SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bidmade* [2003] QCA 422
PARTIES:	**R** **v** **BIDMADE, Rodney John** (applicant)
FILE NO/S:	CA No 230 of 2003 DC No 267 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	26 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2003
JUDGES:	McMurdo P, Muir and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is allowed** **2. The sentences imposed on Counts 6 and 7 are varied by setting aside the serious violent offence declaration made in respect of each of them**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – where offence involved dangerous operation of a motor vehicle – where applicant injured police officers – where serious violent offender declaration made – whether serious violent offender declaration was appropriate – whether sentence manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 161B(4) *R v Bojovic* [2002] 2 Qd R 183, considered *R v Eveleigh* [2002] QCA 219; [2003] 1 Qd R 398, considered
COUNSEL:	R East for the applicant

M Byrne QC for the respondent

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

[1] **McMURDO P:** I have had the advantage of reading the reasons for judgment of Holmes J in which the facts and issues are stated.

[2] The offences of serious assault and dangerous operation of a motor vehicle had extremely concerning aspects. The applicant drove his vehicle dangerously in an attempt to escape from police officers carrying out their duty and as a result two police officers have received significant injuries; police officer Michael suffered grievous bodily harm. A salutatory penalty was warranted for reasons of general and particular deterrence.

[3] The applicant had an extensive criminal history and was a mature man of 36 years. He had a significant drug problem. To his credit, he appeared to be making genuine efforts at rehabilitation and he pleaded guilty at the early stage of committal proceedings.

[4] The learned primary Judge was entitled under s 161B(4) *Penalties and Sentences Act* 1992 (Qld) to declare the applicant to have been convicted of a serious violent offence in respect of these offences with the consequence that he is required to serve 80% of that sentence before eligibility for post-prison community based release. His Honour was required to exercise that discretion judicially and in accordance with the principles set out in *R v Bojovic*.[1] I agree with Holmes J that judges exercising their discretion to make a declaration under s 161B(3) or (4) should determine the imprisonment to be imposed under the sentence having regard to the effect of any discretionary declaration under s 161B(3) or (4). The question here is whether the overall effect of the cumulative sentence with the declaration under s 161B(4) is manifestly excessive in the circumstances. The comparable sentences referred to by the applicant and the respondent do not support an effective sentence of three and a half years imprisonment with a declaration that the offender has been convicted of a serious violent offence, cumulative upon a further 12 month term of imprisonment; the sentence was manifestly excessive. The comparable sentences do, however, support that sentence without a declaration.

[5] I agree with the orders proposed by Holmes J, namely:

- the application for leave to appeal against sentence is allowed;
- the sentences imposed on counts 6 and 7 are varied by setting aside the serious violent offence declaration made in respect of each of them.

[6] **MUIR J:** I agree generally with the reasons of Holmes J and with the order she proposes. If her Honour's view is that the making of a serious violent offender declaration was outside the scope of a proper sentencing discretion, I disagree with her reasons to that extent.

[7] The applicant, whilst in control of a motor vehicle, acted in reckless disregard of the safety of the two complainants. His conduct was potentially life threatening and

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1 [2002] 2 QdR 183.

Constable Michael, in fact, suffered serious injury. I do not consider that the use of the capsicum spray by one of the police officers assists the applicant. The spray was used only after the applicant had commenced to accelerate rapidly with constable Michael in a position where the prospect of his being injured was, or ought to have been, readily apparent to the applicant. There is no reason to suppose that, had the spray not been used, the applicant would have desisted from the course on which he had embarked before making good his escape. The applicant's conduct, in my view, involved the use of "serious violence against another person".[2]

[8] Nevertheless, for the reasons given by Holmes J, the sentencing discretion miscarried and this court must exercise it afresh.

[9] In my view, courts should be careful to pay more than lip service to the need to sentence so as to demonstrate that wilful injury to police officers acting in the performance of their duty or inflicted because of their role as police officers will attract severe punishment. The learned sentencing judge acted on that principle. In this case, having regard to the applicant's early plea of guilty and attempts at rehabilitation, I agree with Holmes J that the sentence imposed by the primary judge would be appropriate without the declaration.

[10] **HOLMES J:** The applicant seeks leave to appeal against a sentence imposed on him on 16 June 2003 on seven counts: burglary, receiving with a circumstance of aggravation, unlawful use of a motor vehicle, stealing, fraud with a circumstance of aggravation, serious assault and dangerous operation of a motor vehicle causing grievous bodily harm. He was sentenced to 12 months imprisonment on each of the dishonesty counts other than the stealing, for which he was sentenced to 6 months. All of these sentences were to be served concurrently. On count 6, the serious assault, the applicant was sentenced to 3 years imprisonment, and on count 7, the dangerous operation of a motor vehicle, to 3 ½ years, with both of these to be served concurrently, but cumulatively on the sentences for counts 1 to 5. The convictions in respect of counts 6 and 7 were declared to be convictions for serious violent offences. It is the making of that declaration which is the basis of this application. The applicant contends that it renders the sentence on counts 6 and 7 manifestly excessive, but does not otherwise take issue with the sentences imposed.

[11] Of the other counts, the offence of burglary consisted of the applicant's stealing property of a value of $1000 from a shed. The receiving offence arose out of a search of the applicant's residence, when various items that had been in a car stolen the previous week were found. The unlawful use of a motor vehicle arose from the stealing of a backpacker's car, which the applicant was driving when he committed counts 6 and 7. The backpacker's backpack was found in the car and this gave rise to the stealing. The applicant and his sister used the backpacker's credit card to purchase a number of items, and this was the basis for the fraud charge.

[12] The acts which were the basis of counts 6 and 7 occurred on 6th September 2002, when a police officer, a Constable Michael, approached the stolen vehicle, which was parked in a shopping centre car park. The applicant arrived on the scene and got into the car, but Constable Michael prevented him from closing the driver's door by standing between it and the body of the vehicle. The applicant started the engine; Constable Michael first asked him to accompany him for questioning, and then told him he was under arrest. The applicant accelerated rapidly, forcing Constable

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2 See *Penalties and Sentences Act* 1992, s 161B(4).

Michael to hold onto the driver's door. At about this point, another officer, Constable Morgan attempted to use capsicum spray on the applicant; some of it seems to have connected with his face around the eye area. Constable Morgan was knocked to the ground by the open door, and sustained severe bruising and muscular damage. The vehicle mounted a gutter and hit a pedestrian crossing sign. Constable Michael's leg was caught between the car door and the gutter, causing a severe compound fracture of his right tibia. The car eventually stalled, and the applicant attempted to flee on foot, but was apprehended.

[13] Victim Impact Statements from both officers were tendered. Constable Morgan's statement was undated, but Constable Michael's bears the date 20 November 2002. It is a reasonable inference that they were made about the same time, that is, 2 1/2 months after the offence and about 7 months prior to sentence. Constable Morgan complained of continuing hip and pelvic pain and headaches, as well as stress and depression. Constable Michael had needed surgery on 2 occasions. He had at the time of making the statement recently moved from using crutches to a walking stick. He was left with scarring, and was experiencing some low level leg pain; swelling in his right leg required the wearing of a pressure bandage and keeping his leg elevated where possible. Both officers were in graduated return to work programs.

[14] The learned sentencing judge described Constable Michael as having "ongoing problems of significant physical disability and emotional harm, as well as being severely restricted in his ability to carry out his employment as a member of the Queensland Police Service." This seems to be something of an over-statement; the officer's statement, perhaps as a result of stoicism, did not report any ongoing emotional problems. As to his employment, his graduated return to work program seemed to have been progressing satisfactorily as at November 2002, and he did not report any particular difficulties. It does seem that the information contained in the victim impact statements being seven months old at the date of sentence, and having been taken relatively soon after the offences, should have been treated with some caution, at least in considering the effects of the injuries on the two officers' capacity for work.

[15] The applicant was 36 years of age. He had convictions in 1990 for breaking and entering, stealing, unlawful use of a motor vehicle, dangerous driving and armed robbery, all of which were dealt with on one occasion leading to a head sentence of seven years' imprisonment. He also had a number of convictions in the Magistrates Court in Victoria. In 1985 and 1988 he was convicted of two counts of theft of a motor vehicle, three counts of theft and three counts of burglary. The longest sentence imposed was six months' imprisonment. On 21 June 2000, he received sentences totalling one year's imprisonment on one count of theft, two counts of theft of a motor vehicle, one count of possessing money which was the proceeds of crime, one count of possessing heroin and one count of trafficking heroin.

[16] The applicant pleaded guilty to these offences at his committal hearing. A report from a nurse with the Community Health Division of the Queensland Health Department, advised that in the month preceding the offences, he had been using massive amounts of morphine and amphetamines but had, while remanded in custody, completed a difficult withdrawal period and had remained drug-free up to sentence. He had, of his own volition, undertaken fortnightly counselling sessions.

[17] The learned sentencing judge said that he gave the applicant credit for his attempts to rehabilitate and for his early pleas of guilty. He accepted that the use of the capsicum spray may have been ill advised and may have contributed to some extent to the prisoner's lack of control of the vehicle, but said that he had difficulty giving that view much weight. He said that the offences encompassed in counts 6 and 7 were, in his view, serious violent offences and, taken with the 1990 conviction for armed robbery, required a declaration. He would, he said, temper the actual term of imprisonment to a degree, having regard to his intention to make the declaration.

[18] The learned sentencing judge must, in exercising his discretion, have acted under s 161B(4) of the *Penalties and Sentences Act* 1992 on the basis that the offences involved the use of serious violence, or that they resulted in serious harm. There is room for argument as to what those terms encompass, neither being defined; but counsel for the appellant did not attempt to argue that neither element was made out in the present case, contending rather that the case lacked features which would warrant the making of a declaration.

[19] In *Eveleigh* [2002] QCA 219, Fryberg J analysed the decisions of this Court in relation to declarations of serious violent offences, and concluded that there were two views discernible. The first was that the process was one of determining the appropriate sentence and then exercising the discretion. In the exercise of that discretion it was necessary to identify specific factors justifying the making of a declaration; and the focus was on the offence, so that it was doubtful that the criminal history was of relevance, and a declaration ought not be made unless the particular offence involved a departure from the norm for offences of that type. The second view was that the declaration power was a sentencing tool which formed a part of the overall sentencing discretion rather than constituting a separate discretion. There was no need, therefore, to identify special circumstances in order to justify a declaration. He concluded from his examination of the authorities that the second view had prevailed.

[20] I am inclined to think that elements of both approaches should be adopted: that there clearly is a distinct discretion to exercise under s 161B(3) and (4), requiring the existence of factors which warrant its exercise; but that the overall quantum of the imprisonment to be imposed should be arrived at having regard to the making of any declaration. However, whichever approach be preferred, it seems to me that the making of a declaration was not justified in this case. The learned sentencing judge did not identify any reason for supposing that the offences warranted a declaration other than in his reference to the applicant's previous offence of armed robbery. If previous offending is relevant, the armed robbery offence was committed some 13 years ago, and no details of its circumstances were available to the Court. Nor do I think that the likelihood of re-offending was such as to require a declaration. The offences were spontaneous, not calculated, and seem to have had a good deal to do with a drug dependency which the applicant has overcome.

[21] There was nothing of a remarkable nature about the offences. The exacerbating feature – the fact that they were committed upon police officers executing their duty – was adequately reflected in the sentences of three and three and half years' imprisonment respectively, particularly having regard to their cumulative effect, giving rise to a total sentence of four and a half years' imprisonment. There was nothing requiring that sentence to be given further punitive effect by a declaration.

[22] I would allow the application for leave, and vary the sentences imposed on Counts 6 and 7 by setting aside the serious violent offence declaration made in respect of each of them.