# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Symss* [2020] QCA 17 |
| PARTIES: | **R**<br>**v**<br>**SYMSS, Shane Antoni**<br>(applicant) |
| FILE NO/S: | CA No 53 of 2019<br>DC No 2821 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane – Date of Sentence: 1 March 2019 (Clare SC DCJ) |
| DELIVERED ON: | 14 February 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 September 2019 |
| JUDGES: | Sofronoff P and Morrison and McMurdo JJA |
| ORDERS: | **1. Leave to appeal granted.**<br>**2. Appeal allowed.**<br>**3. The sentence imposed for counts 1, 2, 4 and 6 is set aside.**<br>**4. For counts 1, 2 and 4 the applicant is sentenced to imprisonment for a term of 10 years.**<br>**5. For count 6, the applicant is sentenced to imprisonment for a term of four years.**<br>**6. The applicant is eligible for parole on 1 March 2023.**<br>**7. The sentences for counts 5 and 7 are not disturbed.** |
| CATCHWORDS: | CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – TOTALITY – OFFENCES COMMITTED IN DIFFERENT JURISDICTIONS – where the applicant was convicted of seven serious offences including rape, indecent assault, breaking and entering into the house of a woman in the night-time with intent to commit an indictable offence, and stealing – where the offences were committed in 1996 in Queensland – where the applicant received a sentence of 16 years imprisonment to be served concurrently with parole eligibility after four years – where the applicant was previously convicted for various armed robberies and house breakings in Queensland between 1993 and 1994 – where the |

applicant committed various offences including unlawful use of a motor vehicle and trespass while on probation – where the applicant was previously convicted for burglary and theft offences in Victoria in 1998 while serving a three years suspended imprisonment sentence from Queensland – where the applicant was previously convicted for murder in New South Wales and sentenced to 22 years imprisonment – where the applicant remains in custody and has not been paroled – where the applicant has been transferred to serve the remainder of his New South Wales sentence in Queensland – where the applicant's sentence of 16 years imprisonment in Queensland is to be served after already serving a sentence of almost 20 years – where, in effect, the total imprisonment term to be served is 36 years with parole eligibility after 24 years –whether the principle of totality has been distorted by the mixed jurisdictional environment – whether the sentence is manifestly excessive

*Criminal Code* (Qld)
*Penalties and Sentences Act* 1992 (Qld), Part 9A

*Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited
*Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, cited
*R v Beck* [2005] VSCA 11, cited
*R v Coghlan* [1998] 2 Qd R 498; [1997] QCA 270, cited
*R v E, AD* (2005) 93 SASR 20; [2005] SASC 332, cited
*R v Henry* [2002] QCA 520, cited
*R v Jamieson* (1992) 60 A Crim R 68, cited
*R v Makary* [2019] 2 Qd R 528; [2018] QCA 258, cited
*R v Penniment* [1992] QCA 110, cited
*R v Rossi* (1988) 142 LSJS 451, cited
*R v Walkuski* [2010] SASC 146, cited
*Richards v The Queen* [2006] NSWCCA 262, cited
*Roffey v Western Australia* [2007] WASCA 246, cited

COUNSEL: S A Lynch for the applicant
J A Wooldridge for the respondent

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

[1] **SOFRONOFF P:** Between February 1993 and December 1994, the applicant committed five armed robberies with personal violence, three of which were in company, an attempted armed robbery and two house breakings. He was aged between 15 and 17 years at the time he committed these offences. He pleaded guilty on 4 September 1995. By then the applicant was 18 years old and he was sentenced as an adult. He was ordered to serve three years probation.

[2] Then, in January 1996 and in March 1996, when he was still only 18 years old, the applicant committed seven further offences. These were:

1. Breaking and entering into the house of a woman in the night-time with intent to commit an indictable offence – 11 January 1996;

2. Raping the same victim – 11 January 1996;

3. Unlawfully and indecently assaulting the same victim, including by penetrating her vagina with his fingers – 11 January 1996;

4. Raping the same victim again – 11 January 1996;

5. Stealing that victim's purse – 11 January 1996;

6. Breaking and entering the house of another woman in the night-time with intent to commit an indictable offence – 4 March 1996;

7. Indecently assaulting that victim – 4 March 1996.

[3] Later, he breached his probation again by committing some other offences and, as a result, he was sentenced to three years imprisonment but that sentence was immediately suspended for an operational period of three years. At that time it was not known that he had committed the serious offences referred to in paragraph [2].

[4] He was not charged with those offences at the time, which were committed during the period of probation.

[5] In 1998 the applicant moved to Victoria. In that State he committed burglary and theft offences for which he was sentenced to four months' imprisonment to be served by way of an intensive corrections order. These offences were committed during the period of the suspended sentence that had been imposed in Queensland.

[6] The applicant then moved on to New South Wales where, together with a co-offender, he killed an elderly widow living alone. She was smothered and stabbed. The two offenders blamed each other and they were both found guilty. However, the applicant's co-offender was found guilty only of manslaughter while the applicant was found guilty of murder (as well as robbery in company and larceny). All of those offences had been committed by him while he was still subject to the suspended sentence of imprisonment that had been imposed in Queensland. He was sentenced to 22 years imprisonment with a non-parole period of 16 and a half years. He has not yet been paroled and remains in custody. His full time discharge date will be 26 April 2021.

[7] The applicant committed the offences in Brisbane in 1996 in the following circumstances. The number of each offence in paragraph [2] above was the count for that offence on the indictment. The complainant in counts 1 to 5 was a 33 year old woman who lived with her two sons aged six and eight. On the night of 10 January 1996, she fell asleep with her two boys in her lounge room. She awoke to find the applicant with his hand over her mouth. He was kneeling over her holding the tip of a screwdriver at her neck. He told her not to look at him. He took the complainant to her bedroom and tied her nightgown around her eyes, made her remove her clothes and then raped her. He inserted his fingers into her vagina, after which he raped her once more. The complainant's young son approached the bedroom and, while the applicant hid behind the bedroom door, the complainant dressed and told her son to go back to bed. The applicant told the complainant to lie down. He then stole her purse and left.

[8] The complainant in counts 6 and 7 was a 70 year old woman who lived on her own. While his brother stood watch, the applicant entered her bedroom where she was sleeping. The complainant felt a hand across her mouth and awoke to see him holding a bladed weapon. The applicant's brother came into the bedroom and helped to tie up the complainant.

[9] At some point, the complainant noticed the applicant's knife on the pillow beside her. She grabbed it and swung it at the applicant. He and his brother then ran away.

[10] Many years later, DNA evidence identified the applicant as the offender in these cases. The applicant was charged with counts 1 to 5 on 5 March 2009 and counts 6 and 7 on 1 April 2013. In May 2018 the applicant was transferred to serve the remainder of his New South Wales sentence in Queensland under legislation that allowed such transfers. He refused to be interviewed by Queensland police.

[11] On 1 March 2019 the applicant pleaded guilty to these charges before Clare SC DCJ. By then he was 41 years old.

[12] Part 9A of the *Penalties and Sentences Act* 1992 (Qld), which creates the regime of serious violent offences, did not apply to the applicant's case because the offences he committed occurred before those provisions were enacted. The Crown submitted that the applicant should be sentenced to not less than 14 years imprisonment for counts 1 to 5 alone. Defence counsel submitted that an appropriate sentence would be in the order of 13 years. Clare SC DCJ observed:

> "… that's the real question, here, is – in my view, is how to – how to properly reflect the cumulative nature of the present sentence. After such a long period of continuous custody, while still recognising the extreme level of the offending. The overall offending."

[13] Her Honour rightly described the applicant's offending as "shocking" and demonstrative of a "level of inhumanity and callousness that is beyond the experience of most offenders". However, her Honour took into account the applicant's adoption of religious beliefs and his productivity while in prison.

[14] Clare SC DCJ sentenced the applicant to concurrent terms of imprisonment as follows:

Count 1: 16 years

Count 2: 16 years

Count 3: 4 years

Count 4: 16 years

Count 5: 2 years

Count 6: 5 years

Count 7: 3 years

[15] The applicant submits that these sentences were manifestly excessive having regard both to comparable sentences and to the totality of the sentences that he must now serve. He points to *Mill v The Queen*[1] in which the appellant had committed three

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1 (1988) 166 CLR 59.

armed robberies over the course of six weeks. He committed two of these robberies in Victoria and the third one in Queensland. In Victoria he was sentenced to imprisonment for 10 years with a non-parole period of eight years. After his release in Victoria he was sentenced in Queensland to imprisonment for a further eight years with parole after three years. The High Court said that he should have been sentenced as though he had committed all three offences in one State and had been sentenced for all of them at the same time. Upon that hypothesis, it was unlikely that he would have been sentenced to an aggregate head sentence of 18 years. Instead, an appropriate sentence would have dealt with the third offence in the same way as the second offence, namely by making it partially cumulative.

[16] The applicant submits that the sentences that were imposed upon him are similar to the sentences that were criticised and overturned in *Mill*. The sentences meant that the applicant would serve a further period of imprisonment of 16 years (albeit being eligible for parole after four years) after he had already served a sentence of almost 20 years. In effect, he would be punished by a total sentence of 36 years with parole eligibility after 24 years.

[17] He submits that the appropriate sentence should have been:

(a) 10 or 11 years for counts 1 to 5;

(b) Three to four years for counts 6 and 7;

(c) The primary sentence should have attached to counts 1, 2 and 4 (as indeed was done);

(d) The sentences on counts 1, 2 and 4 should have taken into account the offending in counts 6 and 7, resulting in notional sentences of between 12 and 13 years;

(e) Under the totality principle, that sentence should have been reduced to a sentence of 10 years to give effect to the approach endorsed in *Mill*; and

(f) The result would be an effective total sentence in New South Wales and in Queensland of 30 years imprisonment.

[18] The respondent submits that the situation presented by the applicant's offending is unlike the situation that was addressed in *Mill.* That submission should be accepted.

[19] In *Mill* the issue for the Court was to identify the applicable principle that must be applied when sentencing an offender for crimes that are closely related in time and nature although committed in more than one State or Territory.[2] The appellant in *Mill* submitted that in such a case the appropriate combination of sentences imposed in two different jurisdictions should not differ from the sentences that would have been imposed if all offences had been committed in a single State and if the offender had been sentenced for all those offences on the same occasion.[3]

[20] The problem in *Mill* arose because, but for the political division of Australia into several legal jurisdictions, the appellant would have been sentenced for his three crimes at a single hearing before the same court. The sentencing for the Queensland offence was delayed until after he had been dealt with by the system of justice in

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2 *supra*, at 62.

3 *ibid*.

New South Wales. The High Court held that the delay in sentencing resulting from the interest of two legal jurisdictions in the sentencing process should not affect the overall punishment imposed upon an offender for offences which are related in time and character but not in jurisdiction. *Mill* was a case in which it was held that the principle of totality should not have been distorted by the mixed jurisdictional environment in which the appellant found himself being sentenced.

[21] That is not this case. Here the applicant committed seven serious offences in Queensland which would have warranted an overall sentence in excess of 12 years. In 1999, three years after committing those offences, he committed a murder in New South Wales. The Queensland offences and the New South Wales murder were not "closely related in time and nature".

[22] The principle of totality is a solution to one of the problems that may confront a sentencing judge because of the numeric nature of imprisonment as a penalty.[4] Sentences of imprisonment are necessarily calculated by reference to the number of months or years for which an offender must be imprisoned. However, strict adherence to the mathematics of sentencing can lead to injustice. *Markarian v The Queen*[5] addressed one problem that can arise by slavish adherence to a mathematically formulaic approach to sentencing. The totality principle addresses a different problem caused by arithmetic when it is applied to sentencing, namely the possibility that when a strictly arithmetical method is applied when sentencing for multiple offences, the result may be disproportionate to an offender's actual overall culpability. According to the totality principle, when considering what is a just sentence for a number of offences, a judge must not be satisfied by passing the sentence which such arithmetic produces. The judge must instead look at the totality of the criminal behaviour constituted by all of the offences when regarded together and then consider what is the appropriate sentence for all the offences.[6] *Mill* then applies this principle to multi-State offences in the same way. The totality principle applies whether the penalty takes the form of a fine or a term of imprisonment or, indeed, whatever might be the form of punishment. It will apply whether the resulting accumulation of punishments is relatively light, such as a series of fines or several cumulative short terms of imprisonment, or whether it is severe. The principle is very much concerned with the concept of proportionality that pervades so many facets of the system of law. In some of its applications it reflects the prohibition against double punishment which is a risk when several offences committed at the same time contain elements that are all proved by the same fact. The present case presents a distinct but related sentencing problem. The offences in this case were committed years apart. They were committed against different victims. They were different kinds of offences. They were committed in different States. They were separated by a third, intervening, period of offending for which the applicant was punished in Victoria and which the applicant does not suggest has to be taken into account in mitigation in these proceedings. The offender has been sentenced already for two of those three sets of offences, in New South Wales and Victoria, and then came to be sentenced finally for the third set of offences, in Queensland, which, however, were committed first in time.

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4 The principle was authoritatively stated in *Mill*, *supra*, at 63; and *cf Pearce v The Queen* (1998) 194 CLR 610, at [45].

5 (2005) 228 CLR 357.

6 *Mill*, *supra*, at 63, citing Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp. 56-57.

[23] The three sets of offences are discrete and independent of each other in every way except that it was the same offender who committed all of them. The sentences imposed for the offences in Victoria and New South Wales did not and could not reflect any punishment for the applicant's culpability for the Queensland offences.

[24] Indeed the applicant's complaint is not that in this case there is a body of culpable conduct that can be comprehended as a coherent unit or domain for sentencing and to which the totality principle can be applied. The applicant's complaint is that if he serves the terms of imprisonment that have been imposed upon him in Queensland, then by the time he is finally released, after having served the remainder of the New South Wales sentence and the whole of the Queensland sentences, he will have served 36 years in prison. His complaint is that even taking into account, as one must, that he finds himself in this predicament by reason of his own acts, the addition of the Queensland sentences to those the applicant was already serving results in a term of imprisonment that is too harsh to be just or fair.

[25] By any standard, the applicant is facing a very long term of continuous imprisonment. Cumulative sentences resulting in imprisonment of such length can be justified in some cases, such as when an offender is sentenced to a long term of imprisonment but then commits a further serious offence while imprisoned, or while at liberty after escaping, or, sometimes, while on bail awaiting trial for a set of offences for which he is later found guilty.[7] If sentences in such cases were not made cumulative then the offender would effectively get a discount by a misapplication of the totality principle. Also, sometimes the need to vindicate the rights of different victims while giving effect to the totality principle results in making sentences cumulative in whole or in part.[8]

[26] In cases in which the factors that ground the totality principle do not easily justify a reduction in an otherwise appropriate sentence, but in which the actual or effective cumulation of sentences would result in a term of imprisonment that the sentencing judge regards as much too harsh, the common law provides a different avenue to alleviate harshness. It is by reference to the notion that a sentence should never be a "crushing sentence".

[27] In *R v Beck*,[9] Nettle JA said:

> "It has been said that the notion of a crushing sentence has never been adequately defined in this State, although it is generally conceived of as one that is imposed in such a way that it would provoke a feeling of helplessness in the applicant if and when he is released or as connoting the destruction of any reasonable expectation of useful life after release. It is also accepted that if multiple sentences are so imposed as to make the totality of the prisoner's liability to incarceration crushing in that sense, some of the sentences should be modified by appropriate orders for cumulation in the application of the totality principle. There are of course no hard and fast rules as to how one is to decide whether the totality of multiple sentences imposed at different times is crushing. As in so much of sentencing, each case depends on its own facts." (citations omitted)

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7 *R v Makary* [2019] 2 Qd R 528.
8 *Richards v The Queen* [2006] NSWCCA 262.
9 [2005] VSCA 11 at [19].

[28] In *Beck*, Nettle JA concluded that a sentence may be crushing:[10]

> "… if the applicant had been sentenced by the one judge at the one time for all of the offences concerned it is difficult to conceive that the judge would have imposed a total effective head sentence as great as nine and a half years with a minimum term of seven years; especially when one has regard to the applicant's plea of guilty and demonstrated co-operation and frankness towards the police. Moreover, and perhaps more importantly, the circumstances of the offences and the applicant's personal circumstances lead me to conclude that the total effective sentence is so long as to risk provoking within the applicant a feeling of helplessness and the destruction of any reasonable expectation of a useful life after release."

[29] In some cases that result may be required nonetheless. The mandatory sentence of life imprisonment for any kind of murder is an example. Also as Doyle CJ said in *R v E, AD*:[11]

> "Care must be taken in using the concept of a crushing sentence. Not uncommonly, for particularly serious crimes, a sentence that is crushing in its effect must be imposed. The use of that term does not imply that when a very heavy sentence is called for, it is appropriate for the court to reduce it simply because to the offender the sentence may be crushing. At the end of the day if that is what is called for, that is the sentence that must be imposed."

[30] However, when a sentence is discretionary, as in the present case, it is open to a judge to decline to exercise the discretion so as to impose a sentence if it would, in the judge's opinion, be crushing. The concept of a sentence as one that is "crushing" has been explained as an aspect of the totality principle.[12] But in cases in which a judge concludes that a sentence that is the result of the application of conventional principles is crushing, the judge may reduce the sentence to avoid that consequence.[13]

[31] The present is a case in which the sentences that were imposed should be reduced for that reason. The principle under discussion operates, in general, after the orthodox process of reasoning to arrive at a just sentence has been concluded. It is during the conventional process of sentencing that factors in mitigation of sentence and factors in aggravation of sentence are to be considered. Those factors arise from the objective circumstances of the offence and from the offender's subjective circumstances. As sentencing judges know too well, many of these factors conflict with each other.

[32] The idea that a sentence should be less severe because it would otherwise be a crushing sentence may conflict with factors that aggravate the severity of the offence, particularly denunciation, yet effect is given to it despite that. Moreover,

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10 *supra*, at [22].
11 (2005) 93 SASR 20, at 30.
12 *Roffey v Western Australia* [2007] WASCA 246, per McLure JA, at [24]-[25].
13 *R v Rossi* (1988) 142 LSJS 451, at 453 *per* King CJ, cited with approval by Doyle CJ in *R v Walkuski* [2010] SASC 146, at [6].

effect is given to it even in cases in which the offender may be, in some ways, undeserving.

[33] This is because it is invoked by shared values of the community which do not countenance either cruelty in punishment or a total abandonment of hope, even for the worst kind of offender. It was this latter consideration which moved Gleeson CJ in *R v Jamieson*[14] to deprecate the making of recommendations that a prisoner "never be released". His Honour observed that it was impossible for a sentencing judge to forecast all of the many different possibilities that the future may hold, particularly in the case of a young offender.

[34] Obviously enough, the reduction in the severity of a sentence serves a prisoner's personal interests. But the purpose of alleviating a sentence that is seen to be inappropriate because it is crushing is to serve the community values that I have attempted to identify.

[35] The applicant's childhood is one that is commonly presented on behalf of offenders with the applicant's criminal history. His parents separated and, at some point in his early teens, he was placed in foster care and he then lived with an aunt. He began to abuse alcohol and cannabis at an early stage of his life. He was 18 when he committed these offences and he is now 42 years old. He cannot remember whether he was intoxicated when he committed the current offences.

[36] On 8 November 2001 he was sentenced in the Central Criminal Court in New South Wales for the murder offence to a term of imprisonment of 22 years for murder, with a parole eligibility date of 26 October 2015. He has failed to get parole. While imprisoned in New South Wales he was assaulted by other prisoners and, because of the circumstances of the murder, he was at risk of further assaults. He was placed in protection for some time, which is an added hardship. He attempted suicide. None of these mitigation factors could be given much weight having regard to the horrendous circumstances of his crime. A denunciatory sentence was called for and was imposed. However, the New South Wales sentencing judge observed that there was evidence that the applicant was not "unredeemable". He noted that the applicant had expressed an interest in furthering his education while in custody. That prospect has now been realised.

[37] At the sentence hearing in this matter the applicant, by his counsel, accepted the allegations of fact set out in the statement of facts. He said that he was ashamed of his past acts and did not seek to minimise the significance of what he admitted having done. He made admissions. He has undertaken many courses of study offered in prison. He has become a devout Christian. He has completed several bible study and other religious courses. There were certificates provided to the prosecution to prove these matters and they were not challenged.

[38] Clare SC DCJ sentenced the applicant to imprisonment for 16 years with a parole eligibility date after serving four years. That date was set expressly so as to give effect to the factors in mitigation. The result was that the Queensland sentences and the New South Wales sentences were cumulative for all but a little over two years. Their effect is that the applicant will be released on 1 March 2035, when he will be 57 years old and by then he will have been in prison continually since he was 24 years old.

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14 (1992) 60 A Crim R 68, at 80.

[39] The head sentence was at the high end of the range or, perhaps, just above that range,[15] but these were very bad offences. However, if the applicant had been sentenced for these offences in Queensland when he was being sentenced for the offence of murder and his associated offences (under a hypothetical sentencing regime that did not provide for mandatory life imprisonment for murder), it is inconceivable that he would have been sentenced to imprisonment for 34 years or that his eligibility for parole would have been postponed until he had served 22 years. To sentence the applicant with the result that he remains imprisoned from the age of 24 until he is almost 60 is to inflict a punishment that is so harsh that it must be ameliorated.

[40] Such mercy is not a reflection upon the applicant's subjective characteristics or his deserts. It reflects the attitude of our community that, in general, and in the absence of particular circumstances, even a justly severe punishment ought not remove the last vestige of a prisoner's hope for some kind of chance of life at the end of the punishment.

[41] The seriousness of the offences in this case mean that, despite the sentence for murder, there should be a degree of cumulation in these sentences above the term to be served for the offence of murder. Consequently, the applicant's parole eligibility date must be set accordingly.

[42] Having regard to these matters, leave to appeal should be granted, the appeal should be allowed and the sentence imposed for counts 1, 2, 4 and 6 should be set aside. For each of counts 1, 2 and 4 the applicant should be sentenced to a term of imprisonment of 10 years. For count 6 the applicant should be sentenced to a term of imprisonment of four years. The applicant should be eligible for parole after serving 40 per cent of the period of imprisonment for these counts (and the sentences for counts 5 and 7 which should not be disturbed). Consequently, the applicant's full time release date will become 1 March 2029 and his parole eligibility date will be 1 March 2023.

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

[44] **McMURDO JA:** I agree with Sofronoff P.

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[15] Comparable cases of rape were *R v Penniment* [1992] QCA 110 (15 years); *R v Coghlan* [1998] 2 Qd R 498 (14 years); *R v Henry* [2002] QCA 520 (11 years).