SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dodds* [2003] QCA 540
PARTIES:	**R** **v** **DODDS, David Anthony** (applicant)
FILE NO/S:	CA No 251 of 2003 DC No 82 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EX TEMPORE ON:	3 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2003
JUDGES:	McMurdo P, Davies JA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed to limit sentence imposed of five years imprisonment with a serious violent offence declaration to counts 1 and 2 and in respect of counts 3 and 4 order that no further penalty be imposed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – where applicant pleaded guilty to a number of offences contained in two indictments – where sentenced to effective term of three years imprisonment on first indictment and to effective term of five years imprisonment and declared "serious violent offender" on second indictment – where application related only to second indictment which involved robbery with violence whilst armed and deprivation of liberty – where long criminal history – where pleaded guilty and cooperated with authorities and expressed remorse – where made attempts to rehabilitate whilst on bail – where sentence imposed on indictment instead of individual sentences – whether sentence manifestly excessive *R v Jones* [2000] QCA 84; CA No 393 of 1999, 17 March 2000, considered

R v Sinden [2000] QCA 408; CA No 163 of 2000, 2 October 2000, considered
R v Thornton [1999] QCA 78; CA No 422 of 1998, 18 March 1999, distinguished

COUNSEL:	N V Weston for the applicant D Meredith for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant pleaded guilty on the 7th of July 2003 to a number of offences, contained in two indictments. The first indictment contained two counts of wilful damage, one count of assault occasioning bodily harm, one count of unlawful use of a motor vehicle, and one count of burglary with circumstances of aggravation. He was sentenced to an effective term of 3 years' imprisonment on those charges. He also was dealt with for two summary matters of obstructing police, arising from offences on this indictment, but was not further penalised. He then pleaded guilty to a second indictment, charging one count of entering premises with intent to commit an indictable offence with a circumstance of aggravation, one count of robbery with violence whilst armed, one count of deprivation of liberty, and one count of unlawful use of a motor vehicle. He was sentenced to an effective term of five years' imprisonment on this indictment. The sentencing Judge, under s 161B of the *Penalties and Sentences Act* 1992 (Qld) ("the Act"), declared that the applicant was "a serious violent offender". Declarations as to time already served under the sentence of 198 days as to the first indictment, and 155 days as to the second indictment, were also made. The applicant originally

appealed against his conviction, and sought leave to appeal against his sentence on the second indictment, but yesterday abandoned the appeal against conviction. His application for leave to appeal only relates to the sentence of five years' imprisonment imposed on the second indictment with a declaration under Part 9A of the Act. In considering whether that sentence is manifestly excessive, it is necessary to review the offences to which the applicant pleaded guilty on the first indictment.

The applicant was 34 years old at the time of the offences, and 35 at sentence. He had a lengthy criminal history. He was convicted in the Ipswich Magistrates Court of two counts of break, enter and steal in 1989, and was sentenced to a community based order. In 1992, he was convicted of a number of offences, the most serious of which was assault occasioning bodily harm and was sentenced to three months' imprisonment. The next month he was convicted and sentenced to three and a-half years' imprisonment, with a recommendation for parole after 18 months, for a robbery in company with personal violence. In 2000, he was sentenced to two years imprisonment for assault occasioning bodily harm in company. In 2002, he was convicted and fined $400 for common assault. He also had an assortment of minor property and vagrancy offences.

The offences on the five-count indictment, the first in time, occurred as follows. On 19 June 2002, the complainant's wife was inside her home unit and heard loud swearing and banging

noises outside in the stairwell. She contacted her husband, the complainant, by telephone and he returned home. He found the applicant kicking a screen door and swearing in front of the next-door neighbour's unit. The complainant said, "Are you all right, mate?". The applicant said, "Who the fuck are you?" and punched the complainant to the left of his jaw. The complainant retreated to his home, closing the door behind him. He then heard an object smash against his front door, and the applicant yelling abuse. He called police, who noticed that a clay pot had been smashed against the complainant's door, causing damage to the pot and door of $780.

On about 20 July 2002, the applicant took car keys from Mr Davies, with whom he shared premises. He drove a vehicle to the home of his former wife at about 2 a.m. He entered her house without permission whilst armed with a pick handle. He used crude and demeaning language towards her. He hit her across the back of the legs with the pick handle. She telephoned triple-0. When police arrived, the applicant told them to "Fuck off, you dogs", and continued to threaten his former wife. Police struggled to detain him, and eventually subdued him with capsicum spray.

This incident also encompassed the two summary counts of obstructing police.

The applicant was remanded in custody, and released on bail after serving 43 days, on the 4th of September 2002.

The offences contained in the second indictment, the four-count indictment, occurred as follows. The complainant and the applicant resided in separate rooms at a Caloundra hostel. On the 30th of January 2003, the applicant knocked on the complainant's door, entered his room and without warning punched him on the nose, causing pain and bleeding. The complainant fell onto his bed, and the applicant punched him a further three or four times. The applicant said, "I'm sick of you Christian cunts; I asked you for some money and wouldn't give it to me." The applicant spat in the complainant's face. He asked the complainant if he wanted to suck his penis. The complainant refused. The applicant picked up a mirror, and threatened to hit the complainant with it. He ordered the complainant to face the wall. As he did so, the applicant said, "I'm not going to hit you, you stupid dopey cunt." He tied the complainant's ankles together with a mobile telephone charger and cord, placed some underwear in the complainant's mouth, and tied the complainant's wrists and ankles together with the bed sheet. He took the complainant's wallet and car keys and demanded his PIN. The complainant complied. The applicant took several items of clothing belonging to the complainant and placed them in a bag. He told the complainant he was going to steal his money and his car; he would return in two hours and if the complainant had moved, he would kill him. As he left, he told the complainant not to make a noise or he would stab him. The complainant did not accede to the applicant's threats, freed himself, and notified police who intercepted him in Fortitude Valley. A tendered victim impact

statement recorded that the complainant suffered a broken nose and also suffered emotional damage. He feared for his life. His relationship with others has suffered. He has lost hundreds of dollars from his wallet and this affected him financially. He says that no amount of money could compensate him for his emotional damage.

The Prosecutor at sentence contended that because of the applicant's previous history for offences of violence, and that the second series of offences were committed whilst on bail, a sentence of between five and seven years was appropriate.

The applicant had a dysfunctional, indeed tragic, background. He was one of 11 children. When he was 14, he witnessed the murder of his brother. At 15, his father died of cancer. He left school, and commenced to abuse alcohol and drugs. He has no real work skills or job training. He moved to Queensland at 19 and obtained some unskilled work but continued to drink heavily. He was married at 29 and has four children, two of that marriage, and two adopted. He and his wife had separated about six months prior to the first series of offences. He was distraught at the break up of his family, and the loss of his wife and alienation from his children. He abused alcohol and amphetamines and committed these offences of which he has little memory.

Whilst on bail, he made attempts to rehabilitate by obtaining part-time security work at Golden Beach Tavern, and joining

the SES as a volunteer. A letter from the Caloundra City SES confirmed that he had done volunteer work for him from October 2002 to January 2003. He sought counselling for his depression from the Sunshine Court and Gympie Health Services and from the Indigenous Mental Health Unit. The stressors of his marriage break-up and his separation from his children became too much for him. Nevertheless, the applicant continued to abuse alcohol and amphetamines and this was a major factor in his commission of the offences, including the second series of offences.

He pleaded guilty at an early stage, cooperated with the authorities and expressed remorse at sentence for his offending. His counsel at sentence did not quibble with the range suggested by the Prosecutor, but asked the Judge to moderate the head sentence if making a serious violent offence declaration.

The learned primary Judge considered that the range of imprisonment for this combination of offences, given the applicant's previous convictions for violence, was six to eight years, before taking into account the plea of guilty, and then, consistent with the submissions made to her, determined that an effective sentence of five years' imprisonment with a declaration under Part 9A of the Act was the appropriate penalty here, recognising the various competing interests.

The applicant contends the learned sentencing Judge's starting point of eight years' imprisonment is too high and that the applicant has received insufficient benefit for his plea of guilty; his attempts at rehabilitation whilst on bail; his depression and apparent remorse. The applicant contends the appropriate sentence is either five years' imprisonment with no declaration under Part 9A of the Act or four years' imprisonment with such a declaration. The applicant also points out that her Honour sentenced the applicant to five years' imprisonment on the indictment, instead of sentencing the applicant on each of the individual counts in the second indictment, and that a declaration under Part 9A could not be made in respect of count four on the indictment, unlawful use of a motor vehicle.

The applicant was a mature man with a history of violence who has continued to commit violent offences even whilst on bail for other offences of violence. The only significant factor in his favour was his early plea of guilty and cooperation with the authorities in the administration of justice.

The applicant has referred to three cases said to be comparable in support of his contention that the sentence is manifestly excessive. Two of those *R v Grogin* [1998] QCA 361; CA No 198 of 1998, 27 August 1998 and *R v Gills* [1996] QCA 034; CA No 443 of 1995, 2 February 1996 concerned offences which were committed prior to the commencement of the significant 1997 amendments to the Act including the power to

declare an offence to be a serious violent offence under Part 9A of the Act.

The third matter relied upon by the applicant was *R v Thornton* [1999] QCA 078, CA No 422 of 1998, 18 March 1999. Thornton pleaded guilty to one count of armed robbery in company, one count of entering premises with intent, one count of deprivation of liberty, three counts of wilful damage and two counts of breaking and entering premises and committing an indictable offence therein. He was sentenced to an effective term of five years' imprisonment without a declaration under Part 9A. The offences concerned the armed robbery in company of a Red Rooster store at Labrador. The applicant carried a machete, an accomplice a crowbar and the other accomplice a replica pistol. Each was masked and wore dark clothing. They broke into the store and then tied up a 14 year old member of staff and ordered the female assistant manager to open the safe. She, too, was bound and a considerable quantity of cash and property stolen. Thornton was 24 when he committed the offences and 25 at sentence. He had a substantial criminal history involving motor vehicle offences and minor drug offences with some convictions for dishonesty but none for violence. Two of the three victims suffered psychological problems as a consequence of the offence. This Court held that the sentence of five years' imprisonment with no recommendation for parole was not manifestly excessive.

This matter is immediately distinguishable from *Thornton* not only because its facts are obviously different but also

because this applicant was a more mature man with a much more serious record for committing offences of violence.

The respondent rightly points out that the most serious offences on the second indictment, counts 1 and 2, were in the category of those burglaries and robberies constituting a home invasion. The schedule of offences provided by the respondent for offences of home invasion with intent to steal confirms the submission made at first instance, as adopted by the learned sentencing Judge, that the appropriate range in all the circumstances here was six to eight years' imprisonment before taking into account the plea of guilty: see *R v Sinden* [2000] QCA 408; CA No 163 of 2000, 2 October 2000 and *R v Jones* [2000] QCA 084; CA No 393 of 1999, 17 March 2000.

The learned sentencing Judge correctly adopted the integrated sentencing process referred to in *R v Bojovic* [2000] 2 QdR 183 and in deciding to impose a declaration under Part 9A of the Act sentenced the applicant to a term of imprisonment at the lower end of the appropriate range. The sentence imposed adequately reflects the mitigating factor of the applicant's cooperation with the authorities in the administration of justice and also appropriately recognises the seriousness of the applicant's multiple offending which included re-offending whilst on bail, his maturity and his extensive previous criminal history for serious offences of violence. The sentence cannot be said to be manifestly excessive.

Both counsel concede the learned sentencing Judge erred in sentencing the applicant to five years' imprisonment on the second indictment instead of imposing individual sentences in respect of each count. It is therefore necessary to technically grant the application and allow the appeal in order to make those ancillary amendments.

I would allow the application for leave to appeal against sentence and allow the appeal to the limited extent only of limiting the sentence imposed of five years' imprisonment with a serious violent offence declaration to counts 1 and 2 and in respect of counts 3 and 4 order that no further penalty be imposed. I would otherwise refuse the appeal.

DAVIES JA: I agree.

CHESTERMAN J: I agree.

THE PRESIDENT: They are the orders of the Court.
