SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Malley* [2019] QCA 130
PARTIES:	**R** **v** **O'MALLEY, Nathan Rodney** (applicant)
FILE NO/S:	CA No 242 of 2018 SC No 627 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 30 August 2018 (Boddice J)
DELIVERED ON:	28 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2019
JUDGES:	Gotterson and McMurdo JJA and Bradley J
ORDERS:	**1. The applicant is granted leave to amend his application to add an additional ground of appeal.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – OTHER MATTERS – where the applicant pleaded guilty to one count of manslaughter as a domestic violence offence – where the applicant was sentenced to 11 years imprisonment and the conviction was declared to be a domestic violence offence and a serious violent offence – where the applicant contends that the learned sentencing judge erred in finding that the applicant's post-offence conduct demonstrated a complete disregard for the deceased and did not demonstrate remorse or concern for the deceased – whether the learned sentencing judge's finding to this effect was open on the material put before the Court – whether the sentencing discretion ought to be exercised afresh – whether the sentence imposed was manifestly excessive *Criminal Code* (Qld), s 303(1) *Channon v The Queen* (1978) 33 FLR 433; [1978] FCA 16, cited *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37,

cited
R v Baggott [2000] QCA 153, considered
R v DeSalvo (2002) 127 A Crim R 229; [2002] QCA 63, considered
R v Harold [2011] QCA 99, considered
R v Heazlewood [2018] QSC 112, considered
R v Hutchinson [2018] 3 Qd R 505; [2018] QCA 29, considered
R v Major; Ex parte Attorney-General (Qld) [2012] 1 Qd R 465; [2011] QCA 210, cited
R v Murray [2012] QCA 68, considered
R v Pringle; Ex parte Attorney-General (Qld) [2012] QCA 223, considered
R v Sebo; Ex parte Attorney-General (Qld) (2007) 179 A Crim R 24; [2007] QCA 426, considered
R v Strbak [2019] QCA 42, cited
R v West [2011] QCA 76, considered

COUNSEL: S Robb for the applicant (pro bono)
M B Lehane for the respondent

SOLICITORS: Roberts & Kane Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Bradley J and with the reasons given by his Honour.

[2] **McMURDO JA:** I agree with Bradley J.

[3] **BRADLEY J:** On 4 May 2018 in the Supreme Court at Brisbane, the applicant, Nathan Rodney O'Malley, pleaded guilty to an offence against s 303(1) of the *Criminal Code* (Qld). He had been charged with manslaughter by unlawfully killing Olivia Tung at Eight Mile Plains on or about 17 March 2016. The offence was charged as a domestic violence offence.

[4] On 30 August 2018, the applicant was sentenced to a term of imprisonment of 11 years. As well, a number of declarations were made: that the conviction was of a domestic violence offence; that the conviction was of a serious violent offence; and that a period of some 877 days of pre-sentence custody was deemed time served under the sentence.

[5] On 19 September 2018, the applicant filed an application for leave to appeal to this court against his sentence. The stated ground of appeal was that the sentence is manifestly excessive.

[6] The application for leave was heard on 15 March 2019. At the conclusion of the hearing, the court indicated that it would entertain an application by the applicant to add an additional ground of appeal, which arose out of the oral submissions that had been made. Such an application and supplementary written submissions in support of it were filed on 22 March 2019. The respondent's supplementary submissions

were filed on 29 March 2019. The fate of that application is considered later in these reasons.

The deceased and the circumstances of the offending

[7] A document prepared by the Crown, entitled "Agreed Statement of Facts", was tendered at the sentence hearing and accepted by the applicant's counsel as agreed.

[8] At the time of her death, the deceased was in a domestic relationship of some 18 months standing with the applicant. She was then 41 years old and of slight build. Her medical records show she weighed 57 kilograms in April 2015. In March 2016, her post-mortem weight was only 45 kilograms. The applicant was then 37 years old and of larger build.

[9] The applicant and the deceased moved from New South Wales to a caravan park at Eight Mile Plains in June 2015. Neither was employed. They were dependent upon the receipt of government welfare.

[10] The deceased lost a significant amount of weight (about 20 per cent of her, already slight, weight) in the 12 months before her death. In her final three months, she had been seen with multiple bruises on her face. In the weeks leading up to her death, she took a number of loans from Cash Convertors without redeeming her pledged property. One week before her death, uncharacteristically, she pawned her mobile phone.

[11] On the evening of Wednesday, 16 March 2016, ambulance officers received a call informing them that the deceased had suffered a fall at home and was unconscious. They attended the residence at 8.23 pm. They found her in her bedroom naked from the waist down with the applicant crouching above her and performing CPR. He appeared distressed and told them that she had fallen off the toilet shortly before he had called them. He also said that the deceased had fallen in the shower the night before.

[12] The ambulance officers attempted to revive the deceased, without success. She was transported to Princess Alexandra Hospital, where she died early the following morning. At the hospital, the applicant gave to police and to hospital staff the same account of what had happened as he had given to the ambulance officers. He said he felt guilty because he had not taken the deceased to the hospital sooner.

[13] Records of the applicant's mobile phone showed that he conducted six internet searches between 7.11 pm and 8.03 pm on 16 March 2016. The searches concerned the possibility of using an asthma machine with broken ribs, Ventolin treatment for broken ribs, and the taking of morphine, Nurofen and ibuprofen.

[14] A post-mortem of the deceased's body was conducted on 18 March 2016. The pathologist determined that the most likely cause of death was multiple injuries including multiple rib fractures with associated lung lacerations, pneumothorax and subcutaneous emphysema, liver lacerations with associated severe haemorrhages in the abdomen, haemorrhage around the right kidney and right adrenal gland, and fractures of the nose. Significantly, substantial injuries to certain ribs and to the liver were inconsistent with a fall in a shower. They more likely resulted from a focused and severe force, such as kicking or stomping.

[15] The deceased was also found to have potentially lethal levels of morphine in her system. They had a significant contribution to her death. As well, she had a number of bruises on her face and body which were not relevant as causes of death.

[16] From the post-mortem examination on 18 March 2016, the more recent injuries to the deceased appeared to be approximately three days old. The agreed facts include the statement, "It cannot be excluded that there was more than one episode of recent trauma."

[17] During the period between the assault and the calling of the ambulance, the deceased was enduring one fractured left rib and six fractured right ribs and four associated lacerations to her liver, one running the full vertical length of the liver and the others ranging from 25 mm to 110 mm. From these, and from injuries to her right kidney and right adrenal gland, she was haemorrhaging internally.

[18] The injuries to her ribs and liver were more likely to be the primary cause of death associated with a very large amount of blood loss, which could have accounted for a significant proportion of her total blood volume.

[19] The applicant was detained by hospital staff under an Emergency Examination Order. He was placed on a mental health watch until 29 March 2016.

[20] Police formally interviewed the applicant on 29 March 2016. A "walk through" of the crime scene was conducted during which the applicant acted out the deceased's falls in the shower and from the toilet. He told police that the deceased was clumsy, and had fallen in the shower the night before her death, bruising her back. He said she asked him to give her morphine from a quantity prescribed for treatment of her late husband's cancer. He told police he gave the deceased four doses, each of a quarter of a tablespoon, over 24 hours. During that time, he said he also gave the deceased Panadol, ibuprofen and Nurofen.

[21] The applicant disagreed with the pathology report provided to police. He maintained that the injuries could have come only from the falls he had described. He adhered to that version in an account he gave to an undercover police officer after he was taken into custody on 6 April 2016.

[22] The applicant's mobile phone records, summarised in the Agreed Statement of Facts, demonstrate he knew the deceased had broken ribs, at the latest, by 7.12 pm on 16 March 2016, when he searched the internet for the answer to the question "can I use asthma machine if I have broken ribs". His enquiries about morphine were not until 8.02 pm, when he searched for "morphine nurofen", and at 8.03 pm, when he searched for "Can you take Ibuprofen and morphine together".

[23] It was only after this time that the applicant called for an ambulance, telling the operator that the deceased was unconscious.

[24] The Agreed Statement of Facts document also recorded that, notwithstanding the version that the applicant had first given, he was to be sentenced on the following agreed basis:

> "(a) The defendant unlawfully assaulted the deceased causing the injuries which caused her death. While not intending to cause Ms Tung grievous bodily harm, the defendant was intending to cause her serious harm.

(b) The defendant kneed her to the stomach and to her back while she was standing, but the final act of kneeing her to her back occurred in a way that led to the deceased falling to the ground with the defendant's knee then impacting into her back whilst she was on the ground.

(c) During the assault the defendant also caused the head and facial injuries on Ms Tung, as observed by the forensic pathologist, including the fracture to her nose.

(d) The defendant had also assaulted the deceased in the past as evidenced by the facial bruising previously observed by witnesses and the healing fractures of the ribs, sternum and [lumbar] spine. This evidence is relevant not to elevate the appropriate penalty for the offence of manslaughter but to demonstrate this was not an isolated instance of violence. The evidence is also relevant to demonstrate the strength of the Crown case in respect to the offence of manslaughter."

The applicant's antecedents and criminal history

[25] The applicant has an Aboriginal heritage. He was 37 at the time of his offending and 40 years old at sentence. He had no Queensland criminal history.

[26] The applicant did have a history of criminal offending in New South Wales. It included convictions for break and enter in 2004 and destruction of property in 2011. More relevantly, the applicant was convicted of offences against his former partner, the mother of his two children, committed in early February 2015. These were for use of a carriage service to menace, harass or offend, for destroy or damage property, for common assault, and for contravention of a prohibition or restriction in an apprehended violence order (domestic). The applicant had approached his former partner's residence unannounced, punched her in the side of the head and destroyed her phone. He was convicted of a further contravention of the apprehended violence order committed on 27 March 2015.

[27] A report of a psychologist, Ms Wendy Bryant, was tendered at the sentence hearing. She noted that the applicant "reported feelings of despair and anguish knowing his actions have caused the loss of his partner." The applicant said that he felt "extreme remorse and guilt" over his acts towards the deceased and "repeatedly expressed remorse for his offending behaviour during the assessment." He did, however, accuse the deceased of often lying to him. In this way, he blamed the deceased for his increasingly intolerant behaviour towards her, for losing his temper, striking her and then physically assaulting her.

[28] The applicant described to Ms Bryant his socially deprived upbringing. He has older siblings: a brother, three maternal half-siblings and two paternal half-sisters. A paternal half-brother died in infancy. He lived with his father and step-mother in Wollongong until age 16, when he moved to live with his half-sister in Sydney. He described his father as a professional and serial criminal, who spent periods of time in gaol. His step-mother was emotionally abusive and the reason he left home. His mother was not involved in his care due to very heavy alcohol dependency and abuse. He would visit his mother every second week-end during childhood. He said she rarely displayed any overt physical affection towards him.

[29] Ms Bryant noted that, if the applicant was born three months premature, as he told her, then the issue of foetal alcohol syndrome may need to be considered along with the possibility of any cognitive or developmental difficulties emerging as a result of his premature birth.

[30] He also said he endured sexual fondling for several weeks at age 11 by a more distant male relative and still experiences intrusive memories of the experience.

[31] He completed year nine, but was expelled from school in year 10 for not attending classes and disruptive behaviour. Since leaving school, he has worked mainly in unskilled manual work. His longest employment was four years as a grounds keeper in Sydney in his late teens, early 20s. He has had long periods of unemployment. He last worked as a casual labourer in 2014, loading and unloading containers.

[32] Ms Bryant interpreted the applicant's Shipley-2 assessments as indicative of extremely low word knowledge and of verbal reasoning in the extremely low range. The results suggest the applicant's intellectual level likely falls in the intellectually disabled range. According to Ms Bryant, this level of intellectual ability would increase the likelihood of the applicant engaging in impulsive behaviour. He reported chronic feelings of rage and resentment towards his former partner and engaging in emotionally dysregulated behaviour where he eventually loses his temper and explodes in a fit of rage.

[33] Prior to this offence, the applicant had sought help from general practitioners. He was prescribed medications for his depression. He was referred to and consulted with psychologists and, on one occasion, a psychiatrist. After the offence, he was hospitalised for about two weeks, presenting with suicidal urges. He was discharged with a diagnosis of adjustment disorder, and with a previous or long-term diagnosis of depression and antisocial personality disorder. In the two years after the offence he received treatment for chronic mental health problems through Mental Health & Specialist Services at The Park Centre for Mental Health and the Prison Mental Health Service. In prison, he has been assessed and treated by a psychiatrist. He is on medication and sees a psychologist once a month.

[34] Ms Bryant's report identified that the applicant requires continued psychiatric treatment, and psychological treatment to address his mental health and to develop anger management skills. Ms Bryant also recommended comprehensive intellectual, neuropsychological and academic assessment to better understand the applicant's ability to deal with complex situations and emotional states. Ms Bryant concluded that his risk of reoffending is likely to remain at a moderate to high level for the foreseeable future without such measures being taken. Ms Bryant also observed that, once released from prison, the applicant would require intense involvement with a vocational rehabilitation and lifestyle support service and ongoing supervision to ensure compliance with appropriate treatment and engagement with these services.

[35] The applicant moved to Queensland in 2015, he said, to get away from his former partner. In doing so he chose to walk away from his parenting responsibilities to his two sons, who would have been aged seven and 10 at that time, and to four older step-children. At the date of this offence, his only current relationship was with the deceased. He has no family network in Queensland and no close friends.

[36] Ms Bryant observed that the applicant's dysfunctional and abusive upbringing is likely to have influenced his offending behaviour significantly. He has a need for psychiatric treatment. As noted above, it is Ms Bryant's opinion that unless that need is addressed, his risk of reoffending will remain at a moderate to high level for the foreseeable future.

The sentencing remarks

[37] The learned sentencing judge accepted that the applicant's plea represented cooperation with the administration of justice for which he should receive some benefit in the sentence.

[38] The offence, his Honour said, was serious. The applicant intended to cause the deceased serious harm by kneeing her in the stomach and in her back while she was standing, bringing her to the ground where his knee impacted her back. His actions caused significant injury to her liver. There were head and facial injuries. This was not the first time he had harmed the deceased physically.

[39] The learned sentencing judge noted that the applicant had sought to treat the injuries by administering morphine and other drugs, but the levels at which they were given had potentially contributed to her death. The principal cause of death was, however, the very large amount of blood loss from the lacerations when her broken ribs impacted her liver.

[40] His Honour then turned to the topic of remorse. Since his findings in respect of that topic are the subject of the proposed additional ground of appeal, I set them out in full. His Honour said:

> "Whilst it may be said that that conduct involved concern on your part for your partner, I do not accept that that is the case. Your conduct, in terms of the lies you told police, indicates that behaviour was consistent with your not wanting people to know what you had done to your partner and your endeavours to try and repair the injuries without others having to be involved.
>
> I accept you did ultimately call for assistance, but by that stage the damage had been done. In my view, your conduct properly is to be described as involving a brutal, unprovoked attack on a slight, vulnerable woman. Your actions then and subsequently demonstrated a complete disregard for her. It also indicated a lack of remorse for what you had done. Any remorse exhibited by you at that time was for your predicament and you alone."

[41] Later in his remarks, the learned sentencing judge returned to this topic. He added:

> "Your conduct on that day, including your conduct subsequently when you told lies to the police and sought to blame the injuries on your partner's own actions, is consistent with a belief that you have an entitlement to treat your partner as you see fit, and that includes with a total lack of dignity and respect.
>
> I accept you exhibited remorse following your actions. However, I do not accept that remorse was directed towards your partner. The remorse was for the position you found yourself in and you used every

> endeavour to try and ensure you were not held accountable for your actions.
>
> Of concern, the contents of the psychologist's report continues to suggest that any remorse you now have is not accompanied by a realistic insight into the inappropriateness of your conduct towards your partner, or a genuine recognition that it was your actions and your actions alone that led to your taking your partner's life."

[42] His Honour noted that in a letter written by the applicant to him, the applicant indicated remorse. He said, however, that he gave "great weight" to what Ms Bryant had said "in terms of the insight that you continue to have difficulty in exhibiting in relation to your conduct being the cause of this death".

[43] The learned sentencing judge found, as an aggravating feature, that the death occurred in the context of a domestic violence relationship.

[44] His Honour had regard to the applicant's extremely dysfunctional upbringing. He accepted that the applicant had been left with feelings of rage and resentment for which counselling and treatment were needed, and that he had a chronic depressed mood and anxiety symptoms.

[45] The learned sentencing judge accepted that the applicant's assessed intellectual level increased the likelihood of his engaging in impulsive behaviour and reduced ability to deal with the demands of interpersonal relationships. It did not, however, provide an explanation for the brutal assault on the deceased, he said.

[46] His Honour noted that the sentence he was to impose needed to provide general and personal deterrence and have a structure that supported and encouraged the applicant's prospects of rehabilitation. He rejected a submission for a sentence of less than 10 years imprisonment as not properly reflecting the criminality of the offending or the deterrence appropriate for the offending. His Honour considered that, on the other hand, a sentence of about 14 years imprisonment would be excessive given the plea of guilty.

[47] The learned sentencing judge concluded:

> "The sentence must properly reflect the fact that you took the life of your partner through an act of violence intended to cause her serious harm. It must also reflect the fact that, having caused her that harm, you did not seek immediate medical assistance. Instead you engaged in medicating her with morphine at levels consistent with ultimately a drug toxicity and thereafter told lies in an endeavour to cover up your responsibility for her death.
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> Balancing all of the matters and having regard particularly to the matters in the psychologist's report, I am satisfied the appropriate sentence is 11 years imprisonment."

Application to add ground of appeal

[48] The applicant wishes to add an additional ground of appeal: that the learned sentencing judge erred in finding that his post-offence conduct demonstrated a complete disregard for the deceased and did not demonstrate remorse or concern for the

deceased. In the above passages extracted from the sentencing remarks, his Honour did make such findings.

Applicant's submissions

[49] The applicant submitted that these findings are inferential in nature and that the evidence did not permit inferences in those terms. In developing the submission, counsel for the applicant noted that, on the agreed facts, the applicant gave the deceased morphine at her request. There was no information before the court on her tolerance to morphine, which was relevant to the toxicity for her of the level administered.

[50] Further, the applicant submitted, the impugned inferential findings "did not account for" the following matters:

(a) that the applicant stayed with the deceased, administered analgesics at her request on his account, performed CPR and called the Queensland Ambulance Service ("QAS");

(b) that while the deceased must have deteriorated in the time between the assaults and her falling unconscious, the applicant had no skills relevant to recognising deterioration in an unwell person;

(c) that the applicant's contemporaneous internet searches reflected a concern to assist her by not combining incompatible analgesics;

(d) that the applicant's diminished intellectual capacity and enraged state did not bespeak calculation or sophistication on his part;

(e) that the applicant's lies were apt to reflect a desire not to be found culpable for offending against the deceased rather than to demonstrate a complete disregard for her *post* the offending; and

(f) that, by contrast, it would have reflected a disregard for the deceased had the applicant left her on her own or not contacted the QAS.

Respondent's submissions

[51] The respondent accepted that a failure to have regard to a defendant's remorse could be a failure to consider a material matter. However, the respondent contended that the learned sentencing judge did take remorse into account – to the extent that it was established by the material. The respondent submitted that his Honour's findings about the extent of remorse were open on that evidence.

[52] The respondent noted that the applicant's statements to police about administering medications to the deceased were included in the Agreed Statement of Facts not as true facts, but only as part of the record of the (mostly false) reports the applicant made about the events that led to her death.

[53] The respondent contended that the applicant's general level of sophistication was irrelevant and that, relevantly, he was intellectually able to set out to deceive the police and hospital staff by attributing the deceased's injuries to her own clumsiness.

[54] The fact the applicant could have behaved more reprehensibly than he did after the assault, the respondent also submitted, did not require a conclusion that his conduct was indicative of genuine remorse for the deceased.

Disposition of the additional ground application

[55] In the context of a defendant's application for leave to appeal against sentence, differing views have been expressed about the extent to which the court will interfere with a learned sentencing judge's finding of fact, short of concluding that the finding was not reasonably open or was produced by a legal error.[1] In the present matter, as in others, the different views have no effect on the result.[2]

[56] The following matters are plain from the Agreed Statement of Facts.

(a) The period between the applicant's assault that caused the deceased's most recent injuries and the applicant calling the ambulance was about 24 hours, being both the applicant's estimate of the time he treated the deceased with morphine and the approximate time indicated by the post-mortem examination.

(b) During that period, the applicant administered morphine and other pain relieving medication, with the aid of some information from the internet searches.

(c) Despite his diminished intellectual capacity and any lack of skills relevant to recognising deterioration in the deceased, the internet searches confirm that the applicant knew the deceased had broken ribs and was in need of serious pain relief.

(d) He also knew about and was able to call the ambulance service to assist the deceased, which he ultimately did.

(e) The applicant did not seek any professional medical assistance for the deceased before he called the ambulance, which he said was at the time she lost consciousness.

(f) The deceased was unconscious when the ambulance officers arrived.

(g) The applicant had assaulted the deceased in the past, as evidenced by bruising to her nose and lower lip observed by others before the assault, the healing fractures of her ribs, sternum and lumbar spine, and the healing wounds and bruising on her shoulders and upper back, all noted post-mortem.[3]

(h) The deceased had survived the earlier assaults and had not reported them to the police.

[57] A logical inference from the agreed facts is that the applicant called the ambulance when he feared she would die, likely because he noticed she had lost consciousness. Before then, he may have assumed or hoped she would recover, as she had from earlier assaults.

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1 See the discussion in *R v Strbak* [2019] QCA 42 at [14]-[27].

2 *Turnbull v Chief Executive of the Office of Environment and Heritage* (2015) 213 LGERA 220 at 225 [31], quoted in *Strbak* at [28].

3 The report of Ms Bryant noted the applicant had disclosed earlier incidents when he shook the deceased and when he hit her.

[58] Whether before he called the ambulance or shortly after they arrived, the applicant appreciated that professional medical assistance for the deceased brought with it enquiries about the cause of her injuries. He confected an exculpatory story, which he then told a number of times.

[59] It follows that the learned sentencing judge did not err in concluding that the applicant's conduct indicated behaviour "consistent with [the applicant] not wanting people to know what [he] had done to [his] partner" and about his "endeavours to try and repair the injuries without others having to be involved." I would not interfere with those matters, whether they are characterised as a summary of the agreed facts or as findings of fact based on the agreed facts.

[60] However, the agreed facts were not sufficient to support a conclusion that the applicant's actions, subsequent to the most recent assault, indicated the same complete disregard for the deceased as was indicated by the assault itself. Nor was there enough to conclude the applicant's subsequent conduct indicated a lack of remorse for what he had done or that any remorse he exhibited was for his own predicament and for him alone. These conclusions were not agreed facts. Findings to such effect were not open on the limited material before the sentencing court. It follows that the learned sentencing judge was mistaken as to the facts in this respect.

[61] The applicant's remorse, or lack of it, was a material consideration for sentencing, in particular for an offence that involved the use of violence and resulted in physical harm to another person.[4] The learned sentencing judge's conclusion about the applicant's complete lack of remorse subsequent to the assault was a consideration in his Honour coming to the appropriate penalty.

[62] Where there has been a mistake about a material consideration, this court does not assess whether, and to what degree, the error influenced the outcome. Rather, it is the duty of this court to exercise the discretion afresh, taking into account all relevant matters, the purposes of sentencing and the statutory guidelines, unless, in a separate and independent exercise of its discretion, the court concludes that no different sentence should be imposed.[5]

[63] In order to determine the outcome of the application for leave to appeal, it is necessary to consider the sentence that would be imposed on the applicant for this offending if the discretion were to be exercised afresh.

Sentencing considerations

[64] The purposes for which a sentence may be imposed and the matters that must be considered in the exercise of sentencing discretion are well-defined,[6] and well-understood.

[65] The relevant circumstances of the applicant's offending are set out at [7] to [23] above. The agreed basis for sentence is noted at [24] above. In short, the applicant assaulted the deceased intending to cause her serious harm and, in doing so, inflicted the injuries which caused her death.

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4 *Penalties and Sentences Act* 1992 (Qld) (**PSA**), s 9(3)(i).
5 *Kentwell v The Queen* (2014) 252 CLR 601 at 615 [35], 617-618 [42].
6 PSA, s 9.

[66] The maximum sentence for manslaughter is imprisonment for life.[7] This invites a comparison between the applicant's offending and the worst possible case of manslaughter, for which life imprisonment might be imposed.

[67] The applicant's offence is serious. The violence used in the assault is described at [38] above. As the learned sentencing judge observed, it was a brutal and unprovoked attack on a slight, vulnerable woman. It caused the ultimately fatal injuries described at [16] above. It also caused or led to a number of lesser fractures, bruises and haemorrhages identified post-mortem. The applicant's use of morphine and other pain-killers indicates the severity of the pain caused by the assault. The deceased endured the fatal injuries for about 24 hours before the applicant called for any trained medical attention. During this time, she had only the internet-aided ministrations of the applicant. By the time the ambulance arrived, she was unconscious. She was taken to hospital in that condition, where she died.

[68] The applicant is entirely to blame for the offending. He did not act in response to any recognisable provocation or threat. He was under no delusion or mistake.

[69] In sentencing the applicant, the court is obliged to treat the fact that this is a domestic violence offence as an aggravating factor.[8] No party contended it was not reasonable to do so. The deceased's dependence on the applicant may be gauged by the fact that the couple had no friends, family or associates in Queensland; that they kept to themselves; and that neither was employed.

[70] Domestic violence offences, including those resulting in the death of a partner, are regrettably prevalent. McMurdo P observed in *R v Major; Ex parte Attorney-General (Qld)*:

> "Deterrence, both personal and general, is an important factor in sentencing in domestic violence cases. So too is denunciation. The community through the courts seeks sentences which show the public disapprobation of such conduct. The effects of domestic violence go beyond the trauma suffered by victims, survivors and their children to their extended families, and friends. Domestic violence also detrimentally affects the wider community, causing lost economic productivity and added financial strain to community funded social security and health systems."[9]

[71] This sentence is to be imposed for the specific offence of manslaughter, but it is relevant to observe that the assault on the deceased was not an uncharacteristic aberration on the part of the applicant. The applicant has a relevant previous conviction, in New South Wales, for assaulting a former partner in contravention of an apprehended violence order made for her protection. He had assaulted the deceased on earlier occasions, without being brought to the attention of the authorities.

[72] The applicant's character, age and intellectual capacity are summarised at [25] to [36], [44] and [45] above.

[73] The applicant's intellectual disability, his deprived childhood and his exposure to emotional abuse and alcohol abuse may help explain his recourse to extreme

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7 *Criminal Code*, s 310(1).
8 PSA, s 9(10A).
9 [2012] 1 Qd R 465 at 481 [53].

violence towards the deceased when angry and enraged. His moral culpability for a lack of impulse control may be reduced on that account. However, as the High Court has noted, the same inability to control a violent response may increase the importance of specific deterrence and of protecting the community from the offender.[10]

[74] In *Channon v The Queen*, the Full Court of the Federal Court observed that:

> "An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem on one view to lead towards a lenient sentence, and on another to a sentence which is severe. That is not an unusual phenomenon in sentencing, where the court must fashion a sentence which either reconciles or balances the various objectives of sentencing, sometimes giving emphasis to one of the objectives of sentencing, sometimes giving emphasis to another."[11]

[75] Subsequent to this offending, the applicant has shown remorse for the enormity of his wrongdoing, which is summarised at [27] above.

[76] Finally, it is notable that the applicant pleaded guilty when the manslaughter indictment was presented. By this timely plea, he cooperated with the administration of justice, saved public resources and spared potential witnesses the renewed trauma of giving evidence of what they observed on 16 March 2016.

Sentences imposed in other cases

[77] Past decisions in other cases are not determinative of the sentence in this case and they do not set a "range" of permissible sentences.[12] However, they may assist in understanding how the various relevant factors should be treated in deciding the sentence.

[78] In their written and oral submissions, counsel for the applicant and for the respondent dealt with the authorities which had been put to the learned sentencing judge.

[79] In *R v DeSalvo* (2002) 127 A Crim R 229, an offender was sentenced to eight years imprisonment for manslaughter, unlawfully killing an associate who spoke to him aggressively and threateningly in the course of a drug deal meeting. On appeal, the making of a serious violent offence declaration was successfully challenged. The sentence was set aside and, on the re-exercise of the sentencing discretion, the offender was sentenced to nine years imprisonment.

[80] In *R v Murray* [2012] QCA 68, the offender was convicted after trial of manslaughter. It was not a domestic violence offence. He had intended to kill his workmate with hammer blows to the head, but due to provocation, was criminally responsible only for manslaughter. He readily admitted to police to delivering the fatal blows and made relevant admissions during his trial. He had prior drug-related and breaking,

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10 *Bugmy v The Queen* (2013) 249 CLR 571 at 595 [44].
11 (1978) 33 FLR 433 at 436-437.
12 *R v Goodwin; ex parte Attorney-General (Qld)* [2014] QCA 345 at [5].

entering and stealing convictions. His sentence of nine years imprisonment was not found to be manifestly excessive.

[81] In *R v Baggott* [2000] QCA 153, the offender was convicted after trial and sentenced to 11 years imprisonment. He had the aggravating circumstance that he disposed of his partner's body in such a way that it was not possible to determine the cause of death. The sentence was pronounced on the basis of the implicit jury finding that he did not intend to kill or do grievous bodily harm.

[82] In *R v Sebo; Ex parte Attorney-General (Qld)* [2007] QCA 426, the offender was convicted of manslaughter by the jury after a trial for murder and was sentenced to 10 years imprisonment. In response to verbal provocation, he had struck his girlfriend repeatedly with a steering wheel lock, intending to cause grievous bodily harm. He took her to a hospital, where he denied causing the injuries. Two days later, she died. The offender had offered a timely plea of guilty to the offence of manslaughter, but the Crown had proceeded to a trial on the murder count. The offender had co-operated in the conduct of the trial, which had focussed on the defence of provocation.

[83] In *R v Pringle; Ex parte Attorney-General (Qld)* [2012] QCA 223, the offender strangled his wife until she was unconscious, then killed her by stabbing her twice in the chest. He was sentenced on the basis that he intended to kill, but was of diminished responsibility due to a delusional disorder. His criminal culpability was far short of murder. He saw his attack on the deceased as a desperate measure of self-defence, but was not totally deprived of the capacity to know the stabbing was wrong, as the deceased was by then unconscious. The offender had some relatively minor criminal history that did not involve violence. He was sentenced to nine years imprisonment, without any early recommendation for parole.

[84] In *R v Hutchinson* [2018] QCA 29, the offender was convicted after trial and sentenced to 14 years for manslaughter. He also disposed of his wife's body, which was never found. He was sentenced on the basis that his conduct showed an extreme lack of remorse.

[85] The applicant also relied on the decision in *R v Heazlewood* [2018] QSC 112, where the offender pleaded guilty to manslaughter, interfering with a corpse and to other, unrelated, offences. The count of manslaughter involved the killing of the offender's mother in the course of a struggle after she confronted him with a knife. After the struggle, the offender moved his mother's body to a bedroom, not caring whether she was alive or dead. A day or so later, ascertaining that she had died, the offender took the body to an isolated location and buried it with lime. He lied about his mother's movements for many years. About six years later, when he became a suspect in police investigations, the offender confessed to having killed his mother. He had no prior convictions for violent offences. He was sentenced to eight years imprisonment for manslaughter and 18 months for interference with a corpse, to be served cumulatively. He was sentenced to 18 months imprisonment for the unrelated drug offences, also to be served cumulatively with the manslaughter and interference sentences. There was no appeal.

[86] The respondent identified two further decisions.

[87] *R v West* [2011] QCA 76 involved a brutal and vicious attack on a man the offender believed was a paedophile. The offender proceeded to trial and was convicted of

manslaughter, his intent being placed in doubt by reason of intoxication. He had a minor criminal history. On appeal, the sentence of 15 years imprisonment was reduced to 13 years.

[88] In *R v Harold* [2011] QCA 99, the offender was convicted of manslaughter, the jury accepting he lacked the requisite intent for murder due to intoxication. The offence involved a prolonged knife attack on the offender's partner. Taking into account two other assaults occasioning bodily harm on the same partner, the sentence was 14 years imprisonment. The court noted that, absent those other assaults, a sentence of 12 years imprisonment would have been imposed.

Conclusions on sentence

[89] In each of *DeSalvo*, *Murray*, *West* and *Heazlewood*, the court was not considering a domestic violence offence. In *DeSalvo*, *Murray* and *Heazlewood*, the offending was provoked. These distinguishing features limit the assistance that might be gained from those decisions in applying the relevant factors for the applicant's sentence.

[90] In *Baggott*, *Harold* and *Hutchinson*, on the defendants' appeals, the respective sentences of 11, 12 (considering manslaughter alone) and 14 years were not found to be manifestly excessive. In *Sebo* and *Pringle*, on appeals by the Attorney-General, the respective sentences of 10 years and nine years were not found to be manifestly inadequate.

[91] The applicant had a relevant prior criminal history, including convictions for prior episodes of domestic violence. This distinguishes him from the offender in each of *Sebo*, *Baggott*, *Pringle* and *Hutchinson*. This aside, the seriousness of the applicant's offending – in its brutality and in respect of the vulnerability of the victim – is similar to that in *Sebo*. Although the applicant was about 10 years older than Mr Sebo, he was of much diminished intellectual level.

[92] The applicant's offending is more serious than that in *Pringle*, because there is no basis for concluding that the applicant's mental health issues or intellectual disability caused him to believe he was acting in self-defence. It is less serious than the offending in *Baggott* and *Hutchinson*, because the applicant did not attempt to dispose of his victim's body so as to conceal his offending. His attempts at concealment were limited to lying to the ambulance, hospital staff and police about what had occurred.

[93] In 2001, in *Baggott*, the court observed that a sentence of between eight and 11 years imprisonment was open. In 2007, in *Sebo*, the court concluded the sentence might have fallen between nine and 12 years without error. The former President's statement in *Major* in 2012, noted at [70] above, indicates the growing awareness of the need to deter, denounce and protect the community from domestic violence offences.

[94] The obligation to treat the fact that an offence is a domestic violence offence as an aggravating factor was made clear by the insertion of s 9(10A) of the *Penalties and Sentences Act*. That provision commenced on 5 May 2016 and applies to sentences imposed after that date. Save for *Hutchinson*, all of the above decisions concerning domestic violence offences involved sentences imposed before this legislative change. It follows that some care needs to be taken in considering the sentences imposed in those earlier decisions for offences involving domestic violence in the context of reconciling or balancing the various relevant aggravating and mitigating factors.

[95] Taking account of the seriousness of the offending manifested by the brutality of the applicant's assault and the relative defencelessness of the deceased, the applicant's remorse after the assault, his timely plea of guilty, his antecedents, his deprived social upbringing, his intellectual disability and the state of his mental health, and bearing in mind the need for some personal deterrence due to his past domestic violence offences and his moderate risk of reoffending, the related need for community protection, and the importance of denunciation of domestic violence offences causing death, I consider a sentence of 11 years imprisonment would punish the applicant in a way that is just in all the circumstances.

[96] If I were to exercise the discretion afresh, the sentence I would impose is no different from that imposed by the learned sentencing judge. It follows that the original sentence should stand as "the appropriate sentence for the offender and the offence."[13] In so far as the additional ground of appeal is considered, I would not grant leave to appeal.

Original ground of appeal

[97] I would also refuse leave to appeal on the originally stated ground that the sentence is manifestly excessive.

[98] Leaving aside the subject matter of the additional ground of appeal, I am not satisfied from the sentence imposed by the learned sentencing judge that there must have been some misapplication of principle in sentencing. In reaching this conclusion, I have had regard to the sentencing factors referred to in paragraphs [65] to [76] above and to the degree to which the sentence imposed for the applicant's offending differs from the sentences imposed in the cases considered at [77] to [95] above that are, to some extent, comparable.

Disposition of the applications and the appeal

[99] I would grant leave to amend the application to add the additional ground of appeal. I would refuse the applicant leave to appeal against sentence.

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13 *Kentwell* (2014) 252 CLR 601 at 618 [42].