SUPREME COURT OF QUEENSLAND

CITATION:	*R v Sinden* [2005] QCA 414
PARTIES:	**R** **v** **SINDEN, Derek Lulu** (applicant/appellant)
FILE NO/S:	CA No 198 of 2005 SC No 535 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 November 2005
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2005
JUDGES:	Jerrard and Keane JJA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal allowed to the extent of setting aside the sentence of 10 years imprisonment for manslaughter and substituting, in lieu thereof, a sentence of eight years imprisonment and a declaration that the applicant has been convicted of a serious violent offence**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - WHEN GRANTED - GENERALLY - where applicant had broken into a house and encountered an elderly woman - where the applicant had pushed the woman, held a pillow over her face and demanded money - where, subsequently, the woman was so distraught that she suffered a heart attack that resulted in her death - where the applicant had an extensive criminal history which included prior occasions on which the applicant had attacked elderly women in their homes - where applicant pleaded guilty on second day of trial to one count of manslaughter and one count of entering a dwelling and committing an indictable offence - where the applicant was sentenced to serve 10 years imprisonment for the manslaughter on 14 July

2005 and a serious violent offender declaration was made - where the applicant had previously been sentenced to seven years imprisonment with respect to certain other offences on 26 May 2000 - where the applicant had been held in custody since 26 April 1999 - whether the learned sentencing judge had correctly applied the totality principle discussed by the High Court in *Mill v The Queen* (1988) 166 CLR 59 - whether the sentence imposed was manifestly excessive

Mill v The Queen (1988) 166 CLR 59, cited
R v Bates; R v Baker [2002] QCA 174; CA No 295 and CA No 329 of 2001, 17 May 2002, considered

COUNSEL: A J Rafter SC for the applicant/appellant
P F Rutledge for the respondent

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

[1] **JERRARD JA:** In this appeal I have had the advantage of reading the reasons for judgment of Keane JA and the orders proposed by His Honour, and I agree with those reasons and orders. The sentences imposed on 14 July 2005, for the offences of manslaughter and burglary, achieve a manifestly excessive result by reason of Mr Sinden being required in the circumstances to serve a minimum term of (as it transpires) 14 years, six months and 10 days from 26 April 1999, before being eligible for post-prison community based release ("parole"). That minimum non-parole period falls just short of the non-parole period for a life sentence.

[2] Mr Sinden has a truly appalling criminal record in this State, beginning with possession of a dangerous drug in 1990 and continuing thereafter until he was sentenced to terms totalling a maximum of seven years imprisonment on 26 May 2000 in the Brisbane District Court. Those sentences were imposed for one offence of robbery with violence and one of burglary, following convictions after a trial, for which the head sentence on each of those counts was seven years. He was also sentenced that day to concurrent terms of five years imprisonment on 15 other counts of burglary, and to lesser terms of imprisonment on two counts of housebreaking, two counts of receiving, one of entering and stealing, one of wilful damage, one of stealing, and two of attempted fraud. Those offences were all committed between 24 May 1998 and 26 April 1999; Mr Sinden had last been released from jail on 21 May 1998. Therefore he repeatedly burgled homes and committed offences of dishonesty to obtain money to get heroin; and was arrested and charged, and then released on bail, on which he re-offended, five times between 25 May 1998 and 26 April 1999. He was on bail when he caused Mrs Brown's death.

[3] Mr Rafter SC, for the applicant, did not challenge the view of the learned sentencing judge that an appropriate term imposed in May 2000 for all offences including the manslaughter of Mrs Brown would have been one totalling 16 years. Mr Sinden was a coward and a bully, as described by the learned sentencing judge, and an opportunistic burglar who preyed in particular upon elderly home owners; there is

however no suggestion that he intended to cause death or grievous bodily harm to victims of his burglaries.

[4] As at 14 July 2005 Mr Sinden had been held in custody since 24 April 1999 in respect of all of the offences for which he has now been convicted, and so had served six years two months and 10 days in custody. He had served more than 80 per cent of the seven year term imposed in May 2000 and had not been placed on parole, apparently in part because of the fact that for some of that time he was on remand facing a charge of murder. If the sentence imposed on 14 July 2005 is varied to order a further eight year term commencing as at 14 July 2005, Mr Sinden will have to serve a total minimum term of 12 years, six and a half months, before being eligible for parole. That equates to 80 per cent of a term of imprisonment of almost 16 years. That is the intent of the proposed order.

[5] It should be borne in mind that Mr Sinden would have been approaching his final release date on the seven year sentence when he came to be sentenced for manslaughter and another burglary offence. He had originally been charged with that offence of burglary, but that charge was discontinued. It was not re-enlivened until he was charged with murder and burglary on 20 November 2003. Regard should be had to that delay in ultimately determining to charge him with burglary of the Browns' residence and an offence arising out of the death of Mrs Brown, and for that reason a sentence should be imposed now which has the same effect that a 16 year term imposed in May 2000 would have had.

[6] **KEANE JA:** On 13 July 2005, the applicant pleaded guilty on the second day of his trial to one count of manslaughter and one count of entering a dwelling house and committing an indictable offence. On these counts he was sentenced on 14 July 2005 to 10 years imprisonment and five years imprisonment respectively, the sentences to be served concurrently. On 8 August 2005, the applicant filed an application for leave to appeal against sentence. That application has been pursued. The ground of the application is that the sentence was "manifestly excessive in all the circumstances". On 10 August 2005, the applicant filed an application with a view to appealing against his conviction. That application has not been pursued.

The circumstances of the offences

[7] On the morning of 26 April 1999, the applicant broke into the home of Mr and Mrs Brown. Mr Brown was out at the time. The applicant attacked Mrs Brown, who was 71 years of age. He pushed her onto a bed, put a pillow over her face and demanded money. He ransacked her belongings and then pushed her to the floor and put the pillow over her face again. Mrs Brown managed to get to a window and to call out to her daughter who lived next door. The applicant then left the premises.

[8] During the incident, Mrs Brown told the applicant that she had just had surgery for cancer and asked him to get off her. Subsequently, she was extremely distraught. She suffered a heart attack and was admitted to hospital. That evening, she suffered cardiac arrest and a brain stem stroke. She was resuscitated but remained unconscious until she died on 30 April 1999.

[9] Difficulties involved in proving a connection between the circumstances of the applicant's assault on Mrs Brown and her death meant that the applicant was not charged in relation to her death until 20 November 2003. He was committed for

trial on 28 October 2004. His trial for murder began on 12 July 2005. The prosecution accepted the applicant's plea of guilty to manslaughter in discharge of the murder count.

[10] At the time of his sentence, the applicant had been in custody since 26 April 1999. On 26 May 2000, he was sentenced to seven years imprisonment in respect of many offences which included offences of entering a dwelling house with intent, and robbery with personal violence. Importantly in this regard, on two occasions in April 1999, he had stolen money from the same 87 year old woman. The applicant's attack on Mrs Brown occurred on the day following the second of these occasions.

The applicant's circumstances

[11] The applicant was born on 23 November 1969. He was 29 years of age at the date of the offences of present concern. He was 35 years of age when he was sentenced for those offences.

[12] The applicant's criminal history commenced in 1986 when, at the age of 17 years, he was convicted of breaking, entering, stealing and malicious injury. Since that time, as the learned trial judge observed, he has "been offending relentlessly while not in custody". He has been convicted of many offences of dishonesty often with actual violence. He has spent much of his adult life in prison.

[13] The applicant was a heroin addict. He asserted in materials put before the learned sentencing judge that he had overcome his addiction. Her Honour may well have been sceptical of these assertions. They were not supported by evidence independent of the applicant. Her Honour concluded that the applicant's prospects of rehabilitation are "extremely limited".

The sentence

[14] The learned sentencing judge took into account the circumstance that the applicant's offending was "driven by his heroin addiction". Her Honour also took into account, as circumstances of mitigation, his plea of guilty, the fact that he was not armed with any weapon and the fact that he desisted from his attack on Mrs Brown when she called out to her daughter. Her Honour also noted the circumstances that the applicant did not intend to kill Mrs Brown or to do her grievous bodily harm.

[15] On the other hand, and importantly, her Honour also noted that she had been unable to detect "any sign of remorse" in the applicant.

[16] The learned sentencing judge accepted that the application of the totality principle discussed by the High Court in *Mill v The Queen*[1] required that she should consider the notional head sentence that would have been imposed had the applicant been sentenced for the offences of present concern on 26 May 2000 when he was sentenced for the other offences he had committed at that time. Her Honour was of the view that, had the applicant been sentenced in May 2000 for all the offences which he had then committed, he would have received a head sentence of 16 years. Her Honour noted that the applicant had been in custody for some six years; and, as has been seen, sentenced him for 10 years for the offence of manslaughter.

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1 (1988) 166 CLR 59.

[17] It is apparent from her Honour's reasons that the learned trial judge fixed upon the notional head sentence of 16 years by reference to the range of 15 to 18 years referred to in *R v Bates; R v Baker* ("*Bates*").[2]

The applicant's argument

[18] The first submission made by the applicant is that her Honour erred in taking *Bates* as a guide to the notional head sentence in this case. *Bates* was a case of a vicious premeditated assault plainly intended to cause bodily harm to the victim and carried out by the assailants for no apparent motive other than the pleasure of seeing the victim suffer.

[19] In this case, the learned sentencing judge recognised that this case was distinguishable from *Bates* in that the applicant had not intended to inflict bodily harm on Mrs Brown, and that he was driven by the need to fund his heroin addiction. On the other hand, there was present in this case the disturbing feature that the applicant's *modus operandi* included preying upon elderly women in their own homes, and the strong demands of deterrence and community protection to which that gave rise.

[20] Having regard to the totality of the offending for which the applicant might notionally have been sentenced in May 2000, and bearing in mind his appalling criminal history, poor prospects of rehabilitation, lack of remorse and the compelling claims of the most vulnerable members of the community to be protected from the applicant, I am not persuaded that a head sentence of 16 years would have been manifestly excessive. If the manslaughter of Mrs Brown was considered alone, the circumstances of that offence were such as to place that crime in the category of more serious cases of manslaughter, where there has been deliberate use of dangerous force though heedless of the consequences, in relation to which a sentence in the range between 10 and 14 years imprisonment would have been in order.[3] The other offences for which the applicant was actually sentenced in May 2000 would then also need to be taken into account in determining a sentence which reflects the overall criminality of the offending conduct for which the applicant was notionally being sentenced.

[21] There is, however, substance in the applicant's second submission, which is that the learned primary judge failed to take into consideration that the applicant, who had not been made the subject of a serious violent offender declaration in May 2000, had served almost six years and three months of the seven year sentence imposed in May 2000 when he was sentenced on 14 July 2005; and that the effect of the sentence of 10 years imprisonment imposed on that date, of which at least eight years must be served in consequence of the serious violent offender declaration made by the learned sentencing judge,[4] means that the applicant will have to serve in excess of 14 years actual imprisonment before being eligible for post-prison community based release ("ppcbr") (from 26 April 1999 to 14 July 2013). If the applicant had been sentenced to 16 years imprisonment in May 2000, then, taking into account the time declared already served at that time, he would have been

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2 [2002] QCA 174; CA No 295 and CA No 329 of 2001, 17 May 2002.

3 See, eg, *R v Petersen* [1998] QCA 065; [1999] 2 Qd R 85; *R v Duncombe* [2005] QCA 142; CA No 410 of 2004, 6 May 2005.

4 A prisoner serving a period of imprisonment for a serious violent offence can only take advantage of a post-prison community based release order after serving 80 per cent of that period: *Corrective Services Act* 2000 (Qld), s 135(2)(c).

eligible for ppcbr in early 2012. This consideration was, in my view, one which was relevant to the application of the totality principle in order to ensure that the cumulative effect of all the sentences imposed on the applicant was "just and appropriate".[5]

[22] Because that consideration was not taken into account by the learned sentencing judge, it falls to this Court to exercise the sentencing discretion afresh. In that regard, a sentence of eight years imprisonment with a serious violent offender declaration would mean that the applicant will be eligible for ppcbr in approximately March 2012 after having served six and a half years. That result would achieve substantially the same result as a sentence of 16 years imposed in May 2000.

Conclusion and orders

[23] I would grant the application for leave to appeal against sentence and allow the appeal, but only to the extent of setting aside the sentence of 10 years imprisonment for manslaughter and substituting, in lieu thereof, a sentence of eight years imprisonment and a declaration that the applicant has been convicted of a serious violent offence.

[24] **MUIR J:** I agree with the reasons of Keane JA and with the orders he proposes.

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[5] Thomas, *Principles of Sentencing* (2nd ed, 1979) at 56 - 57; cited with approval in *Mill v The Queen* (1988) 166 CLR 59 at 62 - 63.