SUPREME COURT OF QUEENSLAND

CITATION:	*R v Heke* [2019] QCA 93
PARTIES:	**R** **v** **HEKE, Tamate Henry** (applicant)
FILE NO/S:	CA No 51 of 2018 SC No 1600 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 23 February 2018 (Applegarth J)
DELIVERED ON:	24 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2018
JUDGES:	Fraser and Philippides JJA and Crow J
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant was convicted of unlawful striking causing death – where the applicant delivered a blow to the deceased who fell backwards onto a road and was hit by a truck – where the applicant was sentenced to six and a half years' imprisonment – where it was ordered, pursuant to s 314A(5) of the *Criminal Code* (Qld), that the applicant must not be released until he has served 80 per cent of that term – whether the applicant's sentence was manifestly excessive *Corrective Services Act* 2006 (Qld), s 182, s 184(2) *Criminal Code* (Qld), s 23, s 300, s 314A, s 315A *Penalties and Sentences Act* 1992 (Qld), s 9, s 161A, s 162 *Safe Night Out Legislation Amendment Act* 2014 (Qld) *R v Ali* [2018] QCA 212, cited *R v Callow* [2017] QCA 304, cited *R v Dwyer* [2008] QCA 117, cited *R v Heather* (unreported, 1178/2017, Supreme Court at Brisbane, 8 March 2018) *R v Mayot* (unreported, 826/16, Supreme Court at Brisbane, 6 March 2017), cited *R v McConnell* [2018] QCA 107, cited

R v Mischewski (unreported, 741/2017, Supreme Court at Brisbane, 18 December 2017), cited
R v Renata (unreported, 1663/2016, Supreme Court at Brisbane, 13 October 2017), cited
R v Renata; Ex parte Attorney-General (Qld) [2018] QCA 356, cited
R v Simeon [2000] QCA 470, cited
R v Skondin [2015] QCA 138, cited
R v Tientjes [1999] QCA 480, cited
R v Tran; Ex parte Attorney-General [2018] QCA 22, cited
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: J J Allen QC, with T Zwoerner, for the applicant
M R Byrne QC for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Crow J and the order proposed by his Honour.

[2] **PHILIPPIDES JA:** I agree with the reasons of Crow J and the order proposed by his Honour.

[3] **CROW J:** The applicant was charged with the manslaughter of Shane Martin Merrigan on 1 December 2015 and in the alternative with an offence against s 314A of the *Criminal Code* of unlawful striking causing the death of Mr Merrigan.

[4] On 22 February 2018, the applicant was acquitted of manslaughter but convicted of unlawful striking causing death. The applicant was sentenced to six and a half years' imprisonment with parole eligibility after having served 80 per cent of the sentence. The applicant applies for leave to appeal against the sentence on the basis that it is manifestly excessive and in particular argues that the sentence imposed did not adequately reflect the significance of the applicant's acquittal on the offence of manslaughter.

[5] The applicant argues that as the offence of manslaughter ought to be considered a more serious offence than the offence of unlawful striking causing death, then he ought to have been sentenced to five years' imprisonment, suspended after the applicant had served two and a half years' imprisonment. The applicant argues that had he been convicted of manslaughter, he would have been sentenced to seven or eight years' imprisonment and accordingly pursuant to s 184(2) of the *Corrective Services Act* 2006 (Qld), he would have been eligible for parole at the halfway point in three-and-a-half to four years.

[6] As the applicant was convicted of the offence of unlawful striking causing death, and the sentencing judge did not make any order under s 314A(6), then s 314A(5) requires the applicant to serve 80 per cent of his sentence prior to being eligible for parole, i.e. the applicant must serve a minimum of 5.2 years' imprisonment.

History of Criminal Offending

[7] On 1 December 2015, the applicant awoke at 1.30 am and left home at 2.00 am in order to commence his working day at Murarrie at 3.00 am. The applicant was employed in a warehouse lifting dry goods and worked his 12-hour shift, with only an hour off for lunch, completing his work at 3.00 pm. The applicant then drove home on the Gateway Motorway.

[8] Whilst driving home on the Gateway Motorway, the applicant and Mr Merrigan encountered each other in their respective vehicles. The applicant and Mr Merrigan were vying to get ahead of each other's vehicle. Mr Merrigan's vehicle overtook the applicant's vehicle on the inside lane. Mr Merrigan's vehicle tailgated the applicant's vehicle and the applicant also caused his vehicle to tailgate Mr Merrigan's vehicle. Aggressive hand gestures were swapped before Mr Merrigan gestured for the applicant to pull over on the side of the Gateway Motorway.

[9] The applicant did pull over with both cars pulling up beside the south bound lane of the Gateway Motorway. The applicant and Mr Merrigan then exited their cars, walked to the area between the cars, and stood dangerously close to the left south bound lane of the Gateway Motorway. The applicant and Mr Merrigan confronted each other, but only for a matter of seconds. Mr Merrigan verbally abused and swore at the applicant, gestured in anger with his arms, and may have pushed the applicant slightly. The applicant then punched Mr Merrigan in the head.

[10] After the blow was delivered by the applicant to Mr Merrigan's head, Mr Merrigan fell backwards onto the roadway and within a second or two, was hit by a truck. Mr Merrigan died instantly from multiple injuries. The applicant was immediately remorseful. He walked down the roadway. He was physically ill and shocked and was heard to say at the scene "[w]hat have I done? What have I done? This person probably has a family."

[11] That was correct, Mr Merrigan was aged 50 at the time of his death and is survived by his wife and children. The applicant showed genuine remorse at the scene, cooperated with police at the scene, and participated in a formal interview, admitting punching Mr Merrigan and making other admissions against his interest.

[12] The applicant was a hardworking father with no criminal history. The applicant was 36 years of age at the time of the offence and had lived a law abiding life with his long term partner and their three children, who were all, at the time of the offence, aged less than 10 years. It is accepted that despite the verbal abuse and a minor assault by Mr Merrigan on him (if such assault in fact occurred) that did not justify the applicant punching Mr Merrigan in the head in response as the punch was "completely excessive".

Unlawful Striking Causing Death

[13] Section 314A of the *Criminal Code* (Qld) provides:

> "**314A Unlawful Striking Causing Death**
>
> (1) A person who unlawfully strikes another person to the head or neck and causes the death of the other person is guilty of a crime.
>
> Maximum penalty—life imprisonment.
>
> (1A) The *Penalties and Sentences Act 1992*, section 161Q states a circumstance of aggravation for an offence against this section.

(1B) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

(2) Sections 23(1)(b) and 270 do not apply to an offence against subsection (1).

(3) An assault is not an element of an offence against subsection (1).

(3A) For subsection (1), the striking of another person is unlawful unless it is authorised or justified or excused by law.

(4) A person is not criminally responsible for an offence against subsection (1) if the act of striking the other person is—

(a) done as part of a socially acceptable function or activity; and

(b) reasonable in the circumstances.

(5) If a court sentences a person to a term of imprisonment for an offence mentioned in subsection (1), the court must make an order that the person must not be released from imprisonment until the person has served the lesser of—

(a) 80% of the person's term of imprisonment for the offence; or

(b) 15 years.

(6) Subsection (5) does not apply if the court sentences the person to—

(a) a term of imprisonment for life; or

Note –

See the *Corrective Services Act 2006*, section 171 for the parole eligibility date for a prisoner serving a term of imprisonment for life for an offence mentioned in subsection (1).

(b) an indefinite sentence under the *Penalties and Sentences Act 1992*; or

Note –

See *the Penalties and Sentences Act 1992*, section 171 for the time of the earliest review of an indefinite sentence being served by a prisoner serving an indefinite sentence for an offence mentioned in subsection (1).

(c) a term of imprisonment and makes either of the following orders under the *Penalties and Sentences Act 1992* for the person—

(i) an intensive correction order;

(ii) an order that the whole or a part of the term of imprisonment be suspended.

(7) In this section—

causing means causing directly or indirectly.

function or activity includes a sporting event.

strike**,** a person, means directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument."

[14] Section 314A was introduced into the *Criminal Code* by the *Safe Night Out Legislation Amendment Act* 2014 (Qld). The explanatory notes of the *Safe Night Out Legislation Amendment Act* provided, in part:

> "The Bill amends the Criminal Code to create a new offence of unlawful striking causing death and a new circumstance of aggravation with an increased penalty for the serious assault of a public officer.
>
> […]
>
> The creation of the new offence of unlawful striking causing death is to principally address the 'coward-punch' homicide cases.
>
> Currently, in Queensland, the offences charged in the circumstances of a fatal 'coward-punch' are murder and/or manslaughter. However, in the absence of overt evidence that the offender intended to kill the victim, a conviction of murder is difficult to secure. Further, the operation of section 23(1)(b) of the Criminal Code poses a challenge to securing a conviction for manslaughter in cases involving a 'coward-punch'. Section 23(1)(b) will exempt an accused from criminal responsibility for the consequences of their actions (example, death resulting from a punch), if the consequence was not intended or foreseen by the offender and would not reasonably have been foreseen by an ordinary person.
>
> The new offence will fill a legislative gap and ensure that the community is protected from such cowardly acts of violence. The new offence of unlawful striking causing death precludes an accused from attempting to argue that although the strike was deliberate and wilful, the death of the victim was an 'accident'."

[15] As a relatively new provision, and in the then-absence of any Court of Appeal "guidance… about sentences for this offence"[1] the sentencing judge had regard to three first-instance decisions "and also to comparable cases involving the offence of manslaughter as providing some guidance" being those sentences for manslaughter "in which a section 23 defence has not been open on the evidence… provided the facts are comparable".[2]

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1 AB 62/30.

2 AB 62/34 – 38.

[16] The manslaughter cases which were provided to the sentencing judge falling into the category identified by the primary judge were:

	Sentence	**Parole Eligibility**
R v Callow[3]	8 years 6 months	3 years
R v Skondin[4]	9 years	5 years
R v Tientjes[5]	7 years	3 years 6 months
R v Simeon[6]	7 years 6 months	2 years 9 months

[17] Callow was sentenced to eight and a half years for a range of violent conduct against a woman, a child and a good Samaritan. Callow knocked the good Samaritan to the roadway and he suffered fatal head injuries. Callow's sentence of eight and a half years was upheld in the Court of Appeal. The primary judge however accepted that *Callow* was factually "a far more serious case."[7]

[18] The primary judge observed in respect to the manslaughter cases that many of the cases were distinguishable as some involved prolonged fights, others were single blow cases involving individuals with criminal histories. As the primary judge observed, the authorities have been surveyed in the Court of Appeal's decisions in *Callow* and *Skondin* (supra). *Tientjes* case was, as the sentencing judge said, of no assistance.

[19] *Simeon's* case involved a sustained attack, namely violence which included headbutting, punching and kicking, including punching of the victim whilst he was on the ground. Simeon was 27 years of age and previously had a good record. The head sentence of seven years and six months was imposed.

[20] The three single instance decisions upon s 314A referred to by the sentencing judge were:

	Sentence	**Parole Eligibility**
R v Ariik Mayot[8]	6 years 2 months	5 years 4 months
R v Armstrong Renata[9]	7 years	5 years 7 months
R v Brandon John Mischewski[10]	9 years 6 months	7 years 7 months

[21] Mayot (aged 19) and the 54 year old victim, Mr Ede, were not known to each other, but encountered each other as pedestrians walking along a Goodna footpath on an afternoon in June 2015. Mayot was walking to the police station to hand himself in for a breach of bail and was in an agitated state. People walking in the opposite direction noticed that Mayot was following closely behind Mr Ede and that Mr Ede appeared anxious.

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3 [2017] QCA 304.
4 [2015] QCA 138.
5 [1999] QCA 480.
6 [2000] QCA 470.
7 AB 63/6.
8 (unreported, 826/16, Supreme Court at Brisbane, 6 March 2017) decision of Holmes CJ.
9 (unreported, 1663/2016, Supreme Court at Brisbane, 13 October 2017) decision of Bowskill J, sentence of 7 years increased to 9 years 6 months on appeal, *R v Renata; Ex parte Attorney-General (Qld)* [2018] QCA 356.
10 (unreported, 741/2017, Supreme Court at Brisbane, 18 December 2017) decision of Lyons SJA.

[22] Mayot stopped walking along the path to ask a passing couple for a cigarette and after they refused, Mayot appeared more agitated and angry and walked on at a faster pace, catching up with Mr Ede. Eyewitnesses observed Mayot walk briefly beside Mr Ede before turning around and punching him in the face. Mr Ede fell to the path, unconscious and later died.

[23] When other citizens came to assist, Mayot told them that Mr Ede had threatened to stab him, however, Mr Ede did not have a knife. Mayot was sentenced on the basis that Mr Ede did, immediately prior to the punch, call Mayot a "black bastard".

[24] The Chief Justice, as sentencing judge, observed that if she were sentencing Mayot for manslaughter, the sentence would have been a sentence of seven years' imprisonment with parole eligibility set at about one-third. Mayot had pleaded guilty to the charge of unlawful striking causing death and received the benefit of that plea in a reduction of sentence.

[25] The plea of guilty, as the sentencing judge observed, is an important point of distinction between the applicant and Mayot, because the applicant pleaded not guilty to both offences.

[26] Renata was sentenced to seven years' imprisonment for unlawful striking causing the death of Cole Miller. Mr Miller was an 18-year-old who, after a night out in Fortitude Valley, was walking to get a cab with his friend Mr Pace when Renata and three of his colleagues approached Mr Miller and Mr Pace. Renata and his co-accused, Maxwell, were the principle agitators of the four men who were looking for a fight. Maxwell was a large man being 195 cm tall and weighing 120 kg, where Renata, whilst 175 cm tall weighed 9 6kg. Mr Miller who was only 18 years of age was tall at 181 cm but only weighed 80 kg. Renata punched Mr Miller from the side with a clenched fist, and because he was attacked from the side, Mr Miller could not see the punch coming. The punch was delivered to Mr Miller's jaw and he fell face first to the ground unconscious and died. Renata pleaded guilty. On the Attorney-General's appeal, the sentence was increased to nine and a half years' imprisonment[11].

[27] Mischewski was a more serious offence insofar as there was a blow to the head followed by a fall to the ground and then a stomping of the victim whilst he lay on the ground resulting in a complex fracture to the skull. Mischewski also had a significant criminal history which included offences of violence. Mischewski was sentenced to nine and a half years' imprisonment.

[28] Soon after the applicant was sentenced, on 8 March 2018, Douglas J sentenced Tristan Mataora Heather to six and a half years' imprisonment for one count of unlawful striking causing death.[12] Heather had turned 18 years of age two days prior to the commission of the offence and had consumed a considerable amount of alcohol both at home and later at a hotel, where he met the deceased. Douglas J noted that the intoxication of Heather may have been driven by the recent death of a childhood friend and Heather just turning 18.

[29] When Mr Heather left the hotel in his intoxicated state, Mr Heather threw a "fake punch" behind the deceased's head before shadow boxing with a light pole, then

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11 *R v Renata; Ex parte Attorney-General (Qld)* [2018] QCA 356.

12 *R v Tristan Mataora Heather* (1178/2017, Supreme Court at Brisbane).

punching another man named Morgan in the upper cheek area. As a result of Morgan being struck by Heather, the deceased argued with Heather before the deceased was pulled away by another man. The deceased was then engaged in a scuffle with Mr Bachop which involved pushing back and forth but no great violence until Heather approached the deceased from behind or the side and punched the deceased once to his left temple, knocking the deceased to the road surface where he struck his head. The deceased was then taken to Gold Coast Hospital and died 11 days later when his life support was removed. Although Heather fled the scene, he was located by police later on the afternoon of the offence. Heather provided an apology, showed remorse, had led a productive life, and was otherwise of a good character.

Sentencing Judge's Remarks

[30] In the present case, the sentencing judge stated:

> "Your conduct was a complete overreaction in a dangerous situation. The jury was not persuaded that you foresaw death as a possible outcome or that an ordinary person in the fast-moving and angry situation would have reasonably foreseen death as a possible outcome. That is a relevant factor which should result in a lesser sentence than one in which death was foreseen or foreseeable so as to exclude a section 23 defence. That said, whilst death may not have been actually foreseen by you in the heat of the moment, your conduct involved, objectively, dangerous conduct. To punch anyone in the head whilst standing on a hard surface risks death or serious injury. To do so beside a busy road escalates that risk.
>
> The fact that you were not affected by alcohol but fatigued after a long day at work and agitated by the encounter distinguishes your case from a case of alcohol-fuelled violence like *Renata*. Still, the Courts must denounce and, if possible, deter people from being involved in angry road-side confrontations with the potential for tragic outcomes like this.
>
> Mr Merrigan died a terrible death. Unlike the grieving family in the Renata case, Mr Merrigan's family did not get the chance to see him in hospital and say their goodbyes in person.
>
> Objectively speaking, you engaged in dangerous conduct after a road rage episode after being sworn at and possibly being pushed without any great force by Mr Merrigan. You overreacted and delivered a single forceful punch to the head, which you did not foresee would kill him. You expressed remorse at the scene. Your actions have had terrible and enduring consequences for Mr Merrigan's loving family. Taking account of the jury's finding, you deserve less punishment than someone who foresaw death as a consequence. However, you deserve to be punished to a similar extent to Mr [Mayot], who was taken to have foreseen the consequences of striking someone to the head but who pleaded guilty."[13]

[31] The learned sentencing judge concluded, before imposing sentence, as follows:

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13 AR 64/15 – 45.

"Had you been sentenced for manslaughter after a trial, a sentence between seven and eight years would have been appropriate. However, you were found not guilty of manslaughter and the basis upon which the jury appears to have reached that verdict must be respected and is a relevant factor on sentencing.

I have regard to the three decisions of Judges of this Court for this offence, in two of which offenders had pleas of guilty in their favour. All three were cases in which the sentences proceeded on the basis that section 23 did not apply and the death was foreseeable.

The most appropriate sentence must take into account both what is appropriate as a sentence of imprisonment to reflect a variety of factors and also an appropriate period to be served before becoming eligible to apply for parole. In my view, the most appropriate sentence in all the circumstances is one of six and a-half years, which will require you to spend more than five years in prison before you are eligible for parole."[14]

Principles of General Application

[32] In *R v Dwyer*[15] Keane JA (as he then was) said:

"[37] …An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, is to be deprecated as involving the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process. In *Markarian v The Queen*, Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> "Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence (*Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]). And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies (*Johnson v The Queen* (2004) 78 ALJR 616 at 618 [5]; 205 ALR 346 at 348 per Gleeson CJ; at 624, 356 [26] per Gummow, Callinan and Heydon JJ)."

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14 AR 65/1 – 17.

15 [2008] QCA 117 at [37] (footnotes omitted).

[33] In *R v McConnell*[16] Fraser JA said:

> "The real issue is whether the sentence is manifestly excessive. That is not established unless the sentence is "unreasonable or plainly unjust" such as to justify the conclusion "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance". In this case the parties' arguments were largely based upon sentences imposed in what were said to be comparable cases. French CJ, Keane and Nettle JJ stated in *R v Pham*, that "[a]ppellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle". And, as the respondent also submitted, sentences in comparable cases do not "set a 'range' of permissible sentences" or "mark the outer bounds of a sentencing judge's permissible discretion", they assist a judge to understand how factors in common should be treated but they do not determine the sentence."

[34] In *R v Ali*[17] Burns J, with whom Fraser and Gotterson JJA agreed said in respect of a manslaughter sentence:

> "It is also to be kept in mind that, quite apart from the folly of attempting to grade criminality in a case at hand through a comparison of aggravating and mitigating factors in other cases as if there could only ever be a single correct sentence, any sentence of 10 years or more will carry with it an SVO declaration requiring the offender to serve at least 80% of that sentence. For that reason, the sentence will often be reduced to take into account factors in mitigation because that is the only way of reflecting those factors so as to arrive at a sentence that is just in all of the circumstances."

Applicant's Argument

[35] The applicant argues that his case differs significantly from the three preceding cases of *Mayot*, *Renata* and *Heather* in that the applicant was to be sentenced following an acquittal of a charge for manslaughter as a consequence of the prosecution not having negatived the defence of accident available pursuant to s 23 of the *Criminal Code*.

[36] The applicant argues that he ought to be sentenced on the basis that the death that he caused was neither foreseen by him nor objectively reasonably foreseeable and for this reason his case is in a category distinct from the other three cases and inferentially of less seriousness than the other three cases.

[37] The applicant argues that the sentence imposed upon him did not accurately reflect the consequent difference in the criminality between his case and the other cases.

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16 [2018] QCA 107 at [15].
17 [2018] QCA 212 at [28].

Section 314A and Manslaughter

[38] As the primary judge observed, it was correct to sentence the applicant on the basis that the death he caused was neither foreseen nor objectively reasonably foreseeable by him as a result of his acquittal for the offence of manslaughter. It further may be accepted for that reason, the applicant's case is in a category distinct from the other three cases. However, given that it is the clear legislative intent from the text of s 314A (and as explained by the explanatory note) the point of the introduction of s 314A was to remove the availability of the defence of accident based on s 23. As Gotterson JA said in *Renata*:[18]

> "[43] I do not find within the above statements, or elsewhere in the Explanatory Notes, an intention that a separate sentencing regime which is harsher than that for manslaughter and completely independent of it, is to apply to an offence against s 314A. To the contrary, that provision is focused upon criminal liability. Its enactment reflects a legislative acknowledgement of the now notorious fact that a single strike to the head or neck can be fatal and that appropriate criminal responsibility should attach to it."

[39] As was expressly reflected by the primary judge, the import of the jury's acquittal on the charge of manslaughter was taken into account by the reduction of the head sentence from seven to eight years to six and a half years. Whilst the sentencing judge did properly take into account that the death of Mr Merrigan was neither actually foreseen, nor objectively reasonably foreseeable, that is more than adequately reflected in the reduction of the sentence.

[40] The applicant's argument proceeds on the assumption that the offence of manslaughter under s 300 is a more serious offence than a conviction for unlawful striking causing death pursuant to s 314A. That assumption must, however, on the proper construction of the *Criminal Code* be rejected. Both sections 300 and 314A carry a maximum sentence of life imprisonment. Indeed, the inclusion by s 314A(5) of a necessity to serve 80 per cent of the term of actual imprisonment evinces the statutory intention that unlawful striking causing death pursuant to s 314A may be a more serious offence than manslaughter as the "80 per cent rule" is akin to an automatic declaration of the offence as a "serious violence offence". However, that is balanced by s 314A(6) which expressly preserves a non-custodial sentence as a sentencing option.

[41] Criminality for s 314A is the striking of the head or the neck of the victim. That, through the text of s 314A(1), the maximum penalty imposed pursuant to s 314A(1) of life imprisonment and the requirement to serve 80 per cent of the sentence (subject to subsection 314A(6)) imposed by s 314A(5) supports the conclusion a s 314A offence ought to be considered as serious as a manslaughter offence.

[42] Just as sentences for manslaughter may vary according to the facts, so must sentences vary pursuant to s 314A according to the facts. The important provision, s 314A(6)(c), preserves a sentencing judge's ability to send an offender, where appropriate, to an intensive correctional order or order whole or part of the term of imprisonment to be suspended (s 14A(6)(c)) is an important and direct recognition

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18 *Renata* (supra) at [43].

that there may be instances where offences committed against s 314A(1) where no term of actual imprisonment ought to be imposed, or alternatively, the term of imprisonment will be wholly suspended.

[43] The sentencing guidelines set out in ss 9(1), 9(2), 9(2A) of the *Penalties and Sentences Act* 1992 (Qld) provide as follows:-

> "**9 Sentencing guidelines**
>
> (1) The only purposes for which sentences may be imposed on an offender are—
>
> (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
>
> (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
>
> (c) to deter the offender or other persons from committing the same or a similar offence; or
>
> (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
>
> (e) to protect the Queensland community from the offender; or
>
> (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).
>
> (2) In sentencing an offender, a court must have regard to—
>
> (a) principles that—
>
> (i) a sentence of imprisonment should only be imposed as a last resort; and
>
> (ii) a sentence that allows the offender to stay in the community is preferable; and
>
> (b) the maximum and any minimum penalty prescribed for the offence; and
>
> (c) the nature of the offence and how serious the offence was, including—
>
> (i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K; and
>
> (ii) the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to, the offence; and

(d) the extent to which the offender is to blame for the offence; and

(e) any damage, injury or loss caused by the offender; and

(f) the offender's character, age and intellectual capacity; and

(g) the presence of any aggravating or mitigating factor concerning the offender; and

(ga) without limiting paragraph (g), whether the offender was a participant in a criminal organisation—

(i) at the time the offence was committed; or

(ii) at any time during the course of the commission of the offence; and

(h) the prevalence of the offence; and

(i) how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences; and

(j) time spent in custody by the offender for the offence before being sentenced; and

(k) sentences imposed on, and served by, the offender in another State or a Territory for an offence committed at, or about the same time, as the offence with which the court is dealing; and

(l) sentences already imposed on the offender that have not been served; and

(m) sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender; and

(n) if the offender is the subject of a community based order—the offender's compliance with the order as disclosed in an oral or written report given by an authorised corrective services officer; and

(o) if the offender is on bail and is required under the offender's undertaking to attend a rehabilitation, treatment or other intervention program or course—the offender's successful completion of the program or course; and

(p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in

the offender's community that are relevant to sentencing the offender, including, for example—

(i) the offender's relationship to the offender's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates; and

(q) anything else prescribed by this Act to which the court must have regard; and

(r) any other relevant circumstance.

(2A) However, the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence—

(a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or

(b) that resulted in physical harm to another person."

[44] Sections 9(3) to 9(12) (inclusive) of the *Penalties and Sentences Act* also set out numerous matters that a court may have regard to. In short, there are many matters which a sentencing judge ought to have regard to in determining an appropriate sentence. In order to meet the purpose set forth in s 9(1)(a) that a sentence must be just, and also in respect of s 9(1)(r) any other relevant circumstance, the courts attempt to achieve, as far as possible, relative consistency in sentencing.[19]

[45] The courts necessarily have regard to s 184(2) of the *Corrective Services Act* which provides that offenders are eligible for parole ordinarily after having served one-half of their sentence. Further, in order to reflect the substantial benefit to the community through pleas of guilty, and as a demonstration of remorse and encouragement of rehabilitation, quite often (but not always) offenders who plead guilty are, made eligible for parole after having served one-third of the sentence.[20]

[46] There is then further legislative intervention in special cases. The most prominent is the necessity to serve 80 per cent of any imposed sentence where the offender is convicted of a serious violence offence pursuant to Part 9A of the *Penalties and Sentences Act*. Again, the courts must be conscious of the parole release or eligibility dates in fashioning a sentence which is "just" in all the circumstances.

[47] Section 314A(5) falls into the same category as s 161A and s 161 of the *Penalties and Sentences Act*. That is, where there is a statutory intervention requiring an offender to serve at least 80 per cent of any imposed sentence. Depending upon the facts, the head sentence imposed for a s 314A offence may be ameliorated because of the requirement for the prisoner to have served 80 per cent of his sentence. If

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19 *Wong v The Queen* (2001) 207 CLR 584 at 591 per Gleeson J.

20 See *R v Tran; ex parte Attorney-General* [2018] QCA 22 at [41] – [42].

there was a failure to ameliorate the sentence, that may result in an improper sentence as the sentence would be, in all the circumstances, "unjust".

[48] Sentencing is an intensely factual process and this may be demonstrated by head sentences in *Mischewski* and *Renata* of nine and a half years in comparison to *Mayot* of six years and two months. Factually, as demonstrated above, *Mischewski* and *Renata* involve a greater criminality and hence a longer sentence of nine and a half years. *Mayot* is factually closer.

[49] It can be observed that the sentencing judge in sentencing the applicant to six and a half years reduced an appropriate manslaughter sentence of eight years by approximately 20 per cent.

[50] It may be, as is demonstrated by the sentences in *Mischewski* and *Renata*, that there ought to be no discount from a putative manslaughter sentence at all. In *Mayot*, an offer by *Mayot* to plead guilty to manslaughter was rejected by the Crown, and so Mr Mayot pleaded guilty to the 314A offence, the subject of the indictment.

[51] The respondent urges that as s 314A is a new and "distinct offence with its own sentencing requirements", that "sentences imposed in broadly comparable circumstances for manslaughter… should be of no more than broad assistance." This submission ought to be accepted. As Gotterson JA (with whom Philippides JA and Henry J agreed) said in *Renata*[21]:

> "[48] It follows, in my view, that sentences for manslaughter have, and are intended to have, a relevance for sentencing under s 314A. At the risk of stating the obvious, it is only manslaughter cases that are factually similar to the s 314A offence at hand that could have a potential relevance in this regard."

[52] The paramount principle, as reflected by the sentencing judge, is contained in s 9 of the *Penalties and Sentences Act*, namely that punishment must be "just in all the circumstances". Certainly a relevant circumstance is whether the accused did actually foresee or it ought to have been objectively reasonably foreseeable that death may result from his criminal act. It may be accepted as an important matter for sentence, however it is by no means the only matter. After considering all of the relevant facts in detail, the primary judge concluded "you deserve to be punished to a similar extent to Mr [Mayot], who was taken to have foreseen the consequences of striking someone to the head but who pleaded guilty."[22]

[53] A significant difference, however, is as recorded by the primary judge, that Mayot pleaded guilty. A plea of guilty ordinarily affords a substantial discount. Mayot was sentenced to six years and two months. In those circumstances, the applicant's submission that his sentence is manifestly excessive when compared to Mayot must be rejected.

[54] An important part of the applicant's submission is the effect of the 80 per cent rule imposed by s 314A(5) rendering the effect of his sentence as "unjust", i.e. 80 per cent of six and a half years being a much longer sentence than 50 per cent of seven to eight years.

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21 *Renata* (supra) at [48].

22 AB 64/45.

[55] Apart from the error in suggesting that s 314A offence is a less serious offence than manslaughter, the effect of the applicant's submission is to urge upon the court to judicially ignore the 80 per cent rule imposed by s 314A(5). That is not a permissible approach.

[56] If a sentence is to be lessened, taking into account and bearing in mind the 80 per cent rule imposed by s 314A(5) (or s 182 of the *Corrective Services Act* 2006 (Qld)), then it can only be done on the proper basis and with reference to important facts relevant to the sentence under consideration.

[57] The sentencing judge's decision accords with the correct application of s 314A of the *Criminal Code* and s 9 of the *Penalties and Sentences Act* to the facts and circumstances of the applicant's offending.

[58] The applicant has not demonstrated that the sentence is manifestly excessive.

[59] The application is refused.