SUPREME COURT OF QUEENSLAND

CITATION:	*R v Shales* [2005] QCA 192
PARTIES:	**R** **v** **SHALES, Leanne Myra** (applicant)
FILE NO/S:	CA No 62 of 2005 SC No 152 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	7 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	7 June 2005
JUDGES:	de Jersey CJ, McPherson and Keane JJA 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 refused**
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 REFUSED – where applicant convicted on own plea of guilty to being an accessory after the fact to manslaughter – where sentenced to 18 months imprisonment - where applicant initially gave a false account to police – where applicant cooperated with police, but where this cooperation was entirely selfish and came very late – where prosecution thus lost the chance of presenting a cogent case against the primary offender – where applicant spent five and half months in pre-sentence custody – whether the sentence was manifestly excessive CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS –

IRRELEVANT FACTORS – TIME SPENT IN CUSTODY – where applicant had spent time in custody while subject to the charge of murder – where applicant was subsequently charged with being an accessory after the fact to manslaughter – whether a declaration under s 161 of the *Penalties and Sentences Act* 1992 (Qld) in relation to pre-sentence custody be made

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – MAXIMUM SENTENCE – GENERALLY – where the trial judge pointed to the inadequacy of the prescribed maximum under s 544 of the *Criminal Code* 1899 (Qld) – whether the trial judge was entitled to diminish the weight given to circumstances of mitigation because of his view as to the inadequacy of the prescribed maximum penalty

Criminal Code 1899 (Qld), s 307, s 544
Penalties and Sentences Act 1992 (Qld), s 161

Markarian v R [2005] HCA 25, approved
R v Barlow (1997) 188 CLR 1, cited
R v Mills (1977) 16 SASR 581, cited

COUNSEL: A W Moynihan for the applicant
D Meredith for the respondent

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

THE CHIEF JUSTICE: The applicant was sentenced to 18 months' imprisonment for the offence of being an accessory after the fact to manslaughter. One Ogborne with whom the applicant then shared a house was responsible for the manslaughter which occurred on the 10th of April 2002.

The applicant had been drinking at a hotel with the deceased whose name was Rieck. The applicant took Rieck back to the house. There was a fight between Ogborne and Rieck and Ogborne asked Rieck to leave. He did leave but returned later and asked could he stay the night. He was allowed to do that

and went to bed.

Ogborne and the applicant were in the lounge room. Ogborne left the lounge room and returned five to 10 minutes later when he informed the applicant that he had stabbed Rieck a number of times. The applicant then left the house. Another person, Hoare, helped Ogborne clean the room and dispose of the body. The skeletal remains of Rieck were discovered in bushland on the 11th of September 2002. Decomposition meant that the cause of death could not be determined.

In the meantime, police officers had spoken with the applicant, first on the 24th of May 2002 when she claimed that the deceased had left the house unharmed. She reasserted that on the 11th and 12th of November 2002. The applicant was charged with Rieck's murder on the 22nd of November on the basis that she was the last person seen with Rieck prior to his disappearance. She was then placed into custody, where she remained until the 8th of May 2003, some five and a-half months.

The body of Rieck had been found wrapped in carpet from the house where the applicant lived. The applicant made contact with the police on the 10th of March 2003 and confessed that Ogborne had killed the deceased and that Hoare had helped Ogborne dispose of the body. She provided a written statement to the police on the 26th of March 2003 in which she included the statement that Ogborne had confessed to his having killed the deceased in circumstances which, if true, amounted to

murder.

Ogborne was charged with murder, but the Crown accepted his plea of guilty to manslaughter apparently on the basis the prosecution considered the applicant would prove an unreliable witness.

The Crown case against the applicant on the charge of being an accessory after the fact to manslaughter was that she had assisted Ogborne by cleaning up the bedroom and by giving false accounts to the police.

Before the learned sentencing Judge the applicant sought to explain her lies to the police on the basis that she feared retribution from Ogborne. The Judge considered that she exaggerated that fear because Ogborne himself was at relevant times in gaol, where the applicant continued to visit him while believing him to be responsible for the killing. The learned Judge was also influenced by the consequences of the applicant's false account which were, as he put it, that the prosecution lost the chance of presenting a cogent case of murder against Ogborne.

In particular, it was not possible, by reference to the skeleton, to discern evidence of the six or seven stab wounds to which the applicant said Ogborne had confessed to her. Had the applicant been truthful with the police at an early stage, when she was first interviewed about six weeks after the offence, the police would have investigated her claims no

doubt with Ogborne and Hoare, and that may well have led to an early discovery of the body of the deceased.

Also, had the applicant made a timely statement to the police in truthful terms, the police may possibly then have assessed her as a credible witness in support of a charge of murder against Ogborne, whereas later, without the support of evidence of wounds to the body, that view of her credibility was apparently not held.

In all these circumstances, there is, therefore, the possibility that the Crown's prospects of establishing the requisite intent for murder against Osborne were diminished, and it is a real possibility.

Mr Moynihan, who appeared for the applicant, pointed out that the Crown could, nevertheless, at the later stage even, have called the applicant as a witness at a trial of Ogborne for murder, but chose to rely instead on the indemnified witness, Hoare. That said it does, nevertheless, remain the position that had the applicant informed the police in March of what she claimed to know of the killing, the prosecution case could have been advanced at a much earlier stage.

His Honour considered that he could not, in sentencing the applicant for this offence, make a declaration under section 161 of the Penalties and Sentences Act in relation to the five and a-half months the applicant had spent in custody while subject to the charge of murder, because it was not time spent

in relation to proceedings for the offence for which she was being sentenced and for no other reason, to adopt the terms of the section.

Mr Moynihan submitted that the same conduct led to the charge of murder as founded the charge of her being an accessory after the fact and he referred to *R v Barlow* (1997) 188 CLR 1 at 9. That was not necessarily so factually.

In any event section 161 was in terms inapplicable, as the Judge rightly recognised. While his Honour did not elaborate upon the view he took that section 161 did not apply in the circumstances of this case, it is apparent he was of the view that since the applicant was originally held in custody on a charge of murder, it could not be said that she was being sentenced for that offence, and accordingly the time she was held in custody in relation to the murder charge could not be taken to be imprisonment already served under the sentence he imposed.

The learned Judge sentenced the applicant to 18 months' imprisonment rather than the maximum of two years, in order to take account “principally” of the period she had spent in custody, but together with the other circumstances of mitigation: those embraced her plea of guilty, her cooperation with the police, her disclosures in relation to Hoare, and a degree of mental instability.

As his Honour observed in relation to the cooperation, it was "entirely selfish and came very late, too late to allow the police to investigate properly and for the Crown to mount a proper case against Ogborne."

His reference to selfishness concerned the applicant's motivation to cooperate, which was plainly to counter the murder charge against her.

The learned Judge pointed to the inadequacy of the prescribed maximum of two years' imprisonment for a case like this, and I agree with his observations. The offence created by section 544 of the Criminal Code covers accessories after the fact for all crimes, save murder, for which section 307 prescribes a maximum penalty of life imprisonment. Accordingly, for an offender who is an accessory after the fact to stealing, for which the maximum penalty is five years' imprisonment, up to manslaughter, for which the maximum is life imprisonment, the maximum penalty for the accessory charge is two years' imprisonment.

Manslaughter, possibly along with attempted murder, would be the most serious principal offences to which the section could apply. The Legislature should give consideration to amending section 544 to accord sentencing Judges a wider discretion when dealing with cases of this gravity. As this case illustrates, the two year maximum penalty is absurdly low. There would be a strong argument in my view for giving a sentencing Judge the discretion to sentence an accessory in a

case like this up to the maximum prescribed for manslaughter itself, that is life imprisonment.

Mr Moynihan submitted, in essence, that the learned Judge was distracted by his view as to the inadequacy of the two year maximum from a proper recognition of it as the legislatively prescribed maximum. Having referred to the inadequacy of the maximum, his Honour went on to say that "ordinary principles of mitigation can therefore have much less scope for operation." He repeated that observation later on in his sentencing remarks.

Of course his Honour was constrained to respect the two year maximum for what it was: see *Markarian v R* [2005] HCA 25. Mr Moynihan submitted that the Judge could only proceed from that maximum, reducing it to allow for circumstances of mitigation, including the time spent in custody, if it was right to regard this case as falling into the worst category of case to which the maximum may apply. This approach is discussed in the *R v Mills* (1977) 16 SASR 581 at 583-4.

Once one acknowledges the range of cases to which section 544 may apply, from being an accessory to stealing to being an accessory to manslaughter or attempted murder, the present case could properly be regarded as falling at or near to the top end of the scale. The particular consequences of the present applicant's conduct, in likely prejudicing the development of the case of murder against Ogborne, mean that it was a particularly serious and grave example of a case

which, by its very nature, already fell at that top end of the scale.

It fell to the learned sentencing Judge to determine the weight to be given to matters of mitigation. He could arguably have given less weight to the period spent in custody in the context of the lateness of the applicant's cooperation, and more weight to the plea of guilty, her mental condition, disclosure of Hoare's involvement and her fear of Ogborne.

While I do not consider the Judge was entitled to diminish the weight given to circumstances of mitigation because of a view as to the inadequacy of the prescribed maximum penalty, they were, in this case, overwhelmed by the gravity of the offence, especially having regard to its possible consequences in relation to the prosecution of Ogborne.

The Judge ultimately arrived at a sentence which could not for offending of this character be considered manifestly excessive. The six month reduction from the maximum appropriately takes account of the time spent in custody and the other mitigating circumstances. I would refuse the application.

McPHERSON JA: I agree.

KEANE JA: I agree.

THE CHIEF JUSTICE: The application is refused.
