SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2018] QCA 136
PARTIES:	**R** **v** **SMITH, Kane Alan** (applicant)
FILE NO/S:	CA No 298 of 2017 DC No 585 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 1 December 2017 (Smith DCJ)
DELIVERED ON:	26 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2018
JUDGES:	Sofronoff P and Mullins and Bowskill JJ
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of burglary and grievous bodily harm – where the applicant broke into the dwelling of the complainant, a 71 year old woman, and began attacking her – where, during the course of the attack, the applicant repeatedly stated that he had been kidnapped – where the applicant called the police during the course of the attack, stating that he needed help – where the applicant stabbed the complainant in her right eye with a butter knife, causing her to permanently lose sight in that eye – where the complainant suffered serious injuries, both physical and psychological, that have rendered her unable to live independently, as she previously did – where analysis of the applicant's blood after the offending revealed the presence of THC and methylamphetamine – where a psychiatric report prepared before sentencing stated that the applicant was suffering a developing methamphetamine induced psychotic disorder at the time of the offence – where the psychiatric report expressed the opinion that the applicant was intoxicated at the time of offending – where the applicant's substance abuse was against a backdrop of a difficult upbringing – where the learned sentencing judge imposed a sentence of seven years imprisonment with

a serious violent offence declaration – where the applicant submits that the offence can be explained by his mental health problems – where the applicant's mental state was one that was induced by heavy drug use at the time of offending – where the applicant accepts that the seven year head sentence was appropriate – whether the learned sentencing judge had insufficient regard to the applicant's mental state in imposing a serious violent offence declaration, such that the making of the declaration rendered the sentence manifestly excessive

Criminal Code (Qld), s 419(4)

R v Bowley (2016) 262 A Crim R 93; [2016] QCA 254, cited
R v McDougall & Collas [2007] 2 Qd R 87; [2006] QCA 365, cited

COUNSEL: N V Weston for the applicant
J A Wooldridge for the respondent

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

[1] **SOFRONOFF P:** Late in the evening of Saturday, 2 May 2015 the complainant, a 71 year old woman, was at home in Torquay in Hervey Bay. She was a healthy, intelligent and socially active woman. She lived with her dog, Gaby, in her own home that had been fully paid for. She heard a knock at the door. This was followed by the sound of glass breaking in her kitchen. The applicant suddenly appeared in her lounge room. He was a 20 year old man of medium height and build. He immediately attacked the complainant. He punched her in the face a number of times. She fell to the floor. She was screaming at him to stop but he kept hitting her in the face. He had a butter knife in his hand and he stabbed her in the face. The applicant kept telling her that he was being kidnapped. She pleaded with him to call the police and he finally did so. In a 000 call he told police he had been kidnapped and that he needed help and did not know where he was. The operator could hear the complainant shouting her address in the background. When police arrived the applicant refused to open the door. He said he did not believe that they were police officers. He would not let them in until they showed their identification. When they came in they saw that he was covered in the complainant's blood and that she was sitting on a sofa vomiting blood and bile. Police found a bent butter knife on the floor. After a violent struggle, the police arrested the applicant.

[2] The complainant's face was severely bruised. Her right eye was closed and there were cuts to her eye, cheek and chin as well as lacerations and tears to her hands and wrists. Her speech was garbled and her consciousness was fading. She had suffered a fracture through the right orbital and a depressed fracture of the sinus. The butter knife had penetrated through her right eye into her brain. A CT scan showed extensive bleeding in the brain and the entry of air into the cranium. She was flown from Hervey Bay to the Royal Brisbane Women's Hospital where she was admitted to the neurosurgery unit.

[3] These injuries have permanently damaged her cognition. She has reduced attention, impulsive behaviour, is distractible and has difficulty following commands. She has poor language skills and reduced day-to-day memory. She has trouble with mobility. She requires assistance for self-care. She needs to be supervised during feeding.

[4] She has totally lost the sight in her right eye.

[5] She has post-traumatic stress disorder, hypervigilance, paranoia, depression and anxiety. She can no longer live in her own home and has been moved to a residential aged care facility. Her injuries were life threatening.

[6] The complainant's daughter submitted a victim impact statement. She said that prior to the attack her mother had lived a very active life in the community. She acted as a mentor to others. She worked part time at Taylor Street Community Legal Service. She travelled widely in the Wide Bay Burnett area for legal community services. She loved living in Hervey Bay in her own house. She drove a car and owned a dog.

[7] In order to attack the complainant the applicant had to take the trouble to climb over an eight foot gate, smash the kitchen window and climb over the sink. He kicked the complainant's dog before beating and stabbing the complainant.

[8] The complainant's family had to sell her house quickly in order to be able to place her in 24 hour care. Her savings have been used to pay for that care.

[9] The family had to assist the complainant to eat, drink and walk.

[10] While in rehabilitation at Maryborough Hospital the complainant believed that her attacker was following her. She felt that everything she ate made her sick. She felt that her medication was making her sick. She was deeply depressed and angry.

[11] The kick that the applicant gave to the complainant's dog, Gaby, caused her death. This too had an effect on the complainant's health.

[12] The complainant's condition has had an effect on members of her family. She can no longer easily visit them. She does not feel safe in her daughter's home. Her daughter is her carer.

[13] The complainant will require various medications for the rest of her life.

[14] Analysis of the applicant's blood and urine about 12 hours after he attacked the complainant showed the presence of tetrahydrocannabinol and methylamphetamine in his blood. The level of THC showed that the applicant was a regular or heavy user of cannabis. The level of methylamphetamine in his blood, 0.07mg/kg, is considered not to be high. However, the analysis was undertaken 12 hours after the attack and the level of the drug in his blood would have been greater at the time of the attack and possibly double the level as recorded 12 hours later. The toxic effects of the drug by way of excess stimulation are normally seen with levels in excess of 0.1mg/kg.

[15] The applicant had a Queensland criminal history for public nuisance offences, assaulting or obstructing a police officer and wilful damage. He had a New South Wales criminal history for offences of dishonesty. This offence was committed by

the applicant while he was on bail for another offence of entering a dwelling and committing an indictable offence therein.

[16] A report prepared by a psychiatrist for the sentence proceeding explained the applicant's personal history. In his childhood he suffered from attention deficit hyperactivity disorder and a learning disorder. He was brought up in a home in which he was exposed to drug taking, domestic violence and emotional and physical abuse. His contact with his biological father was inconsistent. His mother remarried to a man who was imprisoned for multiple breaking and entering offences when the applicant was in his teens. He was bullied during primary school. The psychiatrist who examined him considered that this created "a seed of resentment which contributed to his rebelliousness at school". He was illiterate and at school he frequently got into fights with others. He began using methamphetamine at the age of 16. He had already started using cannabis on a daily basis when he was only 13 years old. From the age of 16 he used methamphetamine and other drugs daily. He also began to drink alcohol and to binge drink. He began to develop symptoms of psychosis. The psychiatric report states that the initial symptoms of psychosis "reflected recurring methamphetamine intoxication superimposed upon a developing methamphetamine induced psychotic disorder". The report expresses the opinion that the applicant was intoxicated with amphetamine at the time of the offence.

[17] A psychologist who examined the applicant for the purpose of sentencing said this:

> "As [a] likely result of both the interpersonal stress and drug withdrawal, he states that he engaged in substantial and excessive ("about 2 eight balls") methamphetamine use. Methamphetamine use itself is known for incurring symptoms of insomnia, anxiety, paranoia, aggression, and violent behaviour. However, Mr Smith's account of delusional belief, specifically feeling that he was being kidnapped by his girlfriend and that he felt she was intending to kill him, and hallucination (reported belief that she was driving on unknown roads) is commensurate with a diagnosis of *Substance Induced Psychotic Disorder – DSM-V-TR* at the time of his offending. Mr Smith's described mental status is supported by research that identifies that some drugs such as amphetamines can cause a condition known as a drug-induced psychosis. This psychosis can last up to a few days, and is often characterized by hallucinations, delusions, memory loss and confusion.
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> In keeping, Mr Smith describes himself as responding to delusions of persecution, behaving in a chaotic and disorganised manner, and having poor memory of the events. This description appears consistent with his account "I thought people were going to kill me … I asked my girl to drive me to the police…. But she started driving the wrong way.. I told her "you're trying to kill me" …. I can remember jumping through a window .. someone was running. … there was blood everywhere ….. I thought I'd been kidnapped…" The extent of his psychosis at the time of offending is verified in the Statement of Facts that reports Mr Smith himself called 000 in which he "told the police he had been kidnapped and that he needed help and did not know where he was" (page 1.) and that his paranoia extended to then

> not permitting the QPS into the home due to his belief that they were not police officers."

[18] It can be said in the applicant's favour that, in the course of the interviews he had with the mental health professionals who furnished evidence and, indeed, in the course of his counsel's submissions to the learned sentencing judge, he did not seek to shift blame for his conduct on to drugs or anything else. The psychologist wrote:

> "Mr Smith's inability to reconcile his value set with his offending behaviour (ie. harming a female) generates disbelief, anxiety, distress, shame, self-loathing, and regret, in described significant cognitive dissonance. This contrition is in keeping with his attempted suicide and verbalization that he "should be dead" opposed to harming a female. …
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> …
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> It is important to note that Mr Smith did not seek to reference his drug use nor his mental status as reasons for his offending at any stage during his interview. … Mr Smith stated:
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> > 'I think about it all the time … it doesn't make sense.'
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> Further to this, I am of the opinion that Mr Smith's offending behaviour is inconsistent with his personal values."

[19] His Honour Judge Smith took all of these matters into account, both the factors in aggravation and those to which I have referred concerning the applicant's personal circumstances which tend to mitigate his offence. His Honour said that he found the case to be a difficult one. I too find this to be a difficult case because, in a sense, the applicant has been a victim of circumstances. His upbringing and life have been hard, and he has suffered. He has used drugs, like so many people do, to self-medicate. His Honour Judge Smith said:

> "It was my opinion, in the light of the maximum penalty, that the starting point here after a trial would be around 10 years imprisonment with an SVO.
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> In your favour, of course, is the plea of guilty, and I need to mitigate the sentence because of the mental health issues in this case. Ultimately, I consider that a head sentence of seven years imprisonment is appropriate for this matter, and I turn to the next question as to whether it should be declared to be a serious violent offence. There was the breaking into the house. It was vicious. She was a frail complainant. It was ferocious. There were significant injuries; a weapon was used. There was a significant degree of force. Of course, you were acting under a psychosis but, of course, there was voluntary intoxication by substances. In my view, this is a case where such a declaration is warranted, and I propose to make the declaration."

[20] His Honour ordered that the applicant be imprisoned for a period of seven years. His Honour declared the conviction to be one for a serious violent offence.

[21] On this application the applicant's counsel accepted that the seven year head sentence was an appropriate one. However, he pointed to the applicant's mental health problems as explaining the offence. He submitted:

> "Once it is accepted that the Applicant's offending was the product of a mental illness rather than any propensity to commit violent crimes the justification for the serious violent offence declaration is greatly weakened."

[22] Counsel referred to *R v Bowley.*[1]

[23] In that case Peter Lyons J, with whom Fraser and McMurdo JJA agreed, said:

> "[46] The fact that the applicant was both intoxicated by drugs at the time of commission of these offences and suffering from a psychosis, does not mean that his mental state is to be excluded from consideration as a mitigating factor."

[24] Taking this factor into account meant, the applicant submitted, that the declaration ought not have been made.

[25] This was not a mere offence of breaking and entering. It was an offence against s 419(4) of the *Criminal Code*, that of entering the dwelling of another and committing an indictable offence therein. The maximum penalty for that offence is life imprisonment.

[26] As was correctly submitted by Ms Wooldridge, who appeared for the respondent, it is not sufficient for the applicant to demonstrate that a serious violent offence declaration may not have been required. It was necessary for him to demonstrate that it was not open for the learned sentencing judge to make such a declaration.

[27] It can be accepted that the applicant was suffering from mental health issues. However, it was not suggested, and could not be suggested, that his mental state was other than one that was induced by his heavy drug use. His proclivity to use methylamphetamine is what made him dangerous. It is true that his resort to drugs was induced, over the long term, by the circumstances reported by the psychiatrist and psychologist. That is but a single factor.

[28] In *R v McDougall & Collas*[2] this Court said:

> "[21] 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,

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1 [2016] QCA 254.
2 [2007] 2 Qd R 87.

> outside "the norm" for that type of offence." (footnotes omitted)

[29] That passage is apposite here. This was a particularly brutal attack upon an elderly woman at night within her home. The applicant continued to bash her as she lay on the ground. He used a weapon that he drove into her brain. The resulting injuries are permanent and have ruined the complainant's life forever. The offence was committed by the applicant while on bail for a similar offence.

[30] It was submitted on the applicant's behalf that the learned sentencing judge gave insufficient weight to the applicant's mental state. I disagree. His Honour gave detailed consideration to the evidence concerning this matter and expressly referred to it as a factor that he had to take into account to mitigate the sentence. But, as I have said, it was only one factor of the many that his Honour had to weigh.

[31] This is a case in which, apart from the violence of the attack itself, it was open to the learned judge to conclude that the protection of the public required a longer period in actual custody before the applicant became eligible for parole.

[32] I see no error in his Honour's reasoning. Nor am I able to infer from the sentence that his Honour imposed that his Honour erred.

[33] I would refuse the application.

[34] **MULLINS J:** I agree with the President.

[35] **BOWSKILL J:** I agree with the reasons of Sofronoff P and agree the application should be refused.