SUPREME COURT OF QUEENSLAND

CITATION:	*R v MP* [2004] QCA 170
PARTIES:	**R** **v** **MP** (applicant)
FILE NO/S:	CA No 42 of 2004 SC No 312 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	20 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2004
JUDGES:	McMurdo P and Chesterman and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – where the applicant was sentenced to nine years' imprisonment for manslaughter – whether the term of imprisonment imposed by the learned trial judge was manifestly excessive *Edwards* (1996) 90 A Crim R 510, considered *R v DeSalvo* [2002] QCA 63, considered *R v Stafford* CA No 503 of 1995, considered *R v Arnoutovic* [2001] QCA 89, considered
COUNSEL:	The applicant appeared on his own behalf M J Copley for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

CHESTERMAN J: The applicant was indicted on a charge of murdering his father, but after a three day trial on 6 February 2004 he was convicted of manslaughter. The trial Judge concluded that the jury acquitted the applicant of murder on the basis that it was not satisfied that the Crown excluded the defence of provocation beyond reasonable doubt. His Honour described any provocation as minimal.

The facts of the matter as described by the trial Judge were that at the relevant time the applicant was very drunk. He became involved in a dispute with his father who, at the time, was sober. No doubt because of the applicant's intoxication the dispute which began about pets turned to the applicant's children and an accusation made by the applicant to his father that the latter had molested his young daughter. According to the trial Judge the father remained silent in the face of the allegation which prompted the applicant to bring his four year old child into the room to interrogate her, then to interpret her responses as confirming sexual molestation by his father and, in the face of his continuing silence, to pick up a knife and stab him in the heart.

The Judge described the attack as ferocious and explicable only on the basis of intoxication. His Honour had no doubt that the applicant intended to cause his father at least grievous bodily harm. On this basis his Honour thought that the jury must have acquitted the applicant of murder because they had a reasonable doubt that the attack was provoked by

the father's implicit acceptance of the accusation that he had molested one of his grandchildren.

The applicant was sentenced to nine years' imprisonment with a declaration that 79 days of presentence custody was time served under the sentence. His Honour noted that the applicant had offered to plead guilty to manslaughter which reflected remorse and a willingness to facilitate the course of justice.

The applicant complains that the sentence is manifestly excessive. There appear to be two bases for his complaint. The first is that the comparable sentences referred to the trial Judge are not in fact comparable and, secondly, that the imprisonment for nine years is a substantial punishment on his family who depend upon his support. The second ground can be disregarded. Imprisonment imposed upon parents, usually fathers, almost invariably involves hardship on children but this consideration is almost never relevant and never in the case of serious offences for which substantial periods of imprisonment must be imposed.

The reason for this approach was explained by Chief Justice Gleeson in *Edwards* (1996)90 A Crim R 510 at pages 515 to 517. It is sufficient to quote one passage,

> "Hardship to spouse, family, and friends, is the tragic, but inevitable consequence of almost every conviction and penalty recorded in a criminal Court… It seems…that courts would often do less than their clear duty… if they allowed themselves to be much influenced by the hardship that prison sentences, which from all other points of

> view were justified, would be likely to cause to those near and dear to prisoners."

Examination of the cases said to be comparable show them to be so.

R v. DeSalvo [2002] QCA 63, was a case in which the Court of Appeal reduced the sentence of eight years' imprisonment imposed for manslaughter together with a declaration that DeSalvo had been convicted of a serious violent offence to a term of imprisonment of nine years. DeSalvo and his victim were both drug dealers. On an occasion when they met to transact business the victim spoke aggressively to DeSalvo who was sitting in his car. He, feeling threatened or provoked, got out of the car and lunged at the victim with a knife, killing him instantly.

The applicant gave himself up and was prepared to plead guilty to manslaughter. He was charged with murder but convicted of the lesser offence. The trial Judge found that the applicant intended to cause the victim some but not serious harm. The Court of Appeal thought that, "[f]or a homicide resulting from a deliberate act like the stabbing" in that case, the appropriate sentence was between 10 to 12 years with some discount for remorse and the offer before trial to plead guilty to manslaughter. As I have said nine years was imposed as the sentence.

In *R v. Stafford* CA No 503 of 1995, the applicant was a young man without prior conviction who stabbed an unarmed victim at

a birthday party. The circumstances which led to the stabbing were not entirely clear. The applicant did not give evidence and the versions of the party guests conflicted. For some reason Stafford became annoyed with the victim when they spoke in the kitchen of the house, which was the venue for the party, armed himself with a knife and stabbed the victim in the chest. The stabbing was described as, at best for the applicant, a response to what seems to have been a minor altercation which he started. A sentence of nine years was upheld.

The third case is *R v. Arnoutovic* [2001] QCA 89, the facts of which were that the victim burst into a flat which at the time was occupied by the applicant and two others. The victim was drunk and affected by drugs and behaved aggressively. It seems he actually inflicted some violence on those in the flat. The deceased then left the flat but the applicant decided to pursue him and armed himself with a large hunting knife for the purpose, he said, of deterring the other from returning to carry out threats of violence which he had made when present. In the ensuing confrontation between the applicant and his victim a fight developed and the victim was fatally stabbed.

The applicant gave himself up to the police a day or two later, thereby demonstrating remorse. The sentence imposed was nine years which was upheld on appeal.

If anything, this case seems to be more serious than those. In none of those cases did the killer intend to cause serious harm to the victim. In each case, what started out as an endeavour to frighten or inflict inconsequential injuries, led to death. Here the applicant's intention was to cause grievous bodily harm, or perhaps death, to the victim. On the findings made the basis for a conviction of manslaughter was provocation of a minimal kind.

In my opinion, a sentence significantly longer than nine years could have been appropriate. It cannot be said that the sentence of nine years is excessive. In my opinion, the application should be refused.

THE PRESIDENT: I agree with everything that Mr Justice Chesterman has said. I will add a few brief observations in case they may be helpful if this matter is used as a comparable sentence in the future.

The applicant was 26 at the time of the offence and 28 at sentence. He had some relatively minor criminal history for drug offending and dishonesty but he had no prior convictions for violence and had not previously been sent to prison. He and his partner had four children aged from a few months to eight years. The applicant's counsel at sentence described his troubled upbringing. His parents were assessed as incapable of providing care and he was raised by his grandparents. He had problems at school and lived on the streets from an early age. He is alcohol dependent and had

been diagnosed by Dr Fama as "[a]n emotionally unstable personality of an impulsive type usually associated with his intoxication and also an alcohol dependent syndrome."

The applicant's counsel at sentence conceded that the range suggested by the prosecutor of nine to 11 years imprisonment was appropriate but urged a sentence at the lower end of that range. His Honour sentenced the applicant accordingly.

The learned sentencing Judge in his sentencing remarks found the following facts. The applicant was drunk when he stabbed his father who was completely sober; they became involved in an altercation over disputes about dogs or dog food; the applicant was angry that the father preferred one of his children over another and, finally, the applicant accused his father of sexually molesting the applicant's child. When the father remained silent in the face of the allegation the applicant brought the four year old child into the room to interrogate her and interpreted her responses as confirming sexual molestation. In the face of the father's continued silence the applicant picked up a knife and stabbed him in the heart intending, as the Judge found, to cause grievous bodily harm. The Judge observed that any provocation could only be viewed as minimal. His Honour took into account the significant mitigating factor of the early plea of guilty to manslaughter at the commencement of the murder trial as reflective of remorse and a willingness to facilitate the course of justice.

The comparable sentences referred to by Mr Justice Chesterman demonstrate clearly that the sentence was not manifestly excessive. I agree the application for leave to appeal against sentence should be refused.

ATKINSON J: I also agree with the order proposed for the reasons given by the President and Mr Justice Chesterman.

THE PRESIDENT: The order is as proposed.
