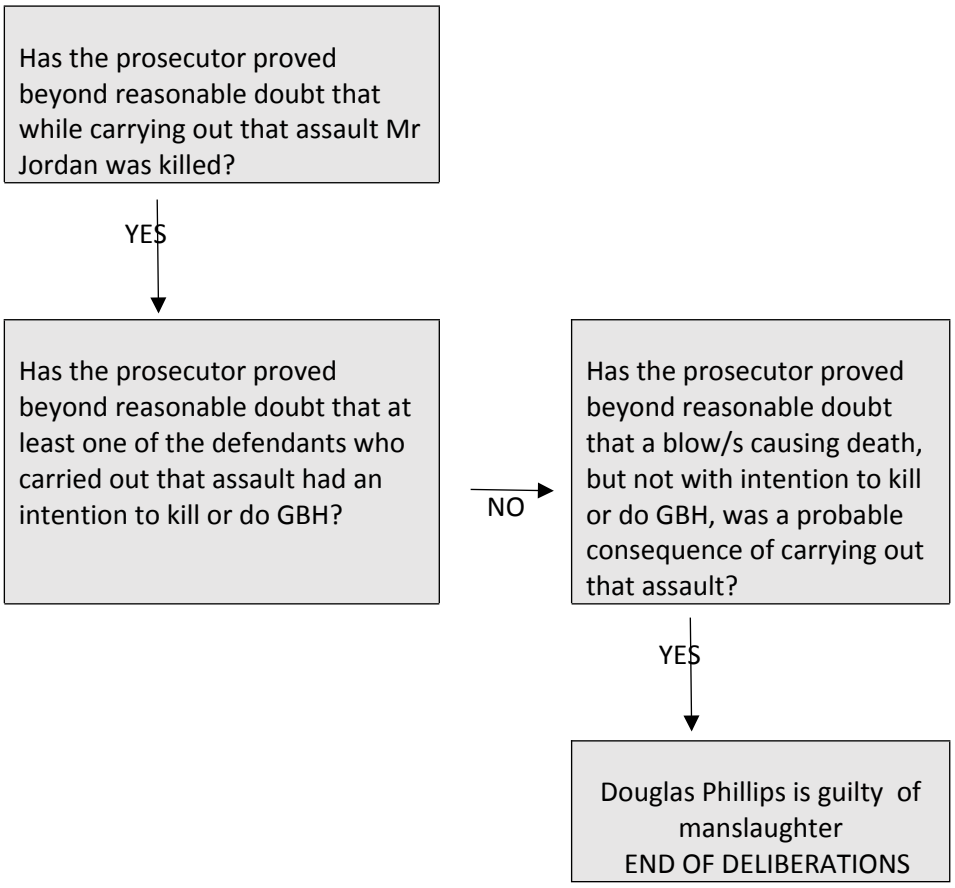
[42] In terms of s 7(b) and (c), Her Honour directed the jury as to the meaning of "aiding" and "encouraging". In accordance with the question trail leading to a conviction for manslaughter pursuant to s 7, her Honour directed the jury that if they were satisfied that the prosecution had proved beyond reasonable doubt that the appellant either inflicted the fatal blow/s or intentionally did acts which enabled, aided or encouraged the defendant who did inflict the fatal blow/s, the jury would proceed to consider the question of foreseeability in the following terms:

> "Has the prosecutor proved beyond reasonable doubt that
>
> - Douglas Phillips foresaw Jesse Jordan's death as a possible consequence of the assault on him
>
> OR
>
> - An ordinary person would reasonably have foreseen Jesse Jordan's death as a possible consequence of the assault on him."

[43] The question trail for a verdict of manslaughter pursuant to s 8[72] was as follows:



69 SRB 588, lines 35-36.
70 SRB 597, lines 24-28.
71 SRB 598, lines 13-24.
72 SRB 1218.



[44] As to the s 7 manslaughter question trail, her Honour explained to the jury the meaning of "possible consequence":

> "It means simply this: was Mr Jordan's death something that could happen if four men assaulted him in the way that they did – punching him, kicking his head and torso, and stomping on him once or more than once."[73]

Her Honour instructed the jury that if they were not satisfied that the defendant actually foresaw Mr Jordan's death as a possible consequence, they had to consider the second question, namely whether the prosecution had proved beyond reasonable doubt that an ordinary person would reasonably have foreseen Mr Jordan's death as a possible consequence of the assault on him.[74] Her Honour further explained this question as follows:

> "This is a question about an ordinary person who knew the circumstances of the assault, what would they have reasonably foreseen? Well you use your commonsense and knowledge of the world there. Was Jesse Jordan's death so unlikely a consequence of the assault that an ordinary person could not reasonably have foreseen it? As I say, the Prosecution only has to prove one of these alternatives, not both."[75]

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73 SRB 605, line 46 to SRB 606, line 1.
74 SRB 606, lines 26-30.
75 SRB 606, lines 31-36.

[45] As to the first question in respect of the s 8 question trail concerning the defendants forming a common intention to assault Mr Jordan together, her Honour had previously identified that the Crown case was that the unlawful purpose was assault.[76] Her Honour directed the jury as follows:

> "Now, again, we're looking at intention – this time, a shared intention. Again, the Crown relies on the type of evidence that I've already outlined in relation to motive or planning. What the Crown says is the purpose of the defendants in going to find out where Jesse Jordan was, going there, and assaulting him. That's what the Crown case about this is. All right. There's no direct evidence that the defendants all made an agreement that they would do this – this assault. But the Prosecutor says you'll infer it from all that evidence that I've discussed earlier."[77]

[46] No redirections were sought by counsel for the appellant in respect of her Honour's directions concerning s 7 and s 8. Further, the question trails which were provided to the jury had been the subject of extensive consultation with counsel throughout the trial.[78]

Ground 1

[47] The appellant submits that his conviction was unsafe and unsatisfactory as he could not have foreseen that the death of Mr Jordan was a possible or probable consequence of the assault upon him. He further submits that the prosecution did not prove beyond reasonable doubt that an ordinary person would reasonably have foreseen the death of Mr Jordan as a possible consequence of the assault on him.[79]

[48] As is evident from her Honour's directions to the jury, in order to convict the appellant of manslaughter the jury only had to be satisfied beyond reasonable doubt that an ordinary person would reasonably have foreseen Mr Jordan's death as a possible consequence of the assault on him. The appellant emphasises that no weapons were used in the assault and that each of the defendants were either barefoot or wearing thongs. The appellant suggests that at no stage was the jury asked to consider the other relevant aspects about the offending:

> "The fact that only one of the injuries was fatal; the effect of number of blows; the visual effect of the blows."[80]

[49] The appellant also relies on the passage from Dr Milne's evidence quoted at [34] above, to the effect that the internal abdominal injuries might all have been caused by one application of force and such injuries would not be apparent to a layperson from an external visual perspective.[81]

[50] In light of the evidence outlined above and the careful directions given by the learned trial judge, it was open to the jury to be satisfied beyond reasonable doubt that an ordinary person would reasonably have foreseen the death of Mr Jordan as a

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76 SRB 588, line 25 and SRB 608, lines 3-4.
77 SRB 607, lines 23-29.
78 SRB 490-493, SRB 496-499, SRB 543-549, SRB 570-577; Outline of Submissions on Behalf of the Respondent (conviction), [20].
79 Amended Outline of Submissions for the Appellant (conviction), [1].
80 Amended Outline of Submissions for the Appellant (conviction), [4].
81 SRB 333, lines 4, 20 and 35; Amended Outline of Submissions for the Appellant (conviction), [3].

possible consequence of the assault on him. The assault was by four young men on a 43 year old overweight victim. While the assault did not involve the use of any weapons, Mr Jordan was subjected to being punched, kicked and stomped on. While the duration of the assault cannot be exactly estimated, it was a sustained assault in two distinct stages. There is no suggestion that Mr Jordan sought to retaliate. It was a ferocious assault which involved all four defendants punching and kicking the defenceless deceased. It occurred in a public place in the presence of witnesses. It left the deceased bleeding from his nose, mouth and ears. Although Mr Jordan was still alive when the assault ceased, at least one of the defendants (not the present appellant) was sufficiently concerned that he attempted to place Mr Jordan in the recovery position. When Mr Jacka sought to intervene he was warned off. Ms Murison described the assault as "[a] fellow getting – absolutely getting the snot ripped out of him".[82]

[51] It is not correct that in directing the jury her Honour failed to deal with the relevant aspects of the assault in respect of foreseeability. Her Honour took the jury through the relevant evidence about the assault. This included the nature of the assault and Mr Jacka's estimate that he witnessed at least 50 punches and kicks. Her Honour's description of the assault made specific reference to the fact that the defendants were not armed and were either barefoot or wearing thongs.[83]

[52] As I have previously outlined, her Honour also extensively summarised the evidence of Dr Milne. It is not correct, as submitted by the appellant, that Dr Milne found "that there was only one fatal injury out of all the injuries that were delivered to Mr Jordan".[84] Dr Milne attributed the cause of death to "multiple injuries", noting that the most significant was bleeding in the abdomen. While he identified this as the main cause of death, there were other conditions identified by Dr Milne that may have contributed to death. Further, as to the external injuries to the abdomen, Dr Milne explained that there could potentially have been five rather than one separate applications of force resulting in the internal injuries which included two lacerations to the liver, lacerations in the mesentery and rib fractures.[85]

[53] Even if it was accepted that it was only one application of force that caused Mr Jordan's death, such a consideration is largely irrelevant in the context of an assault by four men involving numerous punches and kicks to vulnerable areas of the victim, such as the head and the stomach.

[54] There was, in my view, overwhelming evidence from which a jury could be satisfied beyond reasonable doubt that an ordinary person would reasonably have foreseen Mr Jordan's death as a possible consequence of the assault on him. It was therefore reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of manslaughter.

Ground 2

[55] This ground concerns her Honour's direction in relation to the formation of a common intention to assault Mr Jordan for the purposes of s 8. I have already set out at [43] above the relevant question trail for s 8. The appellant submits that the first question of the question trail constituted a misdirection:

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82 See [23] above.
83 SRB 597, lines 24-28.
84 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-16, lines 32-33.
85 See [35] above.

> "The direction failed to point out the requirements of s 8 – 'common intention' and a 'purpose' are subjective elements before proceeding to impose responsibility for the objective consequences of carrying them into effect."[86]

[56] There are a number of difficulties with this submission. The first is that the appellant only seeks to identify a misdirection in respect of s 8 and not s 7. The appellant has not identified any misdirection in respect of s 7. The jury were directed that before considering liability pursuant to s 8, it was first required to consider the liability of the appellant under s 7. As correctly submitted by the respondent, the only pathway by which the jury would have come to consider liability under s 8 as concerned the appellant was:

> "(a) if the jury were not satisfied that the prosecution has proven beyond reasonable doubt that the appellant either inflicted the fatal blow/s or intentionally did acts which enabled, aided or encouraged the offender who inflicted the fatal blow/s; OR
>
> (b) the jury were already satisfied of the guilt of the appellant of manslaughter on the basis of s 7 liability, including that the prosecution had proven beyond reasonable doubt either that the appellant foresaw the death of the deceased as a possible consequence of the assault upon him, or that an ordinary person would reasonably have foreseen the death of the deceased as a possible consequence of the assault upon him."[87]

It follows, according to the respondent, that even if there was a misdirection concerning liability under s 8 for manslaughter, it could not give rise to a miscarriage of justice in the present case as there was a path to conviction under s 7.[88]

[57] The second difficulty is that there was, in my view, no misdirection by her Honour concerning s 8. As correctly submitted by the respondent, the directions to the jury and the flowchart provided to the jury were in terms of the specific factual issues that the jury were required to consider in order to be satisfied of the legal requirements giving rise to liability pursuant to s 8 for either murder or manslaughter. The first requirement which the jury were directed they needed to be satisfied of beyond a reasonable doubt was that the appellant and any other of the defendants had formed a common intention to assault the deceased together. The directions made it clear that it was what could be inferred to be the intention of the particular offender which was to be considered.[89] The Crown case at trial was that the common intention was to assault the deceased. This was not controversial at trial. Nor could it have been, given that both the appellant and his brother immediately commenced to assault Mr Jordan once he was out of the house. Further, without any invitation or encouragement both Selmes and Dean alighted from the car and joined in the assault. Further, her Honour's directions in relation to common intention must be viewed in light of the previous directions given as to intention and motive. Even if it had been in issue at trial that the defendants formed a common

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86 Amended Outline of Submissions for the Appellant (conviction), [7].

87 SRB 1217 and SRB 602, line 11 and SRB 606, line 38; Outline of Submissions on Behalf of the Respondent (conviction), [27].

88 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-23, lines 21-27.

89 SRB 607, line 23; Outline of Submissions on Behalf of the Respondent (conviction) [29].

intention to assault the deceased, the directions on intention and motive made it apparent that the jury was to consider the subjective state of mind of the appellant.[90]

The applications for leave to appeal against sentence

[58] Her Honour sentenced each of the applicants on the basis of the factual summary set out at [10] above. In addition to that factual summary the learned sentencing judge also took into account the following uncontroversial matters:[91]

> "i) Her Honour observed that each of the applicants and the accused Anthony Phillips and Tavella drank a lot of alcohol on Christmas day, no one probably more than the applicant Dean. The applicant Selmes was 'not among the most drunk'.
>
> ii) Her Honour accepted the Crown submission that Christmas Day was not the first occasion that the members of the Phillips family, including the applicant Dean, learned of the allegations by their sister Tara Phillips against the deceased. Her Honour sentenced the applicant Selmes on the basis that he was not involved in these discussions earlier on Christmas Day.
>
> iii) There was in fact no proof at all that the deceased was a paedophile or had offended against Tara Phillips as alleged.
>
> iv) Her Honour found that Anthony Phillips played a leadership role in the offending. He drove the car to the offence location and had some authority over the others. The applicant Douglas Phillips did not have as much of a leadership role as Anthony Phillips, but he was still more of a participant than the applicants Dean and Selmes or the accused Tavella.
>
> v) By 7pm on Christmas Day the applicants Douglas Phillips and Dean, and the accused Anthony Phillips had formed a plan to find and assault the deceased, and teach him a lesson, out of revenge for what Tara Phillips alleged he had done to her as a child. Notwithstanding that they were drunk at the time, her Honour accepted that there was planning and persistence in the efforts of the group to find the deceased. Anthony Phillips took charge of the search, although the applicant Dean was also active in the search and 'played quite a role' in trying to do that. The evidence of phone calls made by Dean to that end had 'a fairly nasty flavour'. Of the applicants and Anthony Phillips, the applicant Selmes was the least involved in the planning. Her Honour did not positively find that Selmes was aware of the plan by 7pm on Christmas Day, as she had found in relation to the other applicants and Anthony Phillips, but he was certainly aware of the plan and the motivation for the plan by the time he travelled to the offence location in the vehicle with the others.

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90 Her Honour's directions as to intent and motive are found at SRB 593, line 23 to SRB 597, line 14.

91 Outline of Submissions on Behalf of the Respondent (sentence), [4.1].

vi) Her Honour found that the plan was always to beat the deceased as soon as he was brought outside by the two Phillips brothers, and that the applicants Dean and Selmes understood that to be the plan before the deceased was brought outside, and was immediately attacked. Once the Phillips brothers commenced the assault, the applicants Dean and Selmes joined in. Her Honour observed that Selmes was really following along men who were older, and all had criminal histories.

vii) Consistent with the jury verdict, each of the applicants and Anthony Phillips fell to be sentenced on the basis that the jury had not been satisfied of an intention to cause death or grievous bodily harm to the deceased.

viii) Each of the three applicants and the accused Anthony Phillips, were younger and fitter than the deceased, who was 43 years of age, was not fit, and had a history of heart attacks and heart trouble.

ix) Much of the assault on the deceased took place virtually under a street light in the front yard, indicative of an attitude of impunity in relation to the attack.

x) The attack was witnessed by neighbours and by four children who were inside the house, all of whom were traumatised from what they observed, and some of whom were still traumatised when required to give evidence at the trial.

xi) It could not be said precisely how long the attack lasted but it was sustained, and savage and vicious. Selmes' actions included stomping on the deceased. Her Honour referred to Selmes kicking the deceased in the back, and having admitted to hitting the deceased a few times while he was on the ground. Selmes had also done boxing in the past.

xii) The deceased was still alive, but lying on the ground, when the offenders desisted. Her Honour identified that the fatal injury to the deceased, the lacerations to the mesentery, were not injuries that those attacking the deceased could see, when they desisted of their own volition and that this was probably relevant to the absence of a finding of an intent to kill (or cause grievous bodily harm). They were however aware that the attack had a significant effect on the deceased.

xiii) There was some evidence that Dallas Dean had put the deceased in the recovery position as the group left the offence location."

[59] While Selmes relies on additional grounds, each applicant relies on the ground that the sentence imposed was in all the circumstances manifestly excessive. When considering whether a sentence is manifestly excessive, Fraser JA observed in *R v Goodwin; Ex parte Attorney-General (Qld)*:[92]

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92 (2014) 247 A Crim R 582 at 585, [5].

> "Comparable sentences assist in understanding how those factors should be treated, but they are not determinative of the outcome and they do not set a 'range' of permissible sentences. Whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences but by reference to all of the factors relevant to sentence. Because sentencing involves a case-by-case synthesis in which past sentences may be used only as guidelines and are not determinative, there can be no underlying range of available sentences for a particular case which may be narrowed or broadened over time by subsequent sentencing decisions."

(a) Douglas Phillips

[60] In sentencing Douglas Phillips to 12 and a half years imprisonment the learned sentencing judge took the following matters into consideration:

(a) The youth of the applicant at the time of the commission of the offence (22 years of age);

(b) The applicant's criminal history which included a conviction and sentence of five years' imprisonment for grievous bodily harm imposed by Judge Rafter SC. That offending was similar to the present offending in that it involved eight juveniles violently assaulting two victims. The applicant served the full five years of this sentence for grievous bodily harm and had only been released from prison 12 to 14 days prior to the assault on Mr Jordan. Her Honour referred to this fact as "one of the most shocking aspects of the offending on your part";[93]

(c) Her Honour also referred to the sentencing remarks of Judge Rafter in respect of a "rape" for which the applicant was sentenced. This is a reference to a conviction for carnal knowledge of a child under 16 years. It is apparent from Judge Rafter's sentencing remarks[94] that this was non-consensual sexual intercourse with a 12 year old girl known to the applicant. The applicant was 16 years of age at the time. The applicant had further convictions for offences of armed robbery in company, attempted armed robbery in company and assault occasioning bodily harm whilst armed and in company;

(d) A psychiatric report from Dr Sundin. Dr Sundin diagnosed the applicant as having an antisocial personality disorder. The applicant's expressions of regret to Dr Sundin concerning Mr Jordan were "very limited";[95] and

(e) The fact that the applicant had offered to plead to manslaughter 12 months previous to trial and the admissions made at trial. Similar to the approach adopted by her Honour in respect of the applicant's brother, her Honour made "no extraordinary allowance" in sentencing for co-operation with the course of justice and by reference to *R v Lyon*[96] did not consider these matters as "terribly weighty".[97]

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93 RB 82, line 8.
94 RB 120.
95 RB 82, line 34.
96 [2006] QCA 146.
97 RB 80, lines 1-5.

[61] In arriving at the applicant's sentence her Honour had regard to a number of comparatives including *R v West*,[98] *R v Meerdink*[99] and *R v Bargenquast, Davis & Holmes*.[100] There is no suggestion that her Honour erred in her consideration of these comparatives. Her Honour correctly, in my view, observed:

> "I will record that the Court has noted that manslaughter cases are very difficult to sentence because there is such a range of behaviours involved and that it is very difficult to make comparisons between cases."[101]

In fixing upon the sentence for the applicant her Honour observed:

> "I have struggled most particularly with the idea that you were very young at the time of committing the offence, four years younger than your brother, and that it was your elder brother who took more of a lead role in the offending. In this regard, I have noted that you have a lesser criminal history in terms of the number of offences over the years but I think to some degree that is outweighed by the very violent offending for which you had just been released from prison at the time of this offending. But as I say, I am very conscious of the youth or your youth at the time of the offending, the fact that you're still young and that really when you're released from the sentence I impose, you will have spent none of your adult life out of prison. I have done my best to make allowance for that, although I think I am constrained by parity considerations and by the fact that youth is normally relevant to prospects of rehabilitation and I think Dr Sundin's diagnosis and, as I say, the fact that this offending so closely followed your release from jail, bear poorly on that."[102]

[62] In oral submissions counsel for the applicant sought to identify two errors in the exercise of her Honour's sentencing discretion. First, her Honour had erroneously referred to the applicant having committed rape rather than unlawful carnal knowledge.[103] The error is submitted to be significant because it may have "affected her Honour's overall view of the history of violent offending"[104] and may have informed her Honour's view of the applicant's vigilante attack on an alleged paedophile. In this respect her Honour observed:

> "I note the Crown's submission about the relationship of your rape of the 12 year old girl in relation to what you say about being motivated by Jesse Jordan's alleged behaviour on the occasion for which I am sentencing you and the comments that you made to Dr Sundin in this regard about paedophiles."[105]

[63] When asked by Dr Sundin about the concept of proportionality with regard to the applicant's behaviour towards the deceased in the context of his own experiences of

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98 [2011] QCA 76.
99 [2010] QCA 273.
100 [2005] QCA 476.
101 RB 81, lines 30-33.
102 RB 82, line 45 to RB 83, line 11.
103 Outline of Submissions on Behalf of the Applicant (sentence), [20]; Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-14, lines 1-9.
104 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-13, lines 44-45.
105 RB 82, lines 25-29.

molestation the applicant stated that he believed that "something has to happen but not to the extent where they should have to suffer pain leading to death".[106]

[64] The respondent accepts that in the course of her Honour's sentencing remarks her Honour did incorrectly refer to the applicant's convictions of unlawful carnal knowledge to be for the offence of rape. I accept the respondent's submission however, that this should be viewed as mere slippage in light of the circumstances of the offending for the unlawful carnal knowledge. As is evident from the sentencing remarks of Judge Rafter SC, this offending involved non-consensual sexual intercourse on a 12-year-old girl. While her Honour did refer to the offending as rape, her Honour has otherwise referred to the offending as non-consensual sexual intercourse with a 12-year-old.[107] Her Honour had previously referred to the conviction correctly as one of unlawful carnal knowledge in the course of submissions.[108] In these circumstances, her Honour's misdescription did not cause the sentencing discretion to miscarry.

[65] The second error identified by the applicant is that the learned sentencing judge failed to take proper account of the earlier offer of the applicant to plead guilty to manslaughter.[109] The Crown accepted that well in advance of the trial each of the applicants had offered to plead to a charge of manslaughter. This offer was not accepted by the Crown and the trial proceeded. However, at the commencement of the trial none of the applicants pleaded guilty to manslaughter, thereby leaving in issue not only murder but also the question of their culpability for the unlawful killing of the deceased.[110] At trial the applicants Douglas Phillips and Dallas Dean sought an acquittal of both murder and manslaughter including on the basis of accident. Douglas Phillips sought to attack the character of the deceased. Further, both Douglas Phillips and Dallas Dean, unlike Michael Selmes, had falsely denied any involvement in the assault when interviewed by police. The Crown therefore submitted at sentence that there was no evidence of remorse on the part of Douglas Phillips or Dallas Dean.[111]

[66] It is not correct, as submitted by the applicant, that her Honour failed to take proper account of the applicant's earlier offer to plead guilty to manslaughter. Her Honour made specific reference to this offer in the course of the sentencing remarks.[112] Her Honour referred to this offer as a "legitimate" consideration but ultimately not of much weight.[113] If any error was committed by her Honour it was not in failing to take into account the earlier offer to plead guilty to manslaughter but rather the weight to be given to this consideration. No error is apparent in this respect. As correctly submitted by the respondent, her Honour was careful in her analysis and determination of the significance that could be attached to the co-operation of the applicant and the view that her Honour took was certainly open.[114]

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106 RB 149.
107 RB 82, lines 18-20.
108 RB 54, line 41.
109 Outline of Submissions on Behalf of the Applicant (sentence), [21].
110 Outline of Submissions on Behalf of the Respondent (sentence), [5.5]; RB 28, lines 38-40.
111 RB 30, lines 14-15.
112 RB 82, lines 34-35.
113 RB 80, lines 4-5.
114 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-26, lines 3-6.

[67] The applicant relies on *R v Cobb*.[115] In that case the applicant had struck his estranged wife in the head with a baseball bat, fracturing her skull and causing life-threatening head and brain injuries. Cobb was tried on an indictment charging him with attempted murder and an alternative charge of doing grievous bodily harm when intending to do so. Prior to trial Cobb had offered to plead guilty to the alternative offence. The Crown did not accept this offer. Cobb also entered a plea of guilty to an offence of doing grievous bodily harm simpliciter at the commencement of the trial. He was ultimately convicted of the alternative charge.

[68] In *Cobb*, the sentencing judge considered that the applicant's offer to plead guilty to the alternative offence was a relevant circumstance in that the applicant had thereby "sought to assist the course of justice".[116] There is nothing in the judgment of Philip McMurdo JA (with whom Holmes CJ and Ann Lyons J agreed) which considered the weight which ought to be given to such an offer. I accept, as submitted by the respondent, that the decision in *R v Cobb* does not demonstrate any error in the approach or conclusions reached by the learned sentencing judge in the instant case.[117]

[69] The applicants Douglas Phillips and Dallas Dean rely on the same authorities to demonstrate that their sentences are manifestly excessive. In addition to *West*, *Meerdink* and *Bargenquast*, which were specifically mentioned in the sentencing remarks, the applicants rely on *R v Smith*[118] and *R v Matthews*.[119]

[70] Douglas Phillips and Dallas Dean submit that these cases establish a range for offending of the present nature at less than 10 years and as not requiring a serious violent offence declaration.[120] This submission cannot be accepted.

[71] *Bargenquast*, for example, involved what McPherson JA described as "an offence which in this case resulted from participation in deliberate acts of violence aimed at recovering a small amount of money, and not one that was the consequence simply of culpable negligence or inadvertence on their part".[121] The assault was by four males. It involved the victim being punched and struck with a piece of wood. The victim was first assaulted in the yard of a residence and then dragged onto a road where he was further assaulted. The sentences imposed, which were not disturbed on appeal, were 14 years, 12 years, 10 years and nine years with a declaration. Mackenzie J (as his Honour then was) observed:

> "It is difficult, in the result, to escape the conclusion that the beating that proved fatal was inflicted in retribution for what they believed he had done, even if his death was unintended. It was therefore a very serious offence.
>
> Having regard particularly to *Duong*, where 12 years imprisonment was imposed on the main offenders in a serious but less protracted series of offences, and where it was also said that the offenders must receive some benefit for their belated pleas of guilty, it cannot be demonstrated that a sentence of 14 years imposed on the leader of the

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115 [2016] QCA 333 at [11].
116 *R v Cobb* [2016] QCA 333 at [11].
117 Outline of Submissions on Behalf of the Respondent (sentence), [5.19].
118 [2000] QCA 169.
119 [2007] QCA 144.
120 Written Submissions of Dallas Dean, [36].
121 [2005] QCA 476 at [2].

> connected series of offences or any of the other sentences which carefully reflect relative degrees of culpability and mitigating circumstances, are manifestly excessive."[122]

[72] The respondent relies on *R v Hedlefs*.[123] This is a recent decision of this Court where Morrison JA considered a number of authorities where the defendant had pleaded guilty to manslaughter. The assault in that case involved the applicant hitting the victim with an object similar to a hammer, causing a broken rib and a laceration of the spleen leading to its rupture, which was the fatal wound. The applicant had pleaded guilty to manslaughter and was sentenced to 10 years imprisonment with a serious violent offence declaration.

[73] After a detailed consideration of the authorities Morrison JA concluded:[124]

> "There is a commonality of factors in *Dwyer*, *Mooka* and *Duncombe* that supports the sentence on Hedlefs:
>
> (a) each pleaded guilty to manslaughter in circumstances where it was not said that there was an intention to cause grievous bodily harm;
>
> (b) unlike Hedlefs, each had been drinking and was intoxicated at the time;
>
> (c) each was sentenced to 10 years with a serious violent declaration, and that sentence was not disturbed;
>
> (d) *Mooka* involved the use of a weapon; neither *Dwyer* nor *Duncombe* did;
>
> (e) each inflicted the injuries in anger and with significant force;
>
> (f) each assault in *Mooka* and *Duncombe* was carried out without provoking conduct; in *Dwyer* it persisted after any provoking conduct;
>
> (g) apart from the plea neither *Mooka* nor *Dwyer* cooperated with authorities; and
>
> (h) each was sentenced for other offences, unlike Hedlefs."

[74] As correctly submitted by the respondent, although *Hedlefs* was a different scenario involving only one offender and a deadly blow with a weapon, the sentence of 10 years with a declaration was imposed following a plea of guilty to manslaughter.[125] The decision in *Hedlefs* was delivered since the applicants in this case were sentenced.

[75] The applicant Douglas Phillips relies on the following matters as supporting the submission that the sentence imposed is manifestly excessive:

> "While this case involved an element of retribution:
>
> • The period of violence was relatively brief;

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122 [2005] QCA 476 at [54]-[55].
123 [2017] QCA 199.
124 [2017] QCA 199 at [79].
125 Outline of Submissions on Behalf of the Respondent (sentence), [8.10].

- No weapons were used;
- This applicant was not the primary offender;
- He was remorseful; and
- He is still a youthful offender."[126]

[76] Her Honour did not sentence the applicant on the basis that the assault was "relatively brief". While it could not be precisely determined how long the assault lasted, her Honour sentenced on the basis that it was a sustained, savage and vicious assault.[127] From Mr Jacka's evidence and that of Dr Milne, it may be accepted that the assault was of sufficient duration to permit the infliction of multiple punches and kicks. As to there being no weapon, while the use of a weapon may be an aggravating feature in an offence of manslaughter, the absence of a weapon is of less significance where the mechanism for the offence "is an orchestrated, sustained and vicious group attack".[128] As to the other matters, it is apparent from the sentencing remarks that her Honour took each of these matters into consideration. The sentence imposed was not manifestly excessive.

[77] Douglas Phillips' application for leave to appeal against sentence should be refused.

(b) Dallas Dean

[78] In sentencing the applicant to 11 years imprisonment with a declaration, the learned sentencing judge took the following matters into consideration:

(a) The applicant was 31 years of age at the time of the assault and 35 at the time of being sentenced;

(b) The applicant was the oldest of the offenders by about 10 years;

(c) He had a criminal history but it was minor compared to those of Anthony Phillips and Douglas Phillips;

(d) The applicant was active in seeking to locate Mr Jordan;

(e) It was the applicant who placed Mr Jordan in the recovery position after the assault;

(f) He lied to police as to his involvement;

(g) He had offered to plead guilty to manslaughter about 12 months before trial but did not plead guilty to manslaughter at trial. His trial was conducted so as not to seek to "blacken" the name of the victim;

(h) A report from a psychiatrist Dr Butler. Dr Butler did not diagnose the applicant as having any antisocial personality disorder. Dr Butler described the applicant as an engaging and cooperative person;

(i) The applicant's efforts at rehabilitation while on remand; and

(j) The applicant had a "sustained" work history and favourable prospects of rehabilitation.

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126 Outline of Submissions on Behalf of the Applicant, Douglas Phillips (sentence), [26].
127 RB 78, line 2, RB 86, line 6 and RB 92, line 2.
128 Outline of Submissions on Behalf of the Respondent (sentence), [8.2ii].

[79] The sentence sought by the applicant's counsel at first instance was one of eight to nine years imprisonment without a declaration. The Crown sought a sentence of 10 or more years with a declaration.

[80] The applicant relies on a number of matters as showing that the sentence is manifestly excessive. These include that he was not the primary offender, he was remorseful with good prospects for rehabilitation and he has three young children. The applicant submits that a sentence of 11 years does not reflect "appropriate credit" being given to him for these factors.[129]

[81] It cannot be said that her Honour did not consider each of these factors. Her Honour sought to balance all these considerations:

> "So as I say, I think there are certainly things to be said in favour of your character and in favour of the prospects of rehabilitation, Mr Dean, and that has got to be balanced with the fact that the victim of this crime died and that the crime was a violent crime which involved taking somebody out of their home – I realise it was not his home but it was a home where he was frequently and very comfortable, so those things have to be balanced."[130]

[82] The applicant does not make any complaint that he is left with a justifiable sense of grievance by virtue of the sentence imposed upon him in comparison to those imposed on Anthony Phillips, Douglas Phillips or Michael Selmes. Further, in light of the authorities discussed at [59] and [69] to [74] above, the sentence imposed of 11 years after trial cannot, in all the circumstances, be considered manifestly excessive.

[83] Dallas Dean's application for leave to appeal against sentence should be refused.

(c) Michael Selmes

[84] The applicant's application for leave to appeal against sentence may be resolved by a consideration of the first amended ground. This ground is that the learned sentencing judge erred in fixing a parole eligibility date beyond the halfway mark of the head sentence without adverting to that possibility and providing the parties with an opportunity to make submissions about it.

[85] It is not suggested that the head sentence of nine years was not within range. The grievance is that her Honour fixed the parole eligibility date beyond the halfway mark without first adverting to that possibility.

[86] In the course of the sentencing proceedings the then counsel for the applicant made the following submissions:

> "My submission is that your Honour would consider a sentence of the order – I accept and concede it must be more than the notional sentence that Tavella would have received because he was involved physically, but he was a lot younger, had a very limited criminal history, and in my submission your Honour would consider a sentence that was, firstly, below the 10 years, and also it's relevant to the consideration of a serious violent offender declaration, that he

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129 Transcript of Proceedings, Court of Appeal, 1-4, lines 45-46.
130 RB 88, lines 13-18.

> had limited history and was young – my submission – and indeed, the lesser involvement physically in the assault.
>
> My submission is that all these features taken together would mean that a sentence of the order of eight, but certainly no more than nine years, would be able to be imposed on him. Your Honour can even consider, in my submission, not only not imposing a serious violent offender declaration, but allowing an earlier, perhaps, release date given the way the trial was conducted on his behalf, in terms of accepting that he was, effectively, guilty of manslaughter."[131]

[87] In reply, the Crown Prosecutor referred to submissions that had been made relevant to the exercise of discretion for the making of a serious violent offence declaration. The Crown Prosecutor submitted as follows:

> "While it's our submission that sentences of 10 years or above would be appropriate, if your Honour is considering a sentence of less than 10 years, it's nevertheless our submission that a declaration ought to be made, and that's in the context of this being a planned group attack, carried out in full view of neighbours, as your Honour has already noted, in the front yard, resulting in the death of the deceased …"[132]

[88] After considering the circumstances of the offending and other factors, her Honour imposed a sentence of nine years and set a parole eligibility date at six years. Her Honour continued:

> "I am not going to make a serious violent offender declaration. In that respect, I have regard to the case of The Crown against McDougall and Collas [2006] QCA 365, paragraph 19, first and second dot points. My reason is that if I were to impose such a declaration, you would have to serve 80 per cent of your sentence. I think that is too much in terms of punishment, just as I think that 50 per cent is too little. As well as thinking that 80 per cent is too much in terms of punishment, I think it is the wrong proportion because I think it will be important for you to have time in the community on parole, more time than you would have if you had to serve 80 per cent of the sentence."[133]

[89] Her Honour's reference to *R v McDougall & Collas* was for the proposition that where the making of a declaration is discretionary, the discretionary powers granted by s 161B(3) and (4) of the *Penalties and Sentences Act* 1992 (Qld) are to be exercised judicially and with regard to the consequences of making a declaration. The critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole.[134] For a serious violent offender a sentence of 10 or more years imprisonment carries with it an automatic declaration pursuant to s 161A of the *Penalties and Sentences Act*. If however, the offender is sentenced to five or more but less than 10 years the sentencing Court has a discretion to declare the offender to be

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131 RB 65, line 44 to RB 66, line 10.
132 RB 69, lines 40-46.
133 RB 94, lines 26-35.
134 *R v McDougall & Collas* [2007] 2 Qd R 87 at 96, [19].

convicted of a serious violent offence as part of the sentence pursuant to s 161B(3)(b). It may be accepted from her Honour's sentencing remarks and the reference to *McDougall & Collas* that she did not consider the applicant's offending warranted a sentence requiring him to serve 80 per cent of the head sentence before being able to apply for parole. Had her Honour not fixed a parole eligibility date at six years, the applicant's parole eligibility date would have been the day after the day on which he had served half the period of the sentence of nine years imprisonment.[135] The sentencing proceedings do however, reveal that her Honour did not advert counsel for the applicant to the possibility of the fixing of a parole eligibility date beyond the halfway point.

[90] The applicant submits that the learned sentencing judge should not have fixed the parole eligibility date at beyond the halfway mark without adverting to that possibility and providing the parties with an opportunity to makes submissions.[136] In *R v Latemore*[137] McMurdo JA (with whom Morrison JA and Boddice J agreed) observed:

> "During the course of the submissions, the sentencing judge had discussed with each counsel many alternative outcomes. The judge would describe a view although that view would then change. But at no stage did the sentencing judge indicate a possible outcome by which, if there was to be no declaration of a serious violent offence, the parole eligibility date would be fixed beyond the halfway mark of the term of imprisonment. For that reason no doubt, neither counsel made any submission about such an outcome. As was held by this court in *R v Kitson* [2008] QCA 86 the sentencing judge should not have fixed the parole eligibility date at beyond the half way mark without adverting to that possibility and providing the parties with an opportunity to make submissions about it."

[91] In *Latemore* the applicant was convicted upon his plea of guilty for an offence of unlawfully doing grievous bodily harm with intent to do so. He was sentenced to nine years imprisonment and his parole eligibility date was set at 7 July 2020, which was five years into his term. The Crown Prosecutor in that case submitted that it was open to the sentencing judge to make a serious violent offence declaration.[138]

[92] In *R v Kitson* the applicant was convicted of a number of drug offences. He was sentenced to imprisonment for a period of 12 months and ordered to be released on parole after serving nine months imprisonment. The possibility of postponement of the parole release date beyond the midpoint of the sentence was not mentioned in submissions or by the learned sentencing judge at the sentence hearing. Fraser JA, with whom Fryberg and Lyons JJ agreed, accepted that the sentencing judge had erred:

> "In my opinion, that contention must be accepted. Because that aspect of the sentence was unusual and was not sought or contemplated in the submissions of either party, in my respectful opinion it should not have been imposed without the learned judge adverting to it and giving the parties an opportunity to be heard."[139]

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135 *Corrective Services Act* 2006 (Qld) s 184(2).
136 Outline of Submissions on Behalf of the Applicant, Michael Selmes, [38].
137 [2016] QCA 110 at [25].
138 [2016] QCA 110 at [16].
139 *R v Kitson* [2008] QCA 86 at [21].

[93] The respondent submits that, notwithstanding the position this Court took in *Latemore*, in the present circumstances, because of the rationale for the sentence imposed by her Honour, the applicant has not been denied procedural fairness resulting in the need for the sentencing discretion to be exercised afresh.[140] This submission should not be accepted. *Latemore* cannot be distinguished from the present case. Both involve a consideration of whether a serious violent offence declaration should be made. While it may be thought that the prospect of the making of a declaration would alert the parties to the possibility that the sentencing judge may structure a sentence with no declaration but a postponed parole eligibility date, *Latemore* is authority for the proposition that in such circumstances the sentencing judge is required to provide the parties with an opportunity to make submissions as to such a possibility.

[94] This approach is consistent with various statements of this Court to the effect that there should be "good reason" to postpone the date of eligibility for parole. In *R v McDougall & Collas* the Court stated:[141]

> "The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence."

[95] To similar effect is the statement of Keane JA in *R v Assurson*:[142]

> "As this Court observed in *R v McDougall & Collas*, eligibility for parole may be postponed under s 160C(5) of the *Penalties and Sentences Act* and s 184(3) of the *Corrective Services Act* 2006 (Qld). These provisions, which may be invoked where there is good reason to do so, enable the imposition of a sentence more appropriate to the specific circumstances of the particular case than the automatic imposition of a requirement that 80 per cent of the sentence be served in actual custody where a serious violent offence declaration is made."[143]

[96] It therefore falls to this Court to re-sentence the applicant afresh. In such circumstances it is unnecessary to consider the other grounds. In terms of re-sentencing, the respondent does not seek a serious violent offence declaration. The respondent does not submit that this Court ought to impose a sentence different to that imposed by the learned sentencing judge.[144] Both the applicant and the respondent were given an opportunity to make submissions as to whether there is, in the circumstances of the

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140 Outlines of Submissions on Behalf of the Respondent (sentence), [9.9].
141 [2007] 2 Qd R 87 at 97, [21].
142 (2007) 174 A Crim R 78; [2007] QCA 273 at [27].
143 See also *R v Galeano* [2013] 2 Qd R 464 at 482, [54] per Gotterson JA, with whom Margaret McMurdo P agreed.
144 Transcript of Proceedings, Court of Appeal, 27 March 2018, 1-31, lines 3-7.

present case, "good reason" to postpone the parole eligibility date beyond the halfway point.

[97] In re-sentencing the applicant the following matters are relevant:

(a) The applicant was only 20 years of age at the time of the offence;

(b) He has an irrelevant criminal history;

(c) He was the least involved of all the defendants in the planning of the assault;

(d) By the time he was in the motor vehicle the applicant knew there was a plan to assault the deceased because he was an alleged paedophile;

(e) Without encouragement the applicant, along with Dean, joined in the assault once the Phillips brothers had enticed the deceased from the house;

(f) The assault was by four young men on a person who was 43 years of age and overweight;

(g) The assault was unprovoked and the deceased never sought to retaliate;

(h) It was the applicant who stopped Mr Jacka from intervening to stop the assault;

(i) The applicant had earlier offered to plead guilty to manslaughter but did not plead guilty to manslaughter at trial;

(j) The applicant did not rely on foreseeability at trial as a basis for acquittal, having accepted in his second police interview that death was a foreseeable consequence of his actions in assaulting the deceased. He also did not attack the character of the deceased in the course of the trial;

(k) As observed by the learned sentencing judge, of all the offenders the applicant ran "a very minimal case" at trial and the cross-examination of witnesses was limited. This may be considered as indicative of remorse;

(l) The applicant was in a stable job and a stable relationship at the time of the assault;

(m) The applicant has favourable prospects of rehabilitation and is remorseful for his actions. Such remorse is evidenced by him voluntarily returning to the police for a second interview in which he admitted his involvement in the offending;

(n) In his record-of-interview with the police the applicant admitted to having taken boxing lessons. He admitted that he both punched and kicked the deceased whilst he was on the ground. He recalls punching him in the jaw and he recalls seeing a lot of blood. He further admitted to kicking the deceased in the stomach, which he described as being similar to kicking a football. On a scale of one to 10, he admitted that he kicked the deceased in the stomach with a force of six or seven. He admitted that punching someone in the face may result in death.[145]

[98] Accepting all the matters in favour of the applicant, I am of the view, having regard to the nature of the assault which resulted in the death of Mr Jordan, that there is good reason to postpone the date for eligibility for parole to 26 December 2018.

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145 SRB 1083, 1088, 1089, 1091-1093.

The applicant was one of four assailants. There was a vigilante aspect to the assault, in circumstances where there was no proof at all that the deceased was a paedophile or had offended against Tara Phillips as alleged. This vigilante feature is to be deprecated by the Courts and in no way reduces the applicant's moral culpability for his actions. The vicious nature of the assault, in particular by the applicant who had training as a boxer, makes this serious offending. It is inescapable that the applicant participated in a vicious assault upon a 43 year old defenceless man which resulted in his death. Many of the punches and kicks were landed while the deceased was on the ground.

[99] The appeal should be dismissed.

Disposition

[100] I propose the following orders:

1. Douglas Allan Phillips' appeal against conviction be dismissed.
2. Douglas Allan Phillips' application for leave to appeal against sentence be refused.
3. Dallas Glenn Kincaid Dean's application for leave to appeal against sentence be refused.
4. Michael Robert Selmes' application for leave to appeal against sentence be granted. The appeal be dismissed.

[101] **BROWN J:** I agree with the reasons of Flanagan J, and the orders proposed by his Honour.