# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Geissler* [2019] QCA 63 |
| PARTIES: | **R**<br>**v**<br>**GEISSLER, Mala Owen**<br>(applicant) |
| FILE NO: | CA No 84 of 2018<br>SC No 29 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Mackay – Date of Sentence: 28 March 2018 (Henry J) |
| DELIVERED ON: | 16 April 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25 October 2018 |
| JUDGES: | Fraser and Morrison and McMurdo JJA |
| ORDER: | **Application for leave to appeal against sentence refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted and sentenced to 12 years imprisonment for manslaughter, a serious violent offence declaration was made and a concurrent term of 12 months imprisonment for an unrelated summary offence was imposed – whether the sentence was manifestly excessive<br><br>*R v Black* [2009] QCA 198, considered<br>*R v Civic* [2014] QCA 322, cited<br>*R v De Salvo* (2002) 127 A Crim R 229; [2002] QCA 63, cited<br>*R v Griffin & Dunkerton* [1999] QCA 71, considered<br>*R v Hicks & Taylor* [2011] QCA 207, cited<br>*R v Lacey; Ex parte Attorney General (Qld)* (2009) 197 A Crim R 399; [2009] QCA 274, considered<br>*R v Mooka* [2007] QCA 36, cited |
| COUNSEL: | J McInnes for the applicant<br>D C Boyle for the respondent |
| SOLICITORS: | Legal Aid Queensland for the applicant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **FRASER JA:** After a six day trial, the applicant was found not guilty of murder and guilty of manslaughter. On the following day the applicant was sentenced to imprisonment for 12 years, in consequence of which it was declared that the conviction was of a serious violent offence (so that the applicant would not be eligible for parole until he has served 80 per cent of the term of imprisonment). The applicant was sentenced to a concurrent term of 12 months imprisonment for an unrelated summary offence to which he pleaded guilty. The applicant appeals against the sentence for the manslaughter offence upon the ground that it is manifestly excessive.

[2] The sentencing judge summarised the factual basis of the sentence. The applicant met his two co-offenders, Wales and Abell, at Abell's home. They drank alcohol and smoked marijuana and methamphetamine. One of the co-offenders led a conversation about going to the home of one Mr Baynton, who was believed by the applicant and his co-offenders to be a drug dealer who would have money. The applicant armed himself with a samurai sword and Wales took a shortened pool cue. By the time they set off in Wales' car all three were significantly drug affected. Each of them wrapped a shirt around his head as a disguise before approaching the deceased's unit, but in their drug-addled state no attempt was made to conceal the number plate of the car they drove in and they chose to commit the offence in broad daylight.

[3] Upon arrival at the unit, Wales knocked on the front door. Abell had the sword's scabbard. Mr Stevens, who was inside the unit with Mr Baynton, opened the door but closed it promptly when he saw the three robbers outside. Wales and Abell kicked the front door. At some stage the door locking mechanism failed. At one point Mr Baynton quickly opened the door and struck Wales on the head with a baseball bat, presumably in an attempt to deter the home invasion. Shortly after Mr Baynton had closed the door – perhaps a few seconds or up to about 10 seconds afterwards – the applicant swore and thrust the sword at chest height through the door. Mr Baynton was leaning on to the inside of the door to hold it shut. The sword pierced through the door and into Mr Baynton's neck, carotid artery and windpipe and it continued 17 centimetres into Mr Baynton's lung. The applicant pulled the sword straight back out. The door was not as solidly constructed as many front doors. With the help of Mr Stevens, Mr Baynton stumbled towards the laundry at the rear of the unit. Later he went outside, where he died.

[4] The applicant and at least one of the co-offenders entered the unit to continue the robbery. The sentencing judge found that the applicant may not have taken in the full extent of the blood staining from Mr Baynton's fatal wound, but the applicant must have appreciated that he had caused some injury. The applicant briefly confronted Mr Stevens and threatened him with the samurai sword. Some cannabis was stolen from the unit before the applicant made his getaway. The applicant disposed of the sword, evaded police, and changed his appearance. He repeatedly told his girlfriend that he had done it but had not meant to put the knife through the door. He said that it was an accident and he had not realised the deceased would be on the other side of the door.

[5] At the trial, the applicant's counsel was instructed to allege that it was not the applicant but Abell who had thrust the sword through the door, despite the fact that the applicant's girlfriend gave compelling evidence that the applicant was responsible.

[6] The trial judge found that the applicant was to be sentenced for manslaughter by reason of the circumstances not constituting one of the bases upon which murder was charged. There was a doubt whether the applicant intended or foresaw what occurred. An ordinary person in the applicant's position would reasonably have foreseen the possibility that the person or persons who had been behind the door up to the striking of Wales still remained nearby. The sentencing judge found that from the perspective of an ordinary person that was a very obvious possibility. It was certainly a foreseeable possibility that in thrusting the sword with the substantial force used by the applicant, the sword might pierce through the door and kill someone on the other side. It was not proved beyond reasonable doubt that the applicant intended, in thrusting the sword that it should pierce out of the other side of the door, although that was a very obvious possibility to a sober person.

[7] The sentencing judge accepted the applicant held no intent to kill someone and likely intended that the sword would be used to intimidate, but the act of going armed was innately serious, and there was an inevitable risk that the sword might be used in carrying out the crime. The applicant's conduct in causing the death of another person brought unspeakable grief to his family and friends. There was nothing in the applicant's personal circumstances to warrant any material discounting of the penalty. The applicant had a concerning criminal history, which included violence and the use of weapons.

[8] The sentencing judge was referred to sentencing decisions – *R v De Salvo* (2002) 127 A Crim R 229, *R v Mooka* [2007] QCA 36, *R v Civic* [2014] QCA 322, *R v Hicks & Taylor* [2011] QCA 207 and *R v Lacey; Ex parte Attorney General (Qld)* (2009) 197 A Crim R 399– and remarked that none were entirely on point, but *Lacey* perhaps was the most helpful. The sentencing judge observed that, because of the need for general deterrence, most weight should be given to the fact that the manslaughter was committed in the course of carrying out an armed robbery home invasion using the very weapon the applicant had taken to carry out that invasion; that made it an especially serious example of the offence of manslaughter.

[9] The particular feature of the facts which the applicant submits makes the sentence manifestly excessive concerns the nature of the act which resulted in death. The applicant's counsel acknowledged that a sentence of 12 years imprisonment for a violent manslaughter was well within the sentencing discretion in a case in which there was face to face violence with a weapon or where there was more remote violence with a more lethal weapon such as a firearm. He submitted, however, that the sentence was manifestly excessive in this case, in which, although a sober person would have appreciated the real possibility of the sword penetrating the door and into someone who a reasonable person might think was behind the door, the applicant did not foresee or intend any such result.

[10] The respondent relied upon the following facts in support of the submission that the sentence was within the discretion of the sentencing judge:

(a) There was a pre-determined plan to commit an armed robbery.

(b) The offenders brought weapons, including the very dangerous weapon of a samurai sword.

(c) The attack was in the deceased's own home.

(d) It was done in company with other offenders.

(e) The offenders were disguised by makeshift balaclavas.

(f) The attack was unprovoked.

(g) The enterprise continued through to the theft of cannabis despite the mortal injury to the deceased.

(h) The applicant was the principal offender on the manslaughter count.

(i) The applicant threatened Stevens with the sword and said "would you like to be next".

(j) The weapon was disposed of into a creek.

(k) The death of the deceased brought "unspeakable grief to his family and friends".

(l) The applicant was 29 years old at the time of the offence and had a substantial criminal history, including offences of violence where custodial sentences were imposed.

(m) The applicant was convicted after a trial where he attempted to cast blame on his co-offender who was giving evidence. The applicant had prior to trial offered to plead guilty to manslaughter. At sentence, defence counsel indicated that offer was made on "an entirely pragmatic basis to avoid the prospect of a risk of a conviction for murder".

(n) There was a total lack of remorse by the applicant.

[11] The applicant's counsel frankly acknowledged that none of the sentencing decisions to which the court was referred was comparable with the present case. I agree, but some guidance may be drawn from three of the decisions referred to the court: *R v Griffin & Dunkerton*,[1] *R v Black*[2] and *R v Lacey; Ex parte Attorney General (Qld)*.[3] In each case the offender was found guilty of manslaughter upon the basis that the intent necessary for murder was not proved. In the first two cases the offenders were sentenced to 12 years imprisonment and in the third case the offender's notional sentence of 12 years imprisonment was reduced to ten years because about two years of pre-sentence custody could not be declared.

[12] In *Griffin & Dunkerton*, after the offenders confronted the deceased about his noisy use of a car and the deceased fired a gun into the air, Dunkerton at the request of Griffin retrieved a shotgun. The deceased fired two more shots into the air and Dunkerton deliberately discharged the gun in the general direction of the deceased, without intending to harm or kill but in a criminally negligent way, and fatally shot him in the chest. The offenders decamped. Subsequently they falsely denied any knowledge to police. Dunkerton was 40 years old with an extensive criminal history which included periods of imprisonment. He was found to lack remorse. The sentence was described as being at the top end of the range but not outside a sound sentencing discretion.

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1 [1999] QCA 71.
2 [2009] QCA 198.
3 (2009) 197 A Crim R 399.

[13] In *Black*, the offender discharged a shotgun into the chest of the deceased from close range, death being almost instantaneous. The verdict of manslaughter was explicable upon the basis that, because of the offender's consumption of methalamphetamines, there was a doubt whether he intended to kill or cause grievous bodily harm. The sentencing judge found that the offender deliberately pulled the trigger. Keane JA referred to *De Salvo* and stated that, where the offender offered to plead guilty to manslaughter before the trial a range of ten to 12 years imprisonment was appropriate for an unlawful killing resulting from a deliberate act on the part of the offender. Keane JA noted that the offence in *Black* had even stronger characteristics of a gangland slaying than was present in *De Salvo*, so that a sentence at the higher end of the range was to be expected.

[14] In *Lacey*, the offender Dionne Lacey was only 20 years old at the time of the offence. He had one prior conviction for possession of an unloaded firearm. After his brother shot the deceased in the thigh, Dionne Lacey shot him in the heart. He was sentenced on the basis that he did not have an intention to kill or cause grievous bodily harm. He deliberately fired into a small room which he knew to be occupied by at least six people, so there was a high risk that the shot would kill or injure one of those people, and he knew at least that the deceased man was in, or close, to the line of fire.

[15] The use of a firearm in the ways described in those cases was obviously and extraordinarily dangerous and there were other serious features in each case. The applicant did not use a firearm and he was not face to face with his victim. But the applicant's criminality is comparable in light of the combination of many aggravating factors in his offence: in company with two armed co-offenders, all three offenders being disguised, the applicant took a sword to an innocent man's home and deliberately used it in an extremely dangerous way in the course of carrying out a violent home invasion for the purposes of a robbery, and the applicant, knowing that he had caused an injury to an occupant, threatened another person with the sword and continued to carry out the planned robbery.

[16] As the sentencing judge observed, this was an especially serious example of the offence of manslaughter and one which required a deterrent sentence. Also bearing in mind the other factors listed in the respondent's submission, the sentence of 12 years imprisonment with the automatic serious violence offence declaration was within the sentencing discretion.

[17] I would refuse the application for leave to appeal against sentence.

[18] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.

[19] **McMURDO JA:** I agree with Fraser JA.