SUPREME COURT OF QUEENSLAND

CITATION:	*R v Randall* [2019] QCA 25
PARTIES:	**R** **v** **RANDALL, Colin David** (applicant)
FILE NO/S:	CA No 116 of 2018 SC No 909 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 100 (Davis J)
DELIVERED ON:	Date of Order: 15 February 2019 Date of Publication of Reasons: 22 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2019
JUDGES:	Sofronoff P and Morrison JA and Burns J
ORDER:	**Date of Order: 15 February 2019** **Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant plead guilty to manslaughter – where the applicant was sentenced to nine years imprisonment with parole eligibility after five years – where s 184(2) of the *Corrective Services Act* 2006 (Qld) provides parole eligibility after serving half of the sentence – where the trial judge exercised discretion under s 160C(5) of the *Penalties and Sentences Act* 1992 (Qld) to postpone the applicant's parole eligibility date by six months – whether the trial judge erred in postponing the statutorily mandated halfway parole eligibility date *R v Amato* [2013] QCA 158, cited *R v Assurson* (2007) 174 A Crim R 78; [2007] QCA 273, applied *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365, applied
COUNSEL:	M J Copley QC, with T G Zwoerner, for the applicant D L Meredith for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the

respondent

[1] **THE COURT:** Colin David Randall killed his ten-week-old son with a single powerful punch to the baby's stomach. Davis J sentenced him to a term of imprisonment of nine years and ordered that he be eligible to be considered for parole after serving five years. Randall now applies for leave to appeal against that sentence, complaining that he should become eligible for parole after serving not five years of his term but six months less. Consequently, this appeal is concerned with the narrow question whether Davis J was wrong (or, because this is an application for leave, arguably wrong) to set the parole eligibility date six months beyond the halfway point of the applicant's nine year sentence.

[2] The applicant is an educated man. He has a science degree with a major in physics. After gaining that degree he became a teacher. He continued his studies and also earned a master's degree in education administration. He has taught at two prestigious private schools. He then quit teaching and was accepted for training to become a Queensland policeman. After being sworn into the Queensland Police Service, the applicant was posted to various South East Queensland stations. At one of these he met the woman whom he would later marry, Debra Chambers. They had a daughter who was born in 2010 and, on 14 April 2014, their son Kai was born.

[3] The applicant was not a happy man. When he killed his son, he was working at Wynnum station. He had a complicated life. For some reason that was never satisfactorily explained, the applicant formed a desire to move to Hervey Bay. He and Debra sold their home in Tingalpa. They entered into a contract to buy a house in Hervey Bay subject to a condition that he was successful in obtaining a transfer to Hervey Bay station. He then made the necessary application but it was refused. The refusal angered and frustrated him. He told Debra that that he regretted having been truthful in his transfer application. He said that he would apply again and that this time he would "do whatever it took to get [to Hervey Bay] even if it meant lying". He asked one of his workmates, "How much of a cunt do I have to be to get out of this fucking place". He complained that the Queensland Police Service had "fucked him over". His work standards were seen to decline. He was not well liked by work colleagues.

[4] While his wife was pregnant with Kai and until he killed him, the applicant was conducting an affair with a woman and, for a short time, with two women. One of these was an intense and continuing affair with a female police officer.

[5] These self-created difficulties troubled him. One evening, Debra observed him weeping at the kitchen sink. He told her that he "had a lot going on", and indeed he did. He said, "I'm just not happy". According to his lover, the fellow police officer, he was also "whingeing and bitching" to her.

[6] And he took out his misery on his son. Debra observed that he handled Kai roughly. He used demeaning language to refer to Kai. In bathing him, the applicant would deliberately place Kai's face so that the water hit it full on, although it was obvious that the baby was distressed by this.

[7] Debra herself was not entirely well. She had been diagnosed with post-natal depression and, in the week before the applicant killed Kai, Debra and her daughter

both fell ill with the flu. In addition, of course, Debra and the applicant were bearing the usual burdens of night feeding their little son and doing all the other tasks of caring for a baby and a six-year-old daughter.

[8] The morning of Saturday, 28 June 2014, began normally. Debra roused Kai from his cot and changed his nappy. The applicant told her that he had fed the baby two hours earlier. Their daughter awoke and the family had breakfast. Kai was in his rocking chair nearby. He fell asleep but woke when his sister disturbed him. Debra comforted him.

[9] After breakfast, Debra was to go to the local shops a few minutes away by car. The applicant was sitting on a sofa and nursing Kai. He complained that Kai was refusing to accept the bottle. Saturday was house cleaning day. Debra asked the applicant to concentrate on the baby and not to trouble with the housework until she returned. Debra and her daughter left for the shops at about 11.40 am. This was the first time that the applicant had ever been left alone with Kai.

[10] The applicant called his wife an hour later, at 12.39 pm. He told her to come home. He said that Kai had "gone limp and lifeless … he is not breathing". He told her that he had not yet called for an ambulance and did so immediately after he hung up. The applicant told the emergency operator that while he had been vacuuming, he had seen that Kai had his eyes open but that he was pale. He said he was now holding Kai and could not tell if the baby was breathing. The operator instructed him how to resuscitate his son.

[11] Debra arrived at home and found the applicant lying on his belly in the hallway with his arms outstretched to Kai who was lying on his back on the floor. The applicant was weeping, repeating "Oh, shit. Oh, shit." Ambulance officers arrived. Kai's heart had stopped beating. He was not breathing. His body was cold. Attempts were made to revive him, both in the ambulance and at the hospital, but Kai had died.

[12] The applicant explained what had happened. He told nurses at the hospital that he performed cardiopulmonary resuscitation upon his son in accordance with the instructions that had been given to him by the 000 operator. He said, "I realise now that I was pushing too low on his stomach". He was crying. He said, "But I did it wrong. I did it wrong." On 29 June 2014, in a written statement to police, the applicant repeated that he had found Kai lying limp in his rocker and that he had applied CPR under instructions from the operator.

[13] He told his wife that he had performed CPR incorrectly and that this was what caused Kai's injuries. He said that he had been "in a panic trying to save my son's life". He repeated this story to his lover who, for his sake, was naturally horrified at the thought of a father desperately attempting to save his son's life by administering CPR.

[14] Police interviewed the applicant on 4 July 2014. He repeated that he had killed his son by his misapplication of CPR.

[15] There were proceedings in the Family Court in December 2015 in which he and Debra were contesting custody of their daughter. The applicant told a social worker engaged to represent the interests of the child that he had performed CPR "in the

wrong spot". He told her that he blamed the 000 operator for giving him wrong instructions.

[16] From the day of the killing until the eve of his murder trial, the applicant consistently maintained these stories and maintained his innocence.

[17] It was all lies. When Kai was brought to the hospital, the treating doctors noticed that his belly was tense, firm and distended. They thought that he must have suffered some kind of traumatic injury. A post-mortem examination of Kai's body performed on 2 July 2014 showed that Kai's 6th and 7th ribs were fractured at the front. His 3rd and 10th ribs were fractured on the side. An area of membrane in the bowel had been stripped off and other tissues that joined his bowel and organs had been bleeding. His liver had been "pulped", as the pathologist described it, so that pieces of Kai's liver lay scattered in his abdomen. His stomach wall was torn. His spleen had been cleaved into two. The abdominal aorta had been torn in two places.

[18] The expert evidence was that these injuries had been caused by a kick or a punch to the abdomen while Kai's body was against an unyielding surface. The experts said that misapplied CPR could not have caused the injuries.

[19] Nevertheless, as late as the final review of the proceeding a week before the trial, the applicant, through his counsel, made it plain to Davis J, the trial judge, that he was contesting even the issue of whether he had caused Kai's death.

[20] Then, two days before the trial, the applicant said that he was willing to plead guilty to manslaughter. The DPP accepted this plea and the applicant was re-arraigned on one count of manslaughter and pleaded guilty. It was then that he finally revealed to his wife that he had killed his son by punching him hard in the belly. Kai was lying in a cot close to the ground and so it follows that to deliver the killing blow the applicant must have decided to punch Kai before bending over or squatting down low so that he could reach him. The Crown accepted that the killing was "spontaneous". More accurately, in our respectful opinion, the applicant's formation of his intention to deliver the punch to hurt Kai was spontaneous. The execution of this plan required a few moments before it could be done, moments to move into position and moments in which there was just time to reflect, if the applicant was capable of reflection, about the thing he was about to do.

[21] This was a cruel, heartless and brutal killing that, in the absence of any mitigating factors, warranted a sentence of imprisonment in excess of 10 years. We do not understand that to be in dispute in this appeal. The applicant had killed a baby that had been left in his sole care and who was absolutely dependent upon his father for his wellbeing, for his safety and for his very life.

[22] On the evidence, the applicant was an immature, self-centred man. He had blamed the Queensland Police Service for his lack of ability to perform as a policeman. He bewailed his fate to his wife and to his lover. He wept at his own perception of his pitiable condition. He then funked his responsibility for killing his son and even tried to blame the 000 operator for causing Kai's death. Having betrayed his wife by his philandering, he compounded that betrayal by deceiving her about how her baby boy had died.

[23] He finally admitted that he had killed Kai in just the way that the Crown's expert had described four years earlier. Kai, it seems, was unsettled, irritable and crying; requiring a change of nappy. According to the agreed statement of facts tendered at

sentence, the applicant had delivered a strong, hard punch to Kai's stomach while the baby was lying in his rocker. The rocker provided rigid support for Kai's body so that the applicant's punch had a devastating effect upon Kai, stopping his heart from beating.

[24] One searches for an explanation for this crime, or at least for some motivating factor, that might make this tragedy understandable. According to the agreed statement of facts, the explanation was just that the applicant was feeling "extremely frustrated". He was frustrated because his daughter and wife had the flu and he had to sleep with the children. He was frustrated by the rejection of his transfer application. A more negligible and petty series of frustrations leading to killing can hardly be conceived.

[25] During submissions, Davis J expressed his doubt whether this was really an explanation at all. In our respectful opinion, it does furnish an explanation. It is consistent with his shirking of culpability, with his self-pity, and his proclivity to foist blame upon anyone or anything other than himself: the Queensland Police Service, the 000 operator's defective instructions and external circumstances.

[26] We respectfully agree with Davis J's assessment that the applicant's late guilty plea was motivated by the same impulse that had motivated his many lies to many people and that had motivated his numerous acts of blame shifting. That motivation was his pursuit of self-preservation irrespective of the price paid by others and that price has been high. The killing has shattered Debra's life. Her suffering has been magnified by her husband's long and cruel deception.

[27] His Honour rejected the applicant's submission that his plea was evidence of his remorse. He was plainly right in that conclusion. On sentencing, an offender's remorse should not be left to inference. If it exists, it should be proved with clarity.

[28] The applicant now seeks leave to appeal on a single ground that contains two elements. The first element is a contention that Davis J wrongly postponed the statutorily mandated halfway parole eligibility date by six months "to guard against undue credit being accorded to the plea of guilty". The second element is that his Honour failed "to recognise that the community's safety did not require a deferment of the statutory eligibility date".

[29] The principles that inform the discretion to postpone the statutory parole eligibility date beyond the halfway mark are settled. Section 160C(5) of the *Penalties and Sentences Act* 1992 (Qld) confers upon the court a discretion to set a parole eligibility date for sentences of imprisonment that are longer than three years. If the sentencing judge has not exercised that discretion, s 184(2) of the *Corrective Services Act* 2006 (Qld) provides that a prisoner will become eligible for parole after serving half of the sentence. The position is complicated by anomalies that accompany provisions for mandatory sentencing.

[30] The offence of manslaughter is one the offences referred to in Schedule 1 of the *Penalties and Sentences Act* as capable of being a "serious violent offences". Section 161A of that Act provides that an offender is deemed to be convicted of a "serious violent offence" if the conviction is for one of the offences listed in Schedule 1 *and* the offender is sentenced to 10 or more years of imprisonment *or* the court declares the offence to be a serious violent offence. The consequence of this process is to invoke s 182 of the *Corrective Services Act*. That provision requires a prisoner who has been convicted of a serious violent offence to serve the lesser of 80 per cent of

the term of imprisonment or 15 years before becoming eligible for parole or, if a judge has set a later date for eligibility, pursuant to the discretion conferred by the *Penalties and Sentences Act*, then on such later date.

[31] A sentence of marginally less than 10 years instead of 10 years thus has a most important consequence for a prisoner. In the former case, the parole eligibility date is the date fixed by the sentencing judge as a matter of discretion or, if no date is fixed, the halfway mark. In the latter case there is no discretion for the judge to exercise and the prisoner must serve at least eight years before attaining eligibility.

[32] In this case, the applicant pressed Davis J with a submission that he ought to give *some* effect to the applicant's late plea of guilty. Davis J accepted that submission.

[33] His Honour undertook a meticulous examination of previous sentencing decisions[1] and concluded that, but for the guilty plea, he would have sentenced the applicant to a term of 11 years. That assessment has not been challenged. Had Davis J imposed that sentence, his Honour could not have mitigated the applicant's punishment by fixing an earlier date for parole eligibility because that sentence would have engaged s 182 of the *Corrective Services Act*. His Honour said that he regarded the guilty plea as one that was not an early plea. There could be no challenge to the correctness of that view. His Honour found that the plea did not evidence any remorse. That too is unchallenged. Consequently, any reduction of the 11 year sentence to reflect the plea could not be a large one. His Honour was minded to reflect the plea by reducing the applicant's sentence to nine years. His Honour was not persuaded that he ought, nevertheless, make a serious violent offence declaration. However, in his Honour's opinion, the resulting sentence of nine years with automatic parole eligibility at the halfway point would have given underserved weight to the applicant's plea. Consequently, his Honour exercised his discretion to postpone the applicant's parole eligibility by six months beyond the halfway point and fixed the date at 30 January 2021. The result was a sentence of nine years imprisonment with parole eligibility after five years, a little over half way.

[34] The applicant's submission is not that the sentence is so excessive on its face that it must be inferred that the sentencing discretion miscarried. Such an argument would be an impermissible invitation to tinker with Davis J's judgment.

[35] Instead, the applicant submits that a reduction of penalty to take into account the plea "was to be reflected in the reduction of the head sentence" and that the significance of a guilty plea is not to be taken into account in the exercise of the discretion to postpone parole. He cites two cases as authority for that proposition. The two cases are *R v McDougall and Collas*[2] and *R v Assurson*.[3] The applicant submits that paragraphs [21] and [22] of the Court's reasons in *McDougall and Collas* and paragraphs [22] of the reasons of Williams JA and paragraph [27] of the reasons of Keane JA demonstrate the existence of such a principle. The paragraphs from the first case are as follows:

> "[21] The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of

---

1 *R v Riseley* [2009] QCA 285; *R v Strbak*, unreported, Applegarth J, SC No 1643 of 2016, 18 December 2017; *R v Baxter,* unreported, North J, SC No 74 of 2015, 21 November 2017; *R v Williamson*, unreported, Atkinson J, SC No 600 of 2015, 6 April 2017.

2 [2007] 2 Qd R 87; (2006) 166 A Crim R 191; [2006] QCA 365.

3 (2007) 174 A Crim R 78; [2007] QCA 273.

eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggest 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.

[22] An example of a sentence in which the learned judge did express reasons, upheld on appeal, for the discretionary declaration of a serious violent offence for an offence of manslaughter, is in *R. v. A.* [2003] QCA 538. The judge referred to a relatively long period of pre-planning, the preparation for commission of the offence, a strong element of revenge, the fact that that applicant was the instigator of the offences and the principal offender, and was responsible for the vast majority of the violence inflicted on the complainant. Weapons were used."

[36] The paragraphs relied upon from *Assurson* are these:

"[22] If no further order was made the applicant would be eligible for parole after serving half the sentence, that is after serving four and a half years: s 184(2) of the *Corrective Services Act 2006* (Qld). As the sentencing judge pointed out that represents too big a reduction for mitigation based on a relatively late plea of guilty. This Court in *McDougall* pointed out that a sentencing court could, for good reason, exercise the power conferred by legislation postponing eligibility for parole beyond the half-way point; that is now provided for by s 160C(5) of the *Penalties and Sentences Act* and s 184(3) of the *Corrective Services Act*. That was the approach adopted by this Court in *Saunders*. The "good reason" for postponing the parole eligibility date in this case is established by the extent of trafficking, the fact that more than one Schedule 1 drug was involved, the fact that the applicant was prepared to resort to violence to recover payment for drugs supplied, and the fact that he re-offended whilst on bail.

…

[27] As this Court observed in *R v* McDougall, 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."

[37] Those cases do not support the existence of any such remarkable principle. They show two things. First, the exercise of the discretion under s 160C(5) of the *Penalties and Sentences Act* to postpone a parole eligibility date must be supported by a "good reason". That is nothing more than a restatement of the general proposition that a discretion to make an order must be exercised judicially. The term "judicially" in that context means that the discretion must be justified by a reason and that reason must be informed by the purpose for which the discretion has been conferred. As Davis J observed, the purpose of the discretion to vary a parole date from the default halfway mark that the Act otherwise imposes, is to empower a sentencing judge to achieve a just sentence in all the circumstances. That purpose is, in our view, the paramount objective of sentencing.

[38] Because of the many different kinds of offences, the infinite kinds of circumstances surrounding the commission of offences and the limitless kinds of offenders, both the discretion as to length of imprisonment and as to the fixing of a parole date cannot possibly be circumscribed by judge-made rules so as to preclude consideration of whatever relevant factors might arise in a particular case. It may be common to impose a head sentence by having regard mostly to the circumstances surrounding the commission of the offence and to fix the actual period of custody by reference to an offender's personal circumstances. But there is no rule of law that requires that to be done in every case. In the absence of a statute that prescribes the way in which an offender should be punished, sentencing judges have always regarded all of the elements of a sentence to be flexible. They will continue to do so in order to arrive at a just sentence in all the circumstances.

[39] The principle for which the applicant contends does not exist. The two cases relied upon by the applicant are, in truth, authority for the contrary. In *Assurson* the appellant had been sentenced to imprisonment for nine years after a plea of guilty. It was common ground that, but for the plea, a sentence of between 12 and 13 years would have been appropriate. Having reduced the sentence to reflect the plea, the sentencing judge nevertheless made a serious violent offence declaration with the result that the appellant had to serve a little over seven years of his sentence. His Honour thought that the automatic halfway point for parole eligibility would have given too much credit to a very late plea. The Court of Appeal decided that the declaration had been wrongly made because the Crown had not sought it and because the appellant had not had the opportunity to make submissions about it. The declaration was set aside. However, the Court of Appeal agreed with the trial judge that parole eligibility at the halfway point would have given the appellant too much credit for his plea.

[40] Williams JA observed that it is open to a sentencing judge to postpone the statutory parole eligibility date provided that there is a good reason for doing so.[4] Whether the circumstances offer a reason depends upon the case at hand. In any case, the reason must be identified specifically because s 13 of the *Penalties and Sentences Act* requires a sentencing judge both to take a plea of guilty into account[5] and to give reasons why, if it be the case, the sentence has not been reduced by reason of the plea.[6]

---

4 *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365 at [2].
5 Section 13(1)(a) of the *Penalties and Sentences Act* 1992 (Qld).
6 *ibid*, s 13(4).

[41] In *Assurson*, therefore, the Court held the view that a reduction of the head sentence from 12 years to nine years coupled with parole eligibility at the halfway point would have been too lenient because it would have represented "too big a reduction for mitigation based on a relatively late plea of guilty". The reason why that was so was to be found in the seriousness of the offence.[7]

[42] Similarly, *McDougall and Collas* is an example of the flexible character of the discretion to vary a parole eligibility date. To demonstrate this elementary proposition it is necessary to do no more than to refer to paragraphs [3] and [4] of the headnote to the case. They state that the discretion conferred by s 161B(3) and s 161B(4) of the *Penalties and Sentences Act* requires the existence of factors that warrant its exercise and that the considerations that can be taken into account in such an exercise are "the same as those which might be taken into account in relation to other aspects of sentencing".

[43] The purposes of sentencing are many and the process itself is not capable of being reduced to discrete intellectual modules.[8] Sentencing practices emerge and develop over the course of years. One of these practices is the rule of thumb that a timely plea of guilty is often reflected by setting parole at the one third point. However, as Fraser JA said in *R v Amato*,[9] although s 13 of the *Penalties and Sentences Act* requires a plea of guilty to be taken into account, the Act does not dictate how it must be taken into account. The discretion to fix a parole eligibility date is unfettered and the significance of a guilty plea for the exercise of that discretion will vary from case to case. Consequently, there can be no mathematical approach to fixing such a date.[10]

[44] The authorities cited by Davis J demonstrate that the mitigating effect of a guilty plea can be manifested in many ways. One way is to reduce the head sentence. Another way is to reduce the non-parole period. The corollary of the latter proposition is that, having regard to circumstances such as those in *Assurson* and in this case, the mitigating effect of a plea might require a reduction in the head sentence and a postponement of the parole eligibility date.

[45] That is what the Court of Appeal did in *Assurson* and that is what Davis J did here. His Honour reduced the head sentence to give the applicant credit for his guilty plea. That reduction would have resulted in parole eligibility after only four years and six months, a period that his Honour considered inadequate. Consequently, his Honour postponed the parole eligibility date to ensure a just sentence. It was open to his Honour to exercise his discretion in the way he did.

[46] The applicant's first attack upon his Honour's exercise of discretion fails.

[47] The second ground of attack can be dealt with shortly. The applicant submits that Davis J erred because he did not recognise that the safety of the community did not require the parole eligibility date to be extended beyond the halfway point. Nobody

---

7 The offence was one of trafficking and the factors justifying postponement were the extent of the trafficking, the number of different drugs involved, the appellant's use of violence to recover debts and his re-offending while on bail: *supra*, at [22].

8 *cf.* the cases referred to by Davis J in his sentencing remarks: *Barbaro v The Queen* (2014) 253 CLR 58 at [34]; *Markarian v The Queen* (2005) 228 CLR 357 at [65] citing the now classic *dictum* of Jordan CJ in *R v Geddes* (1936) 36 SR (NSW) 554 at 555-556.

9 [2013] QCA 158.

10 *supra*, at [20].

had suggested that it did and his Honour, accordingly, did not decide that that was a factor that justified a postponement of the date. His Honour made it perfectly clear that the postponement was ordered to ensure that the guilty plea was not given undue weight. For the reasons that we have already given, his Honour did not err in that approach.

[48] For these reasons, we dismiss the application.