SUPREME COURT OF QUEENSLAND

CITATION:	*R v Crawford* [2020] QCA 68
PARTIES:	**R** **v** **CRAWFORD, Aaron John** (applicant)
FILE NO/S:	CA No 234 of 2018 SC No 803 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time (Sentence) Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 29 May 2018 (Burns J)
DELIVERED ON:	9 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2019
JUDGES:	Fraser JA and Henry and Bradley JJ
ORDERS:	**1. The application for an extension of time within which to appeal is refused.** **2. The application for leave to appeal against sentence is refused.** **3. The application for leave to adduce new evidence in the proposed appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant filed his application to appeal against sentence approximately three and a half months after the sentence was imposed – where the applicant applied for an extension of time within which to appeal against sentence – where the applicant deposed that as a result of extensive media coverage of his sentence, he was held in protective custody and had no communication with his solicitor for two weeks – where the applicant deposed that once he was transferred to a standard high security protection unit, it took him two weeks to "settle, speak with my family and come to terms with my son returning to New Zealand" and he had no correspondence from his solicitor – where the further delay of two and a half months was unexplained – whether the Court should exercise the discretion to extend time CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR

INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was convicted on pleas of guilty and sentenced to concurrent terms of imprisonment of ten years for manslaughter and two years for interfering with a corpse – where the applicant was originally charged with murder – where the applicant offered to plead guilty to manslaughter soon after he was charged, but on a version of facts that falsely minimised his culpability – where one of the applicant's co-offenders subsequently pleaded guilty to murder – where the applicant's offer to plead guilty to manslaughter was then accepted by the Crown – where this plea was entered two days before the applicant's trial for murder was listed to commence – where the sentencing judge took the applicant's plea of guilty into account, "late though it is" – whether the sentencing judge erred by characterising the applicant's plea as "late" – whether the applicant's plea of guilty was entered at the first reasonable opportunity

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – TO ADMIT NEW EVIDENCE – where the applicant submitted that the sentencing process miscarried because the sentencing judge did not have all of the information that was relevant to the formulation of the appropriate sentence – where the applicant sought to adduce evidence of three assaults upon the applicant by other prisoners while he was in prison – where the applicant submitted that these assaults amounted to extra-curial punishment for his offending – where the applicant sought to adduce evidence of a letter of apology he wrote to the family of the deceased – where the applicant sought to adduce evidence of his history of drug use and sexual abuse he suffered as a child – where the applicant sought to adduce evidence demonstrating that he was driven to rehabilitate himself in order to reunite with his son – whether the Court should exercise the sentencing discretion afresh – whether a more lenient sentence would be appropriate in light of all the material available to the sentencing judge and all the new evidence sought to be adduced

Atholwood v The Queen (1999) 109 A Crim R 465; [1999] WASCA 256, applied
Cameron v The Queen (2002) 209 CLR 339; [2002] HCA 6, applied
R v Daetz; R v Wilson (2003) 139 A Crim R 398; [2003] NSWCCA 216, applied
R v Hannigan [2009] 2 Qd R 331; [2009] QCA 40, applied
R v WAW [2013] QCA 22, considered

COUNSEL: P J Callaghan SC, with P J Wilson, for the applicant
D Balic for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** On 29 May 2018 the applicant was convicted on his pleas of guilty and sentenced to concurrent terms of imprisonment of ten years for manslaughter and two years for interfering with a corpse. It was declared that the conviction for manslaughter was a conviction for a serious violent offence. The effect of that declaration, which was mandatory in the circumstances, is that the applicant will be eligible for parole after he has served eight years in custody, including a period of 937 days the applicant spent in pre-sentence custody from 4 November 2015 until the date of sentence which was declared to be time already served under that sentence.

[2] On 13 September 2018 the applicant applied for an extension of time for appealing against the sentence. The applicant deposes that, as a result of extensive media coverage of his sentence, he sought protective custody. On 6 June 2018 he was transferred to a unit where he was locked down for 22 hours a day and he had little or no communication with anyone for two weeks and no communication at all with his solicitor. On 21 June 2018 he was transferred to a standard high security protection unit. In relation to the period between 21 June 2018 and 13 September 2018, the applicant's explanation for his delay in applying is that it took him two weeks to "settle, speak with my family and come to terms with my son returning to New Zealand", he had no correspondence from his solicitor, and he discussed the possibility of an appeal with his mother when he had the opportunity to do so. That does not satisfactorily explain the delay in applying for leave to appeal during the period of about two and a half months preceding the filing of his application. Having regard to the length of the sentence, however, I would exercise the discretion to extend time if the proposed appeal has substantial merit.[1]

[3] Before discussing the two grounds of the proposed appeal I will outline the circumstances of the offences.

[4] The applicant was one of six people who faced charges in relation to the death of Greg Dufty. The applicant was sentenced together with Lionel Patea, who pleaded guilty to murder, and Nelson Patea, who pleaded guilty to manslaughter. Clinton Stockman had been sentenced upon his pleas of guilty to manslaughter and interfering with a corpse and Liam Bliss had been sentenced upon his plea of guilty to manslaughter. Ethan Clarke had not been dealt with when the applicant was sentenced.

[5] The applicant was a very close friend of Mr Dufty. They were also in a commercial relationship concerning drugs. Mr Dufty owed money to the applicant. He also owed a drug debt to a man called Price. Stockman assisted in looking after a cannabis crop which the applicant and Mr Dufty managed together. Mr Dufty stole cannabis from the plantation with a view to selling it and repaying his debt to Price. Instead, he kept some of the cannabis, he did not repay Price, and he stole more drugs, money, and property from Price. Price told the applicant who said that Mr Dufty "needed a beating". On 6 July 2015, after the applicant made inquiries of Mr Dufty's partner about his whereabouts, the applicant, Stockman and Lionel

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1 See *R v Tait* [1999] 2 Qd R 667; *R v GV* [2006] QCA 394.

Patea met, after which the applicant and Stockman bought a metal tyre checker and zip ties. Later the applicant met Mr Dufty at a restaurant and they departed together in the applicant's truck. Bliss collected the Pateas and Clarke and drove to the pre-arranged place to which the applicant took Mr Dufty.

[6] As Mr Dufty was greeting some of the men, Lionel Patea struck Mr Dufty in the head with a shifting spanner. Mr Dufty fell to the ground and the applicant, Nelson Patea and Clarke kicked him. The applicant also struck Mr Dufty in the stomach with the tyre checker whilst Mr Dufty lay on the ground. Whilst the applicant and others were kicking Mr Dufty the applicant abused Mr Dufty. Stockman told the applicant to stop. The applicant told him to "mind his own fucking business". Lionel Patea held a knife to Mr Dufty's throat and asked him where the money was. Mr Dufty did not reply and he was continuously kicked on the ground and was hit in the legs with the shifting spanner or the tyre checker. At the applicant's direction Stockman collected the zip ties and the applicant used them to secure Mr Dufty's hands behind his back. Whilst Mr Dufty was unconscious he was carried to the applicant's truck. The applicant and Stockman then drove off with Mr Dufty slumped forward on the dash. Lionel Patea, who had driven with others towards his residence, telephoned the applicant or Stockman and told them to take Mr Dufty straight to the hospital. They did not do so.

[7] When Stockman and the applicant arrived at a truck yard, the applicant kicked Mr Dufty out of the passenger seat onto the ground, dragged him into a shed, and attempted to rouse him. The applicant splashed water on him, telling him to wake up because the applicant was going to torture him. The applicant and Stockman discussed what to do over a number of hours. Stockman said that the applicant should go to the police and take Mr Dufty to hospital. After some time the applicant realised that Mr Dufty was not breathing. He told Stockman to help him dispose of Mr Dufty's body. When Stockman refused the applicant secured his compliance by threatening his family. On the following day, the applicant told Stockman that there was "work to be done". After making various preparations and transporting the body to a different place, they placed it upon some wood, poured diesel fuel over the body, lit a fire, and tended the fire for a number of hours until there was no sign left of Mr Dufty's body. The applicant subsequently lied to Mr Dufty's partner about Mr Dufty's whereabouts and to police about his involvement in the attack on Mr Dufty.

[8] The applicant was sentenced upon the basis that he was criminally responsible for the offence of manslaughter as someone who had prosecuted the unlawful common purpose of assaulting Mr Dufty. He did not himself intend to cause death or grievous bodily harm and his knowledge of the plan, which he was instrumental in devising, was not such that murder was a probable consequence – rather, it was a probable consequence that Mr Dufty could very well be unlawfully killed.

[9] The sentencing judge referred to the following circumstances raised in the submissions of the applicant's counsel. The applicant was 27 at the time of the offences and 30 at the time of sentence. He had previous convictions but they were of no particular relevance to this matter. He had been in custody on remand since 4 November 2015 when he was arrested. He came from a good family in New Zealand, was educated to year 11, and later moved to Australia. He worked in various occupations until he started his own transport business in 2012. At the time of his offences he had three trucks. He also worked in swimming pool construction.

The applicant had a 10 year old son. He had shared access and supported his son financially, and that came to an end when he was arrested. The sentencing judge took into account some admissions made by the applicant in police interviews and that he ultimately pleaded guilty to manslaughter as well as interference with a corpse. The sentencing judge observed that, having listened very carefully to submissions made by the applicant's counsel, who the judge was sure said all that could be said on the applicant's behalf, the sentencing judge had "heard not one word of a regret or remorse expressed on your behalf" which was to the applicant's "enduring shame".

[10] The agreed statement of facts with reference to which the applicant was sentenced records that the applicant offered to plead guilty to manslaughter soon after he was charged (in April 2015, according to the applicant's outline of argument at sentence), but on a version of facts that was contradicted by other evidence and now accepted by the applicant not to be accurate. That offer was not accepted. The applicant again offered to plead guilty to manslaughter in mid-May 2018. That offer was accepted following the resolution of matters concerning Lionel and Nelson Patea. On 24 May 2018 lawyers for the Pateas raised the possibility of guilty pleas by Lionel Patea to murder and Nelson Patea to manslaughter. The pleas by all three offenders were subsequently entered on 28 May 2018.

[11] The sentencing judge observed that the applicant and Lionel and Nelson Patea were due to be tried for murder on the day after the sentence hearing, a pre-trial hearing was listed to commence on the day before the sentence hearing, negotiations that commenced late in the preceding week resulted in the pleas entered by the applicant and the Pateas late on the day before the sentence hearing, and the Crown accepted the pleas of guilty by Nelson Patea and the applicant to manslaughter in discharge of the counts of murder that had been proffered against them. The sentencing judge remarked that he would have imposed a head sentence higher than 11 years were it not for the applicant's plea of guilty, "late though it is", and the degree of co-operation the applicant did attempt. That may be contrasted with the sentencing judge's reference to Lionel Patea's plea being "at a very late stage".

[12] The second ground of the proposed appeal contends that the sentencing judge erred by characterising the applicant's plea of guilty as "late". The applicant argues that because a plea of guilty to manslaughter would have exposed him to forensic prejudice in defending the murder charge whilst it remained on foot, the first reasonable opportunity for him to enter his plea of guilty to manslaughter was when the Crown first indicated it would accept such a plea in discharge of the charge of murder. In a passage in *Atholwood v The Queen*[2] approved in *Cameron v The Queen*,[3] Ipp J observed that the question whether it was possible for a person to plead at an earlier time is to be answered by determining when it would first have been reasonable for the plea to be entered. In circumstances in which the offender pleaded guilty to a charge when the prosecution withdrew other charges, Ipp J considered it particularly important to establish the time when it could first be said that it was reasonably open to the offender to plead guilty to the offence of which he was convicted, and in that exercise it was necessary to take into account forensic prejudice the offender would have suffered if he pleaded guilty to certain counts

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2 (1999) 109 A Crim R 465 at 468.

3 (2002) 209 CLR 339 at 345 [21] (Gaudron, Gummow and Callinan JJ) and at 363 – 364 [74] – [75] (Kirby J).

while others (that were subsequently withdrawn) remained pending against him. Whilst the prosecution maintains those counts "there is a strong incentive for a person who recognises his guilt on other counts … to persist in a not guilty plea to all counts" and "it should not be assumed, mechanically, that the offender has delayed pleading guilty because of an absence of remorse, or that, reasonably speaking, he has not pleaded guilty at the earliest possible opportunity."

[13] The forensic prejudice the applicant argues he would have suffered if he had pleaded guilty to manslaughter is that, in the absence of an indication by the Crown that the plea would be accepted, the Crown would have nothing to lose by persisting with the murder charge because, if it failed, the applicant would nonetheless fall to be sentenced for manslaughter.

[14] It is necessary to bear in mind that the question whether a plea of guilty is entered at the first reasonable opportunity bears upon the extent to which the plea indicates remorse, acceptance of responsibility, and willingness to facilitate the course of justice.[4] The applicant sought to negotiate a plea of guilty to manslaughter at an early stage but only upon an inaccurate factual basis that minimised his culpability, including, as the sentencing judge remarked, by the absence of any admission that he had inflicted any violence on Mr Dufty. At best for the applicant, his plea may be regarded as having been offered on a factual basis which substantially reflected his true culpability in mid-May 2018. There is no evidence to contradict the natural inference that it was only shortly before the date fixed for trial that the applicant was prepared to plead guilty on such a basis. In these circumstances the applicant's plea of guilty should not be treated as having been entered at the first reasonable opportunity. The trial judge's characterisation of the plea as "late", accompanied as it was by an acknowledgement of such co-operation as the applicant did attempt, reveals no error in the exercise of the sentencing discretion.

[15] The first ground of the proposed appeal contends that the sentencing process miscarried because the sentencing judge did not have all of the information that was relevant to the formulation of the appropriate sentence. This ground depends upon acceptance of the applicant's application to adduce in the proposed appeal evidence of facts he knew at the time of sentence but which was not adduced at the sentence hearing. Evidence of this kind, which is within the category of "new evidence" rather than "fresh evidence", may be admitted if it shows that a sentence other than that which was imposed is warranted in law, but even where that is shown there are some cases in which the evidence generally will not be admitted, including cases where an applicant deliberately withheld the evidence at the sentence hearing.[5]

[16] The applicant argues that new evidence of three assaults upon the applicant in prison by other prisoners should be taken into account upon the basis that they amounted to extra-curial punishment for this offending. This topic is addressed in affidavits affirmed by the applicant.[6] The third assault to which the applicant deposes occurred after he was sentenced. It is therefore incapable of revealing an error in the exercise of the sentencing discretion. As to the first assault, the applicant deposes that after information about the applicant's co-operation with the authorities had been circulated in the prison, he was assaulted by more than 10 other prisoners on 30 September 2016. He was taken to hospital and given a suture in a

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4 *Cameron v The Queen* (2002) 209 CLR 339 at 346 [22].
5 *R v Maniadis* [1997] 1 Qd R 593.
6 Affidavits filed on 14 September 2018 and 5 July 2019.

laceration above his lip, and it was suggested he might require analgesics for facial bruises. About six weeks later, as a result of concerns for the applicant's safety his activities in the prison were curtailed, including by excluding him from engaging in prison programs or attending the gym or oval and by restricting visits.

[17] As to the second assault, the applicant deposes that after he was transported to a watch house for his committal hearing in March 2017 he sustained lacerations to his head and bruising as a result of a co-accused, Clarke, punching him in the face and punching him whilst he was on the ground. Clarke pleaded guilty and was sentenced for that assault. That was reported in detail in the local newspaper.

[18] In *R v Daetz; R v Wilson*[7] James J observed that extra-curial punishment should be taken into account as a material fact in the sentence to ensure that an offender is punished appropriately and not excessively for the same offence, and:

> "I have concluded from this examination of the authorities cited to the court and especially *Allpass* [(1993) 72 A Crim 561], *Clampitt-Wotton* [(2002) 37 MVR 340] and *Cooney* [(Unreported, Queensland Court of Appeal, CA No 386 of 1997, Pincus, Davies JJA and Fryberg J, 6 March 1997)] that, while it is the function of the courts to punish persons who have committed crimes, a sentencing court, in determining what sentence it should impose on an offender, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence. This is so, even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence. … there may well be many cases where extra-judicial punishment attracts little or no significant weight."

Upon that view, extra-curial punishment is taken into account as one example of a serious loss or detriment an offender has suffered as a result of having committed the offence.

[19] James J's analysis was endorsed in *R v Hannigan*.[8] Chesterman JA (with whose reasons de Jersey CJ agreed) held that the principle explained in *Daetz* did not apply in that case because the injuries sustained by the offender were minor rather than serious.[9] Chesterman JA also identified the theory underlying the relevance of extra-curial punishment as being "that it deters an offender from re-offending by providing a reminder of the unhappy consequence of criminal misconduct, or it leaves the offender with a disability, some affliction, which is a consequence of criminal activity". In such cases one can see that "a purpose of sentencing by the court, deterrence or retribution, has been partly achieved."[10]

[20] The assaults upon the applicant in prison seem likely to have resulted from one or more co-offenders having perceived that the applicant's co-operation with the authorities exposed them to conviction or increased punishment for their offending. The assaults were therefore not a direct consequence of the applicant's criminal

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7 (2003) 139 A Crim R 398 at [57] and [62].
8 [2009] 2 Qd R 331.
9 [2009] 2 Qd R 331 at [16] – [24].
10 [2009] 2 Qd R 331 at [25].

misconduct. Arguably the assaults were nevertheless a consequence of that misconduct, albeit an indirect consequence. If so, and if the assaults were sufficiently serious to be taken into account, they might appropriately have been taken into account in formulating a just sentence upon the basis identified in *Daetz*.

[21] It is not necessary to reach a conclusion about those issues. The assaults upon the applicant and their consequences for the applicant were in any event material considerations in his sentence upon the conventional basis that, as a result of his co-operation with the authorities and without any personal fault, he was restricted in his prison activities, exposed to risks of harm, and likely to suffer some degree of hardship beyond that which necessarily flowed from his imprisonment.

[22] The respondent acknowledges that it was likely that the applicant did not tell his counsel about those matters but argues that the nature of the information suggests that the omission may have been deliberate. In that respect, the applicant deposes that the assault in September 2016 "made it extremely difficult for me to concentrate on giving exacting instructions to my lawyers" and his constant worry about the welfare of his son "made it difficult for me to give legal instructions".[11] On the day of sentence his solicitor and barrister attended upon him in the court cells for about 10 minutes and he signed a document which he believed to be plea instructions. At that conference his personal background was also discussed and he was asked "some basic questions in relation to my education, work and my parents". The conference was shorter than 10 minutes and he was not asked for any specific detail about his history of drug use or about his child. Any findings the Court makes about that evidence must be understood in the context that the applicant's legal representatives did not give evidence about these communications. The applicant's evidence does not expressly exclude the possibility that there were other relevant communications between the applicant and his legal representatives, but in the absence of any challenge that evidence justifies the inference that the applicant's omission to inform his counsel of the matters dealt with in his new evidence was not attributable to a deliberate decision by the applicant but resulted from inadequacies in the way in which his instructions were sought.

[23] In relation to the third assault upon the applicant, which occurred after he was sentenced, the applicant deposes that on 6 October 2018 he was assaulted by five or six prisoners, one of whom shouted "kill him for Lionel". The applicant was transported to hospital. A clinician's report reveals that the applicant suffered a fracture to a facial bone, he was treated with both simple and opiate pain relief and was to be followed up by a maxillofacial surgeon in one week, and he was to have access to simple analgesia and low dose opiate analgesia if required. Upon the applicant's return to the prison he was held in the detention unit for about 15 days for his own safety, and then moved to a protection unit in the prison where he stayed for three or four months before being transferred to a residential unit in the prison. This assault appears to have been committed for the same reason as the first two assaults.

[24] The applicant deposes that before the sentence hearing he wished to and ultimately did write a letter of apology to the family of the deceased. He spoke to his solicitor about writing an apology letter to the deceased's family. He was advised against

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11 Affidavit filed 14 September 2018, paras 7 and 8. The applicant deposes to his representation by a solicitor and barrister: affidavit filed 5 July 2019, para 21.

writing such a letter because it could be used against him at the trial. The applicant deposes that after he pleaded guilty to manslaughter and the plea was accepted in discharge of the murder charge on 28 May 2018, he drafted an apology letter to the family of the deceased, he provided that letter to his solicitor before the sentence hearing on the following day, and he was advised against providing it to the court because it might antagonise the family of the deceased. This aspect of the applicant's evidence is corroborated in an affidavit affirmed by his mother. She also deposes that the applicant had told her months earlier that he wanted to write a letter of apology to the deceased's family but had been advised against it. The applicant's mother's evidence also corroborates the applicant's evidence that he asked his mother to follow up his lawyers to ensure the apology letter was provided to the family of the deceased. In an email dated 2 June 2018 to his solicitor the applicant's mother reminded the solicitor to send her a copy of the letter the applicant wrote on the day before sentence to give to the family of the deceased, so that she could keep it in readiness for a future parole hearing. That email also records that the applicant asked whether the letter was given to the deceased's family on the day of sentence as he had requested. Ultimately, that letter was not sent to the family of the deceased upon the advice of the applicant's solicitor that it was not a good idea.

[25] After stating that because of the court proceedings the applicant had not been able earlier to fulfil his wish to express his deepest sympathy, the letter notes that the deceased was a good friend of the applicant and advises the family of the deceased against being resentful, asks for their forgiveness, and advises that forgiving him might help them to obtain "closure". After stating that the applicant could not do or say anything to bring the deceased back, the letter concludes, "I just want you to know I am sorry!". The applicant's name is written under the salutation, "my prayer's and condolence's". Despite the inappropriateness of much of the letter, particularly its self-centred focus upon the applicant, the letter does convey sympathy, an apology, and condolences. It is some evidence of limited insight and remorse by the applicant.

[26] In the applicant's subsequent affidavit filed on 30 July 2019, he deposes that, after having had a chance to review the letter of apology he had prepared, in hindsight and with the benefit of some discussions with his mother he realised that the letter did not accurately express what he meant. He deposes that, whilst in custody he had found God and in his apology letter had tried to express his remorse and wanted to help the family grieve. The affidavit exhibits a new apology letter, which expresses a full and sincere apology for his actions and their impact upon the family of the deceased. The weight of this evidence is reduced by the long delay in the production of the letter and the circumstances in which it was produced.

[27] Even so, bearing in mind the sentencing judge's reference to the absence of any regret or remorse expressed in defence counsel's submissions, it should be accepted that the absence of any expression of remorse on behalf of the applicant was a material consideration in the formulation of the sentence.

[28] The applicant deposes that he completed various programs and courses whilst on remand, including a program directed at recovery from substance abuse. This evidence lacks significance for the sentence if considered in isolation, but it may be regarded as material – albeit of little weight – when considered in conjunction with the other evidence.

[29] The applicant's affidavit includes evidence that he suffered serious sexual abuse as a child, which is submitted to provide some background to the applicant's subsequent drug use. The applicant deposes that for a period of about a year he was sexually abused by a step-brother, who was 15 or 16 when the applicant was five. He mentioned this only to a former partner, a family lawyer, and a psychologist the applicant saw in custody. A prison record refers to the applicant having reported that he previously experienced sexual assault as a child, that he sometimes struggles to cope in relation to that, and that he presented as calm and stable. The record, by a "counsellor", states that the applicant was referred to Health & Psychological Services, but the applicant deposes that he had not had counselling or treatment in respect of the sexual abuse. The applicant's affidavit does not disclose whether or not he gave instructions to his lawyers about this or otherwise explain why it was not drawn to the sentencing judge's attention. There is no evidence and it is not submitted that the prior sexual abuse described by the applicant contributed to his offending or otherwise rendered him less culpable for it. Evidence of this kind is sometimes adduced as relevant background, particularly in the context of a submission that an applicant had a disadvantaged upbringing. It is not shown to have any particular significance in this case.

[30] The applicant deposes to having had long-standing issues with drug abuse. It is submitted that this formed the background to the offending. The applicant deposes that he began using cannabis, drinking alcohol, and using amphetamines whilst he was still a teenager. When he was 17 he moved to Australia to get away from people with whom he was associating and his drug use. The applicant refers to the birth of his son in 2007, separating from his partner when his son was about one year old, and sharing custody when his son was aged one to four. The applicant had full custody of his son in 2012. In 2013 he sent his son to Queensland so he could start school and live with his mother. After his mother relapsed into drug use, the applicant obtained custody of his son again in late 2013. Because of the applicant's requirement to travel regularly for his work, at a time the applicant does not specify he sent his son to live with the applicant's father and father's wife in New Zealand. The applicant's motivation was to ensure that his son received a good education with strong family support. The applicant deposes that he sent money to New Zealand to financially support his son. The applicant does not mention the extent of this financial support. The applicant deposes that around this time his relationship with a partner of five years broke down and his business was struggling financially. He began using methylamphetamine again almost daily to numb the pain for a period of about 18 months leading up to the death of Mr Dufty.

[31] The evidence does not suggest and it is not submitted that the applicant's drug use contributed to or rendered the applicant less culpable for his offending. This kind of evidence is often tendered in sentence hearings and received as showing relevant background which does not justify but may to some extent explain the circumstances in which offending occurred. Again having regard to the seriousness of the applicant's offending, there is little significance in this evidence of drug use for the purposes of the sentence.

[32] The applicant submits that the evidence demonstrates that he was driven to rehabilitate himself in order to reunite with his son. In addition to the references to the applicant's relationship with his son in [30] of these reasons, the applicant deposes that his son was eight when he was arrested and 11 when he was sentenced. When the applicant was in custody his son was initially in the care of his

grandfather in New Zealand and a few months later in the care of his mother. Following the applicant's sentence his son was returned to New Zealand, the applicant has had almost daily telephone contact with his son since then, and the applicant's son has visited him a few times when his mother or grandmother have brought him over from New Zealand. The applicant deposes that he did not use drugs when he had his son, he loves his son, his son is a major motivation for him not to use drugs, and when he is eventually released from custody and deported to New Zealand the applicant wants nothing more than to be part of his son's life.

[33] The evidence about the applicant's relationship with his son mentioned in [30] of these reasons conveys no information that might materially have affected his sentence beyond the information taken into account by the sentencing judge. The evidence described in the preceding paragraph of these reasons exemplifies a common result of serious criminal misconduct – serious emotional and other adverse consequences for the offender and members of the offender's family. No mitigation of the sentence is justified on that account, but this evidence, considered together with the evidence about the apology letter and also the applicant's co-operation with the authorities, is relevant as some indication of a prospect of rehabilitation. The evidence is not very persuasive in light of the applicant's conduct of separating himself from his son, engaging in self-destructive drug use, and committing serious offences.

[34] I will consider the appropriateness of the applicant's sentence upon the assumption that all of the new evidence upon which he relies should be taken into account in conjunction with the material that was before the sentencing judge. Upon that basis, notwithstanding the weaknesses in the evidence I have mentioned, the Court must proceed upon the footing that the sentencing discretion miscarried, exercise that discretion afresh, and re-sentence the applicant unless in the independent exercise of this Court's discretion it concludes that the sentence imposed by the sentencing judge or a greater sentence is the appropriate sentence.[12]

[35] The applicant submits that, taking into account the new evidence, the appropriate sentence is nine years' imprisonment with a serious violent offence declaration. The acknowledgment that a serious violent offence declaration should be made even if the term of imprisonment is reduced below 10 years is plainly appropriate in view of the shocking circumstances of the applicant's manslaughter offence. The real issue is whether, in the independent exercise by this Court of the sentencing discretion with reference to the material before the sentencing judge and the new evidence sought to be adduced in the appeal, the term of imprisonment for the manslaughter offence should be shorter than 10 years.

[36] The applicant relies upon one of the comparable sentencing decisions taken into account by the sentencing judge, *R v WAW*,[13] in which an offender was sentenced to nine years' imprisonment for manslaughter with a concurrent term of one year for interference with a corpse. The applicant submits that whilst s 13A of the *Penalties and Sentences Act* 1992 (Qld) did not apply in the applicant's sentence as it did in *WAW*, the circumstances of the applicant's case included co-operation with the authorities, admissions and a plea of guilty, and the degree of risk he assumed by his co-operation was not diminished by the Crown's attitude towards it and that risk

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12 *Kentwell v The Queen* (2014) 252 CLR 601 at 618 [43].

13 [2013] QCA 22.

was realised to some extent. In *WAW*, the offender was sentenced upon the basis that she and her two co-offenders, W and N, had a common plan to assault the deceased in a serious way and an unlawful killing was a probable consequence of executing that plan. In the course of participating in the disposal of the deceased's body and when the offender was strongly under the influence of morphine, she cut off the deceased's penis after being told that he was a rapist or a paedophile. She made a comprehensive disclosure of the offending which was suggestive of remorse. The evidence implicating her came from her own confession to police and without evidence provided by her and her undertaking pursuant to s 13A of the *Penalties and Sentences Act* 1992 (Qld), the prosecution would not have been able to proceed against N. The nature and objective seriousness of the offences to which the offender in *WAW* was a party were similar to those committed by the applicant, but the applicant's role in the offences was much more prominent and his co-operation with the authorities was much less significant than in *WAW*. The sentence imposed upon the applicant is consistent with such guidance as may be derived from the decision in *WAW* to refuse leave to appeal.

[37] In oral argument at the hearing of the application, senior counsel for the applicant relied upon the notional sentence of nine years' imprisonment without a serious violent offence declaration which the judge who sentenced the co-offender Stockman indicated would have been imposed but for Stockman's co-operation with the authorities pursuant to s 13A of the *Penalties and Sentences Act* 1992 (Qld). Senior counsel acknowledged that aspects of the applicant's offending were more serious than Stockman's offending, but argued that this was appropriately taken into account by the addition of a serious violent offence declaration to a sentence of nine years' imprisonment for the applicant. The respondent submits that the notional sentence for Stockman is consistent with the sentence imposed upon the applicant, having regard both to the greater seriousness of the applicant's participation in the offence and the relationship between the two men.

[38] The respondent's submission reflects the circumstances of the offences described by the sentencing judge. (I note that it also reflects evidence at Stockman's sentence hearing which was provided to the Court.) The applicant was an enthusiastic participant in the vicious assault upon Mr Dufty as well as being the moving force in the attack and the attempt to conceal the offence – he organised a weapon, transportation, a meeting at the place where Mr Dufty was assaulted, and the callous and disrespectful destruction of the body after Mr Dufty died. The applicant rebuffed Stockman's attempt to stop the applicant's attack upon the defenceless victim, Stockman complied with the applicant's direction to obtain zip ties, the applicant fashioned the zip ties into rudimentary handcuffs and gave them to Stockman to secure Mr Dufty's hands behind his back after Mr Dufty had lost consciousness, and the applicant subsequently secured Stockman's unwilling co-operation in the destruction of the body by threatening his family.

[39] Those and the other circumstances already mentioned reveal the seriousness of the applicant's manslaughter offence. Notwithstanding the mitigating factors emphasised by the applicant, and having regard to the sentences of 10 years' imprisonment with automatic serious violent offence declarations imposed in *R v Mooka*[14] and *R v Dwyer*[15] upon offenders with more serious criminal records who entered early pleas of guilty

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14 [2007] QCA 36.
15 [2008] QCA 117.

for offences of manslaughter which were spontaneous and did not involve any co-offenders or improper interference with a corpse, in this case a term of imprisonment shorter than 10 years would manifestly be too lenient in all of the circumstances.

Disposition and proposed orders

[40] The new evidence the applicant applies to adduce in the appeal does not show that a sentence more lenient than that imposed by the sentencing judge is warranted in law. Although in some respects that evidence suggests that there were deficiencies in the way in which the applicant was represented at the sentence hearing, those deficiencies did not result in the applicant suffering any miscarriage of justice. Exercising the sentencing discretion afresh with reference to all of the material available to the sentencing judge and all of the new evidence sought to be adduced, a more lenient sentence would be inappropriate. In these circumstances, I would refuse the application for leave to adduce new evidence in the proposed appeal, the application for an extension of time within which to appeal against the sentence, and the application for leave to appeal against the sentence.

[41] **HENRY J:** I agree with the reasons of Fraser JA and the orders proposed by his Honour.

[42] **BRADLEY J:** I agree with Fraser JA.