SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wales* [2019] QCA 64
PARTIES:	**R** **v** **WALES, Joshua Don Francis** (applicant)
FILE NO:	CA No of 122 of 2018 SC No 84 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Mackay – Date of Sentence: 17 May 2018 (Crow J)
DELIVERED ON:	16 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2018
JUDGES:	Fraser and Morrison and McMurdo JJA
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. Vary the sentence imposed upon the applicant by setting aside the serious violent offence declarations in respect of each offence of which the applicant was convicted.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant was convicted and sentenced to nine years imprisonment for manslaughter with a concurrent term of four years imprisonment for burglary by breaking whilst armed with violence in company with property damage – where a serious violent offence declaration was made in respect of each offence – whether the sentencing judge erred by failing to adopt an integrated approach to sentencing – whether the serious violent offence declaration rendered the sentence manifestly excessive having regard to the principles of parity *Criminal Code* (Qld), s 8 *Penalties and Sentences Act* 1992 (Qld), s 161B *AB v The Queen* (1999) 198 CLR 111; [1999] HCA 46, applied *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2, cited

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v Hicks & Taylor [2011] QCA 207, applied
R v Illin (2014) 246 A Crim R 176; [2014] QCA 285, applied
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, applied

COUNSEL: K Prskalo, with J Horne, for the applicant
D C Boyle for the respondent

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

[1] **FRASER JA:** The applicant was convicted on his pleas of guilty and he was sentenced to nine years imprisonment for manslaughter and to a concurrent term of four years imprisonment for burglary by breaking, whilst armed, with violence, in company, with property damage. The sentencing judge declared that the applicant was convicted of a serious violent offence in respect of each offence. The applicant applies for leave to appeal against the sentence on two grounds: (ground 1) the sentencing judge erred by failing to adopt an integrated approach in the exercise of the sentencing discretion and (ground 2) the serious violent offence declaration rendered the sentence manifestly excessive having regard to the sentence imposed on co-offender Abell and the principles of parity.

[2] The applicant was sentenced upon a statement of agreed facts. I will reproduce the relevant parts of the statement:

> "On the afternoon of the offence … the defendant and his friends, Mala Geissler and Jeremy Abell, formed a plan to violently rob the complainant, Tyrone Baynton, a cannabis supplier, of some drugs. Mr Baynton had previously supplied Jeremy Abell with cannabis. Geissler armed himself with a katana[1] and the defendant armed himself with a pool cue.
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> The defendant drove the group, along with Abell's girlfriend … past the deceased's address. [Abell's girlfriend] saw that the group had weapons in the car and asked to be dropped off …
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> After dropping [her] off, all three offenders wrapped shirts around their heads as makeshift balaclavas.
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> The offenders attended the deceased's address in Arcturus Street, Mackay. All three exited the vehicle. Geissler drew his sword and handed the scabbard to Abell to use as a weapon. By now, it was about 6:03pm.
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> The group knocked on the door, which was opened a small way before being slammed shut. The deceased and his friend … Stevens, were on the other side of the door. Geissler, Abell and the defendant all attempted to break down the door.

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1 A Katana is a samurai sword.

> The deceased opened the door and struck the defendant to the head with a wooden bat before forcing the door closed again. Efforts to break through the door then ceased momentarily.
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> Geissler then yelled "*hey cunt*" and stabbed the sword through the left hand side of the door at neck height. The blow was delivered overhand with the curvature of the blade facing upwards and the point penetrating the door and the deceased's neck in a downwards direction through the door. The blade delivered a deep wound penetrating his lung. Following the blow, the pressure holding the door shut fell away and it was able to be opened by Geissler and the defendant.
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> Geissler and the defendant entered the house while Abell remained outside, as he didn't want to go inside in case the deceased recognised his voice. Stevens tried to help the deceased out of the house by dragging him to the back door out of the laundry at the rear of the unit. After doing so, Stevens walked back into the residence and was confronted by Geissler and the defendant.
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> Stevens was struck to the arm with a pool cue by the defendant, causing bruising. One of the two of them threatened Stevens with the sword asking "*where is he, where is it*" and "*do you want to be next?*" Stevens picked up a knife and attempted to strike one of the intruders before running back to the laundry and leaving via the back exit. He went to a Caltex service station and called police for help.
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> Whilst standing outside the house Abell was seen by a neighbour. She described him as standing guard and when she saw Abell, he raised a finger to his mouth to indicate she should be quiet.
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> Geissler or the defendant then took an unknown quantity of cannabis from the home. The defendant yelled "*it's time to go*" and all three offenders ran down the side of the units and over to the defendant's car and left the scene."

[3] The statement of agreed facts also records that Mr Baynton died from his wound at about 6.45 pm, Geissler or the applicant disposed of the sword by throwing it into a creek whilst they were accompanied by Abell, the three offenders divided the cannabis amongst themselves, and when police found the applicant he denied any knowledge or involvement in the killing.

[4] The applicant was 24 years old when he offended and 27 at the time of sentence. He had a criminal history. He had been fined for various offences and he had been given probation for sexual offences he committed as a 17 year old. When he was aged between 22 and 24, he was sentenced to imprisonment on three different occasions: six months imprisonment with immediate release on parole for four offences of entering premises and committing an indictable offence; 15 months imprisonment with parole eligibility after about one month for property and dishonesty offences; and one month imprisonment for breaching a bail condition imposed concurrently with 12 months imprisonment with parole release after about four months for unlawful stalking. The applicant committed the subject offences about six months after the expiry of the sentence of the 15 months imprisonment and whilst he was on bail for the unlawful stalking offence.

[5] The prosecutor relied upon some offences in the applicant's criminal history as support for a submission that the applicant had a propensity to act violently. In August 2011 the applicant was fined for wilful damage in April of that year. In that offence, the applicant argued with another person. After consuming alcohol the applicant returned, threw rocks on the roof of the person's house, and smashed a bedroom window with his fist. In January 2013 the applicant was fined for going armed so as to cause fear in December 2012. After the applicant argued with a female person, he left but returned thirty minutes later, armed with a tyre iron and accompanied by a male friend who was also armed. They confronted the boyfriend of the female person. The applicant tried to entice him into a fight whilst holding the tyre iron in a way which suggested he was likely to use it in any fight. In March 2013 the applicant was fined for trespass and unlawful possession of weapons in late January 2013 (ten days after he was fined for the previous offence). The applicant together with Abell and someone else discharged firearms at a cattle property. The property owner saw them throw rifles into the scrub and contacted police, who found a dead brolga with a bullet wound.

Ground 1: failure to adopt an integrated sentencing approach

[6] Decisions of the High Court establish that a sentencing court is obliged to formulate a sentence by the "instinctive synthesis" method, meaning that the court must not break down the sentence into component parts but take into account all of the relevant sentencing factors to arrive at a single result: *Markarian v The Queen*[2] and *Barbaro v The Queen*.[3] It was held in *R v McDougall and Collas*[4] that this method of sentencing requires that the discretion under s 161B(3) of the *Penalties and Sentences Act* 1992 to declare an offender to be convicted of a serious violent offence (an effect of which is that eligibility for parole arises only after 80 per cent of the term of imprisonment, rather than after the mid-point of the term or on a date fixed by the court) "falls to be exercised as part of, and not separately from, the conclusion of the process of arriving at a just sentence"; the discretionary power must be exercised "with regard to the consequences of making a declaration" and "the overall amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so".[5] The Court also observed:

> "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 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."[6]

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2 (2005) 228 CLR 357 at 373-375 [37].
3 (2014) 253 CLR 58 at 72 [34].
4 [2007] 2 Qd R 87 at [17].
5 Ibid at [19].
6 Ibid at [21] (footnotes omitted).

[7] The relevant observations by the sentencing judge appear towards the end of the sentencing remarks. The sentencing judge cited a sentencing decision as an indication that the appropriate sentence was ten years imprisonment and remarked that when a court sentences an offender to ten years or more imprisonment, as occurred in relation to Geissler, the relevant offence is automatically declared a serious violent offence with the result that the offender must serve 80 per cent of the term. After mentioning another sentencing decision in which an offender was sentenced to ten years with the automatic declaration, the sentencing judge referred to a pre-sentence custody certificate and concluded that the applicant should be given credit in the sentence for about four months of pre-sentence custody which could not be declared. The sentencing judge returned to the first comparable sentence and observed that it suggested "ten years, a serious violent offence, which is eight years imprisonment less what you have served". The sentencing judge went on to make these observations (I have emphasised the remarks of most relevance to the first ground of appeal):

> "The appropriate way to deal … with you … is to give you some discount on the head sentence for your plea …to take into [account] that the four months that you have served cannot be declared. You … will be given credit for that by reducing the head sentence from ten years with its automatic declaration of a serious violent offence down to nine years. **The most difficult matter is the determination of whether either or both offences ought to be declared serious violent offences, with the consequence that you will be required to serve 80 per cent of the time. The cases show that pursuant to section 161(b)(3), there is a broad discretion. The cases also show that this is a singular process, taking all of the facts into account.** As I have said, ordinarily, absent … your cooperation shown through a plea, absent the fact that you ought to be given credit for four months serving, I would have sentenced you to ten years.
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> **Taking into account your own particular circumstances, your plea, the time you have served, as I have said, the head sentence will be nine years. I do, however, in the circumstances of this case, consider that both offences ought to be declared a serious violent offence.**"

[8] The sentencing judge then explained the reasons for making that declaration: there was a home invasion, a plan formed to rob in a way which involved violence, Geissler had a deadly weapon and used it, the home invasion was by three hooded men, the evidence showed there was extreme violence with blood throughout the unit, and this kind of a home invasion involving the use of a sword was outside the norm, even for manslaughter.

[9] The applicant argues that the sentencing judge did not adopt the required integrated approach to sentencing but instead reduced a notional ten year term to nine years (to give credit for the plea of guilty and a four month period of custody which could not be declared) and fixed upon the resulting nine year term without having regard to the making of the serious violent offence declaration. In the process of reducing the notional head sentence to nine years the sentencing judge did not take into account the effect of the serious violent offence declaration and, having arrived at that term of imprisonment, the sentencing judge made no adjustment to reflect it. The

respondent argues that the sentencing judge was well aware of the consequences of making the declaration and properly took its effect into account in determining the sentence of nine years imprisonment. The respondent emphasises the references in the sentencing remarks to the effect of a serious violent offence declaration as meaning that the offender must serve 80 per cent of the sentence and the sentencing judge's use of the expression "a singular process".

[10] The sentencing remarks confirm the unsurprising fact that the sentencing judge appreciated the consequence of making a serious violent offence declaration in a sentence involving imprisonment for nine years that parole eligibility would be deferred until the applicant had served 80 per cent of the term of imprisonment. Accepting as much, the applicant's argument under this ground of appeal nonetheless reveals an error in the exercise of the sentencing discretion. The applicant did not contest the respondent's submission and I accept that no discount for the four month period was in fact necessary because the applicant was serving a different sentence at that time. That does not alter the fact that the sentencing judge expressed an intention to give credit both for four months spent in pre-sentence custody and for the plea of guilty. In the sentence actually imposed the total discount allowed for the four months spent in pre-sentence custody and the plea of guilty is that the term of the notional sentence was reduced by one year, thereby reducing the minimum custodial period by less than ten months (80 per cent of one year). The discount in the term and the consequential reduction for the plea of guilty must have been even smaller, perhaps six months and less than five months respectively. Giving full weight to the breadth of the sentencing discretion, in a sentence of this magnitude that could not be regarded as a sufficient discount for the plea of guilty in the particular circumstances of this case. The respondent did not argue to the contrary. That being so it does appear that the sentencing discretion miscarried, inferentially in the manner advocated for the applicant.

[11] It follows that it is necessary to exercise the sentencing discretion afresh. It is therefore not necessary to adjudicate upon the second ground of appeal.

The appropriate sentence

[12] After a trial Geissler was convicted of manslaughter and sentenced to 12 years imprisonment, with the automatic declaration that he was convicted of a serious violent offence. Geissler's application for leave to appeal against his sentence was heard concurrently with the present application. Judgment in that application is also given today.[7] My reasons for concluding that Geissler's application should be refused describe the matters of significance for his sentence and it is not necessary to repeat them here. The applicant's sentence should be significantly more lenient than the sentence imposed upon Geissler. So much is common ground in the parties' submissions.

[13] Abell was convicted on his pleas of guilty to manslaughter, burglary by breaking whilst armed in company with property damage and armed robbery in company with personal violence. He was 25 years old when he committed the offence. He had a criminal history including a prior robbery offence which the sentencing judge in his case described as being clearly a mild example of that offence. It was accepted on the evidence that Abell was remorseful. Abell pleaded guilty to an ex-

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7 [2019] QCA 63.

officio indictment. He was found to be entitled to a discount on his sentence in accordance with *AB v The Queen*[8] upon the basis that, although the police investigation might have unearthed enough evidence to charge him, the police did not in fact have enough evidence to prosecute him for the offences to which he pleaded guilty. That sentencing judge considered that, without regard to some unusually significant factors in Abell's favour (which are described in material supplied to the court), bearing in mind that he committed the offence whilst on a suspended sentence and he had a criminal history, notwithstanding his age and that he did not commit the physical act, a sentence of imprisonment of about nine years with no serious violent declaration and parole eligibility after about a third would comfortably have been within range. Applying the necessary discounting of the sentence (particularly for the *AB* factor and the unusually significant factors which are not applicable in the applicant's case), that sentencing judge imposed a head sentence of five years imprisonment with parole eligibility fixed after one third of that term for the manslaughter offence, and lesser concurrent sentences were imposed on the other offences.

[14] The sentencing judge referred to the sentences imposed upon Abell and Geissler and concluded that the applicant's offending was more serious than that of Abell and closer to the offending by Geissler, albeit not as serious because Geissler was the one who delivered the fatal blow. The sentencing judge regarded the applicant's offending as being more than that of Abell: whilst Abell participated in the attempt to break and enter by kicking the door at least once and perhaps more, during the momentary break when the deceased opened the door and struck the applicant and forced the door closed, Abell moved away from the door, although remaining nearby, whereas the applicant stayed right beside Geissler; the applicant and Geissler entered the premises after the stabbing, whereas Abell remained outside on lookout; in Abell's case, the sentencing judge accepted that Abell did not know that an injury had been inflicted, but that was not so in the applicant's case; and, most importantly, after Abell understood that a man had died, he cooperated with the authorities, assisting in recovery of the weapon, showed signs of significant remorse, and, in the result, Abell was entitled to special leniency in accordance with *AB v The Queen*,[9] whereas although a discount for pleading guilty was available to the applicant, the applicant's discount for pleading guilty was not of the same degree.

[15] Counsel for the applicant acknowledged that, whereas Abell's cooperation warranted a significant discount in his sentence, the applicant's cooperation was limited to his plea of guilty to manslaughter which was offered at an early time. It was submitted, however, that there was little to distinguish between Abell's and the applicant's criminal culpability. The applicant emphasised that, although Abell had not armed himself before arriving, he took possession of the sword sheath which Geissler handed to him before they approached the unit, so that he and the applicant were both armed.

[16] The applicant also submitted that the assessment by the sentencing judge in Abell's case that, without regard to some unusually significant factors, a sentence of about nine years imprisonment with no serious violent offence declaration and parole eligibility after about a third would comfortably have been within range was

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8 (1999) 198 CLR 111.

9 Ibid.

a relevant factor in application of the "parity principle" for the applicant's sentence. I do not accept this submission. In *R v Illin* (2014) 246 A Crim R 176 at [24] I referred to the aspects of the parity principle which are relevant here:

> "… The "parity principle" is designed to ensure equality before the law and takes into account that equal justice according to law generally requires that "like cases be treated alike" and that there be "differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law": *Green v The Queen* (2011) 244 CLR 462 at 472 – 473 [28] (French CJ, Crennan and Kiefel JJ). In order to achieve those objectives, an appellate court may interfere with a sentence which is not manifestly excessive if, upon an objective analysis, a disparity between that sentence and the sentence of a co-offender may give rise to a legitimate sense of grievance or create the appearance that justice has not been done; conversely, the parity principle does not justify interference in a sentence where its disparity with the sentence of a co-offender is explicable by differences in the circumstances of the offences or the offenders' personal circumstances: see *Lowe v The Queen* (1984) 154 CLR 606, *Postiglione v The Queen* (1997) 189 CLR 295, and *Green v The Queen*."

[17] Thus application of the parity principle requires an objective analysis of the relationship between an offender's sentence and a sentence actually imposed upon a co-offender, rather than a "notional" sentence mentioned in a sentencing judge's reasons for the latter sentence. I proceed upon the footing that upon an objective analysis the sentence imposed upon the applicant should not be excessive in comparison with the sentence actually imposed upon either co-offender after taking into account all of the material differences between the circumstances of the applicant's case (including his personal circumstances) and those of the co-offender's case.

[18] The applicant's counsel submitted that, like Geissler, Wales was not aware when he entered the residence that a fatal injury had been inflicted but it could be inferred that he was aware that some injury had been inflicted. The respondent did not contest that submission. It remains the case that, unlike Wales, Abell cannot be regarded as having that awareness; he continued to participate in the robbery as a lookout, but he did not do so after he was aware that an injury had been inflicted upon an occupant of the residence.

[19] The respondent referred to the following matters as serious factors in the applicant's offending:

(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 struck Stevens with a pool cue in the course of the robbery.

(i) The applicant drove the offenders in his car to and from the premises.

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

(k) The applicant denied any knowledge of, or involvement in, the killing.

[20] Both the applicant and Abell were parties to the plan for the home invasion, an aspect of which involved Geissler being armed with the sword, and both were with Geissler outside the front door of the residence when Geissler delivered the fatal blow through the door. Considering the applicant's sentence afresh, for the same reasons as were given by the sentencing judge (and noting also that the applicant struck Stevens with a pool cue in the course of actively participating with Geissler in the robbery after the fatal injury had been inflicted) I conclude that the applicant's criminality was worse than Abell's criminality, so that the applicant's offending should attract a more severe sentence for that reason alone. Furthermore, the applicant's mitigating factors are very much less favourable. I would add that what otherwise might appear to have been an unusually lenient sentence imposed upon Abell is explained by the matters mentioned in [14] of these reasons, and especially by what were described as unusually significant factors.

[21] A number of comparable sentence decisions were cited, but it is necessary to refer only to *R v Hicks & Taylor*,[10] in which earlier decisions are cited and taken into account. A sentence of ten years imprisonment with the resulting serious violent offence declaration was imposed upon Hicks for manslaughter. Hicks formed a common unlawful purpose with two co-offenders to rob a householder. The principal offender entered the house, armed with a gun, while the others waited outside, and in the course of a struggle the principal offender shot dead an occupier of the house. Hicks had a criminal record which did not include any prior conviction of an offence of violence. He declined a police interview and three police officers were required for cross-examination at his committal. Hicks was sentenced as an instigator of the robbery, being motivated by his apparent belief that the householder owed him money as a result of a previous drug deal. The sentence for manslaughter was set aside upon the ground that the sentencing judge had wrongly taken into account a finding that Hicks was armed with a steering wheel lock. The Court found that a head sentence of nine years' imprisonment for Hicks offending was supported by the comparable cases of *R v Schuurs*[11] and *R v Georgiou*.[12] It was also held that the circumstances of the offence were not outside the norm for the offence of manslaughter where the liability for the offence arises under s 8 of the *Criminal Code*, so that the discretion should be exercised against making a serious violent offence declaration for Hicks' conviction of the offence of manslaughter. Accordingly a sentence of nine years imprisonment (with no amelioration of the statutory eligibility for parole at the halfway mark) was substituted for the sentence imposed by the sentencing judge.

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10 [2011] QCA 207.
11 [2000] QCA 278.
12 (2002) 131 A Crim R 150.

[22] Notwithstanding the differences in circumstances, that case supplies some guidance for the appropriate sentence here. The same sentence in this broadly comparable case would accord with that guidance and would not be excessive in comparison with each of the sentences imposed upon the applicant's co-offenders after taking into account the differences between the applicant's case and each co-offender's case. In these circumstances I would not exercise the discretion to make a serious violent offence declaration in relation to the applicant's offence, for which he (like Hicks) was liable under s 8 of the *Code* rather than as a principal offender. As in *R v Hicks and Taylor*, the applicant will be eligible to apply for parole after the mid-point of the nine year term; the benefit of the plea of guilty is reflected by discounting the term of imprisonment and by the result of that discounting being that parole eligibility is not automatically deferred until after 80 per cent of the term has been served.

[23] I would grant the application, allow the appeal, and vary the sentence imposed upon the applicant by setting aside the serious violent offence declarations in respect of each offence of which the applicant was convicted.

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

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