SUPREME COURT OF QUEENSLAND

CITATION:	R v Richard John Meerdink and Jason Andrew Pearce [2010] QSC 158
PARTIES:	R v Richard John Meerdink and Jason Andrew Pearce
FILE NO/S:	442/09
DIVISION:	Trial Division
PROCEEDING:	Sentence
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	Trial: 29/09/09 to 910/09
JUDGE:	Applegarth J
COUNSEL:	GJ Cummings for the Crown
	F Richards for Richard John Meerdink
	G McGuire for Jason Andrew Pearce
SOLICITORS:	Office of the Director of Public Prosecutions for the Crown
	Legal Aid Queensland for the defendants

[1] Richard John Meerdink and Jason Andrew Pearce, you are each to be sentenced for the offence that on or about 4 July 2008 at Maryborough you unlawfully killed Wayne Warren Ruks. You each pleaded not guilty to a charge of having murdered Mr Ruks. The jury at your trial found you not guilty of that offence. The jury found you, Mr Meerdink, guilty of manslaughter. Mr Pearce, you pleaded guilty to manslaughter at the start of the trial. Mr Pearce you are also to be sentenced for a summary offence to which you pleaded guilty at the end of the trial on 9 October 2009. The charge is that on 6 July 2008 at Maryborough you unlawfully had in your possession a thing, namely a water pipe that you used in connection with the smoking of a dangerous drug. Given the gravity of the offence of manslaughter for which you are to be sentenced, I do not impose a further penalty for that summary offence.

The circumstances of the offence

[2] On 3 July 2008 at around 9 pm the two of you were walking past the Post Office Hotel in Bazaar Street, Maryborough when you encountered Mr Ruks. He was very drunk. When he died some hours later his blood alcohol level was 0.338. How intoxicated each of you were is hard to say. Ultimately, it is of marginal relevance because as the Chief Justice of this State observed in *R v Dwyer* [2008] QCA 117 at [6] "intoxication resulting form the voluntary ingestion of alcohol or drugs cannot

generally be advanced as a circumstance mitigating the penalty to be imposed for violent crime committed while the offender was in that condition."

[3] Each of you had been drinking earlier that afternoon and evening, but you were not completely drunk or incoherent. Mr Power, who was sober and sitting outside the Post Office Hotel, where he was participating in a poker tournament, observed you as you were walking some 50 metres towards him. He did not observe either of you to be drunk, but Mr Meerdink you said to him that you and Mr Pearce were "having a blinder", and were "pissed". Mr Meerdink, you were carrying the bladder from a cask of wine. Mr Ruks made a grab for it. You then crossed the road away from the Port Office Hotel and Mr Ruks followed you. He was interested in obtaining some marijuana. He had asked Mr Power about where he could get some but Mr Power told him that he did not do that sort of thing.

[4] The CCTV camera which recorded you entering the grounds of St Mary's Church in company with Mr Ruks at around 9.15 pm suggests some instability in your walking. Each of you was significantly under the influence of alcohol, but you were not blind drunk.

[5] Mr Ruks followed you to the vicinity of a bench seat in the garden. Mr Pearce, you intended to smoke some marijuana there. Mr Meerdink, you kept your distance from marijuana smoking because consuming it would have breached your parole. The CCTV footage suggests that Mr Ruks was initially welcome to join both of you in the churchyard.

[6] Precisely what happened at or in the vicinity of that bench seat over the following few minutes is disputed. It is clear that something that Mr Ruks said or did shortly before 9.19 pm caused great offence. Mr Ruks had been behaving badly earlier that day, due to the influence of alcohol. Mr Pearce in records of interview referred on different occasions to him dribbling. He was likely to cause offence by some such action. What is disputed is whether Mr Ruks touched you, Mr Pearce. Although reference was made in the media to a so-called homosexual or gay advance, that is an unhelpful and misleading tag. Mr Ruks may have touched you or said things that you interpreted as a sexual proposition. The relevant point is that whatever he said or did caused you offence.

[7] The CCTV does not show that Mr Ruks actually touched you. The recorded conversation between you and a covert police officer in the watch house cells records you saying that you were going to roll up a scoob when Mr Ruks "started all this poofter shit". There is no evidence that Mr Ruks was a practising homosexual, and I do not find that he touched you. Instead, there is evidence that he was extremely drunk. I think it likely that he said something foolish to you in order to induce you to share the marijuana that you had, and that he wanted to share. You interpreted or misinterpreted what he said as a serious proposition. You told the covert police officer that you had been sexually abused as a child and you "snapped". After whatever Mr Ruks said, you told him to leave and he did so.

[8] At about 9.19 pm Mr Ruks left the vicinity of the bench seat and walked towards Bazaar Street. Mr Meerdink followed, and Mr Pearce followed next. At about 9.20 pm Mr Ruks stopped and turned around and appeared to be speaking to both of you. There was a verbal confrontation at about 9.20 pm with both of you. Each of

you appear to take turns to aggressively order Mr Ruks out of the churchyard. Mr Ruks did so.

[9] Mr Ruks made the fatal mistake of returning to the vicinity of St Mary's at around 9.22 pm. At around 9.23 pm you, Mr Pearce, confronted Mr Ruks. Mr Meerdink appeared to restrain you from going forward, although the CCTV footage is capable of different interpretations as to who, as between each of you, was restraining the other at different times. My interpretation of the footage is that Mr Meerdink was restraining Mr Pearce from going forward. At around 9.23 pm Mr Ruks was standing with both hands by his side and apparently talking to one or both of you. It seems that he must have said something which caused further offence to you Mr Pearce. I infer that you threatened some response because Mr Ruks starts to run. You, Mr Pearce, chased him, with Mr Meerdink following. You quickly caught up to him and tackled him to the hard surface beside the church wall. You hurt your leg in the tackle. At this point Mr Ruks did nothing to assault you or Mr Meerdink. You tackled him and he ended up on the ground, slightly above you.

[10] Mr Meerdink, you came up beside Mr Ruks and delivered a kick to his body. At the trial each of your counsel separately submitted to the jury that the CCTV footage showed that the kick was to an area other than his abdomen. Mr Richards, on behalf of Mr Meerdink, submitted that it was to the upper thigh or back. Mr McGuire told the jury that the CCTV footage clearly showed that Mr Meerdink's kick was to the buttock or the back of the leg. Upon sentence, the prosecution contends that the kick was to his right flank.

[11] The kick that you delivered was not to the abdomen, and it was not the fatal kick.

[12] Mr Meerdink, you then dragged Mr Ruks in the direction of the garden bed. Mr Pearce followed you there.

[13] Over the next six or so minutes, each of you violently assaulted Mr Ruks whilst he was on the ground near the garden bed. The CCTV footage is not clear but each of you was involved, and each of you delivered kicks or punches or both. It was a prolonged and cowardly attack. At different times each of you left the place at which Mr Ruks was on the ground but then you returned.

[14] As cowardly as the attack was, the jury was not satisfied that either of you intended to kill or cause grievous bodily harm to Mr Ruks.

[15] They were, however, satisfied that either a blow or a kick or a number of blows or kicks that were delivered to Mr Ruks' abdomen during this time caused his death. Professor Ellis said that it was likely that at least one application of force to the middle of the abdomen caused the death. He could not conclude whether it was a single blow or kick or multiple blows or kicks that caused the death.

[16] You did not know that Mr Ruks had received blows that were going to kill him. You did not know that one or more of your blows caused internal bleeding into the abdomen that was going to prove fatal. However, you did intend to give him what can only be described as a beating, and you did so. Mr Pearce, you were wearing boots, which makes your conduct in kicking Mr Ruks callous in the extreme. However, having kicked and punched him whilst he was on the ground, you then proceeded to prop him up in the recovery position and use Mr Ruks' jacket to make a pillow for his head.

[17] Most, if not all, of the kicks, were delivered to Mr Ruks' torso. Mr Pearce, on one occasion, you bent down and punched Mr Ruks in the head. He received injuries to his face, quite possibly when he was tackled or fell onto a hard surface. Unlike in some other manslaughter cases, you did not stomp or kick the victim on the head. It was probably a kick to Mr Ruks' abdomen that led to his internal bleeding and eventual death. The abdominal injury required quite a lot of force. However, according to Professor Ellis the majority of Mr Ruks' injuries, cuts and abrasions were minor in nature. He was not rendered unconscious or comatose.

[18] Concerned passers-by saw Mr Ruks in that position and thought he was a drunk. Some concerned citizens took the care to check his pulse, and did not realise how precarious his position was. They showed concern for their fellow citizen. Unfortunately, they were not to know what had happened to Mr Ruks or that he was bleeding internally. I detected in the evidence of one witness a hint of regret on his part that he did not do more. However, to their credit that individual and his friend, who checked Mr Ruks' pulse and thought that he would be alright when he woke up, showed concern for their fellow citizen.

Summary of circumstances of the offence

[19] To summarize, it is impossible to know which of you inflicted the fatal blow or blows. However, each of you inflicted kicks or punches or both, and aided the other to do so by your presence and implicit encouragement. At the time this occurred the defendant was in a parlous position on the ground.

[20] It was not a premeditated attack in the sense of luring Mr Ruks into the church yard with the intent to rob him with violence. Your original interactions with him as you entered the church yard seemed friendly enough. However, after 9.19 pm an ugly episode developed. It culminated in a cowardly attack on a defenceless man when he was on the ground.

[21] You left him exposed to the elements, now knowing that what you had done was going to kill him. You left the churchyard with no remorse for your actions.

Personal circumstances – Mr Meerdink

[22] Mr Meerdink, you were 39 at the date of the offences. You are 41 now.

[23] Your parents separated when you were three and you grew up without the support of your natural father. You were educated to Year 9 and then pursued employment and had a good employment history. You married and had children. Unfortunately, you abused substances. Dr Moyle's comprehensive report diagnoses you as suffering polydrug abuse and dependence, which only went into remission when you were in jail. He also diagnosed you as having an anti-social personality disorder.

[24] Dr Moyle assessed you as having mild cognitive difficulties and limited frontal lobe control over impulses and emotions. Your limited control is readily reduced by as few as a couple of alcoholic drinks.

[25] Your descent into substance abuse led you into contact with the criminal justice system, starting in 1986. You committed a number of dishonesty, motor vehicle and property offences. You do not have a history of violence, save for four charges

of robbery with actual violence, being armed robberies that occurred in March 2001, when you were in the grip of heroin addiction and robbed to pay for your addiction.

[26] On 31 May 2002 you were sentenced to imprisonment for six years for robbery with actual violence. Your conduct in prison has been good. Whilst in prison between 2002 and 2005 you completed studies and upon your release began employment. However, in late 2007 you again committed offences. You went back into prison as a result. You were released from prison on 13 June 2008 on parole.

[27] I will not detail the contents of Dr Moyle's report. I direct that a copy of it be sent to the Department of Corrective Services for the attention of those responsible for your imprisonment and for those who will have to consider at some future date appropriate conditions for your release back into the community. Dr Moyle comprehensively describes your anti-social behaviour, non-compliance with community-based orders, resistance to supervision in the community, resort to drugs and behaviour in seeking "a rush".

[28] You were shocked and surprised that Mr Ruks had died. I accept what you told Dr Moyle about your sympathy for your victim's mother when you saw her at the trial. However, I do not find that you have any great remorse for your actions. You may have felt sorry for your victim when you learnt of his death, and felt sorry for his mother when you saw her at the trial. However, you rationalise your behaviour as going to help a friend. Perhaps the impulse to help a friend explains your initial reaction in kicking Mr Ruks when he was on top of Mr Pearce after the tackle. It does not explain your role in the episodes of violence that lasted, on and off, for several minutes when Mr Ruks was on the ground. You gave friends who provided you with a reference to understand that your actions were in supporting a mate. [Exhibit 7] That is not a frank or complete account of your actions. It indicates a selective account of the history of the attack on Mr Ruks, and confirms Dr Moyle's assessment that you can choose not to give a reliable account of your actions. He wrote:

> "I am convinced that he can use his own judgement as to whether or not to fully inform or tell the truth and does not display sufficient cognitive impairment to account for all memory losses for past offending when he so clearly can recall them when challenged. It is more likely he minimises his wrongdoing to deceive the reporter" (Exhibit 8 p 28).

[29] It is submitted, correctly, on your behalf that you left the vicinity of the garden bed, so as to distance yourself from Mr Pearce, and to indicate a desire to leave. However, your behaviour when near the garden bed was not the behaviour of someone helping a mate to defend himself. It was helping yourself to assault Mr Ruks and, by your presence, encouraging Mr Pearce to do the same.

[30] Your counsel correctly submits that at trial you accepted that you were present at the scene, and had some involvement. The possibility of finalising the matter by way of a plea of guilty to manslaughter was contemplated and discussed with the prosecution. However, such a plea was not acceptable to the prosecution in order to finalise the matter. You chose to plead not guilty to manslaughter, as was your right, and hoped that the jury would acquit you because of the extent of your involvement or on the basis of a defence of accident. It would be quite wrong to penalise you in any way because you pleaded not guilty to manslaughter. It is,

however, an important point of distinction between your case and that of Mr Pearce, who pleaded guilty to manslaughter.

[31] You have undertaken additional courses since you have been on remand which shows a preparedness to come to terms with your problems of substance abuse. Over time you may better understand the role that alcohol had on your actions on the night of 3 July 2008 in disinhibiting you. Over time you may better appreciate the need to abstain completely from alcohol in order to control your impulses. You may be on the path towards understanding the conditions that Dr Moyle has diagnosed, and how even relatively small quantities of alcohol can disinhibit you. You have a long way to go to address factors such as alcohol that influenced your behaviour. In time you may feel genuine remorse for your victims. However, I am not persuaded that to date you have shown genuine remorse for your actions.

Personal circumstances - Mr Pearce

[32] Mr Pearce, you were born in 1971. You were 36 at the time of the offence and you are 38 now.

[33] As a six year old you were sexually abused on at least two occasions by a school janitor. You did not tell your parents about this at the time, although now you wished that you had. They asked you whether anything had happened because after this episode you began to misbehave at school. As a child you felt isolated and thought people were against you. You completed an apprenticeship. You drifted from one job to another and led the life of a loner. You would settle down for some time but then leave your employment, and you even lived on the streets for a time. You were able to abstain from alcohol for a time, but you resorted to alcohol and cannabis. You have a criminal history that commences in 1992. It includes property offences, minor drug offences and summary offences that resulted in fines and community-based orders. You have no previous convictions for assault or offences of violence. You served short periods of imprisonment. You were sentenced to four months imprisonment by an order of the Rockhampton Magistrates Court in February 2007 for property offences. On 4 March 2008 you were sentenced to two months imprisonment for an offence of stealing that occurred on 30 November 2006. Upon your release from prison you regained employment in Maryborough. You were in a relationship with a woman with whom you resided at the time of the offence.

[34] You have the support of your family.

[35] After initially lying about your lack of involvement in relation to the assault, you came to admit your involvement.

[36] In March 2009, well before trial, you offered to plead guilty, and that is indicative of your remorse. You pleaded guilty to manslaughter at the start of the trial. I take your early offer to plead guilty and your actual plea of guilty into account.

[37] In your unguarded statements to a covert police officer in a watchhouse cell on 7 July 2008 you explained how you "snapped" after Mr Ruks walked off and was yelling abuse. You did not clearly say that Mr Ruks had touched you, or that he had grabbed you on the penis. That may be implicit in some things that you said. However, in that unguarded account of your actions you refer to the fact that you

were sexually abused as a child and said that that was the reason that you snapped. That said, you blamed yourself and said:

> "You know if I wasn't pissed I would not have lost my head. I blame myself. I was pissed".

[38] I conclude that there is an element of embellishment or reconstruction, rather than genuine recollection, in what you told police in formal interviews about Mr Ruks grabbing you on the penis. I am not prepared to find that that such touching in fact occurred.

[39] Your demeanour in the video-recorded walk-through of St Mary's is consistent with remorse for your actions. You described your own actions in assaulting Mr Ruks as "horrific".

[40] Prior to being sentenced you read Mr Ruks' mother's victim impact statement. You have wanted to write to her to express your remorse but did not do so lest it be perceived as an attempt to gain favour.

[41] You may have convinced yourself that Mr Ruks touched you, and told others, including the police that he did so. I am not persuaded that he did. Relevantly, the submissions on your behalf on sentence do not positively assert that this happened. They simply observe that, on the video evidence, it is clear that Mr Ruks had done something to upset you prior to Mr Ruks being chased away on the first occasion. Your counsel fairly acknowledged the passing of time between when Mr Ruks was chased away and the time he returned and there was a verbal exchange, which led to you running after him and tackling him.

[42] Overall, I consider that, amongst other things, your frank acceptance of blame when you spoke to the covert police officer on 7 July 2008, your early offer to plead guilty and your actual plea of guilty are indicative of remorse.

The loss of a life and the impact on the victim's mother

[43] The simple, stark and tragic fact is that a life has been lost.

[44] Whatever offence Mr Ruks may have caused by his drunken and erratic behaviour on the night, the response by each of you was out of all proportion to the offence that he gave. He did not die from a single, spontaneous punch, as sometimes occurs in a manslaughter case when the victim's head hits the ground. Mr Ruks died from assaults that he received when he was on the ground. On and off over a period of several minutes each of you assaulted him. Each of you may not have intended to cause him grievous bodily harm, let alone kill him. However, you intended to seriously assault him and you did so. One purpose of the sentences that I will impose on each of you is to denounce your conduct for unlawfully taking the life of a fellow human being. The sentences that I impose also have the purpose of deterring the same or similar conduct.

[45] In addition to taking another's life, you have devastated another life: that of your victim's mother. She has to live with what she describes as a "life-long void", having lost a caring son who she loved very much. She was shocked by the news of his death and had the trauma of having to see his bruised body after it was taken to

Nambour. She does not understand why you did what you did and concludes that her son was "killed for nothing".

Prosecution's submissions

[46] I accept the prosecution's submissions that this was a cowardly attack on a drunken individual who could not defend himself. The prosecution goes so far as to submit that the deceased was killed because he was "a temporary inconvenience". This simplifies matters. The relevant narrative is that Mr Ruks caused some offence to you at around 9.19 pm, left the churchyard at your insistence and returned a short time later when a further verbal exchange occurred. Mr Pearce chased him and injured his leg. This must have added to his anger. Mr Ruks was drunk and defenceless.

[47] The prosecution submits that Mr Ruks was "callously abandoned to the elements and his fate" and that a simple phone call could have saved his life. It is true that he was left to the elements and there was no anonymous call by either of you to an emergency number. He was left in the recovery position and was conscious when you left him. You did not realise the potential consequences of his injuries, but nor did others who observed him and felt his pulse, being individuals who were ignorant of the beating that he had earlier received. You certainly abandoned Mr Ruks to his fate after beating him, and that was callous.

[48] My findings of fact do not accord in all respects with the factual basis contended for by the prosecution.

[49] The prosecution contends for a sentence of 10 to 11 years for Mr Pearce, and 11 to 12 years for Mr Meerdink.

[50] The prosecution explains that difference on three grounds. The first is Mr Meerdink's history of violence, namely four counts of actual violence whilst armed with an offensive weapon on different dates in March 2001 when he was a heroin addict. The second is that the offence for which he is being sentenced today was committed whilst he was on parole. The third is aspects of Mr Meerdink's psychology, as reported by Dr Moyle, and his prospects of rehabilitation heighten the need for a sentence that provides protection for the community.

[51] The prosecution does not distinguish between Mr Meerdink and Mr Pearce on the basis of Mr Pearce's plea of guilty, and submits that neither defendant is remorseful. In short, the prosecution submissions do not give Mr Pearce any real credit for his plea of guilty. However, as I have observed, I consider that Mr Pearce has shown remorse and that his plea of guilty is consistent with it.

Meerdink submissions

[52] Mr Richards of Counsel submits that Mr Meerdink should be sentenced to between eight and nine years imprisonment. He submits that a careful analysis of the cases relied upon by the prosecution demonstrates an absence of the aggravating circumstances that might warrant a sentence of 10 years or more. He submits that the following are matters in mitigation:

- Mr Meerdink's history should be considered in light of his longstanding substance abuse and dependence;

- The assault was not premeditated;
- Mr Meerdink was unaware the deceased was fatally injured by the assault;
- Mr Meerdink was remorseful for his actions and their tragic consequences;
- Mr Meerdink cooperated with authorities;
- Mr Meerdink's explanation that Mr Ruks' death was not intended or foreseen, was verified, so far as it can be, by the evidence of a covert police officer;
- The possibility of finalising the matter by way of a plea of guilty to manslaughter was contemplated, but not acceptable to the Crown; and
- The conduct of the trial was consistent with a man who always accepted his presence at and involvement in the incident.

[53] As will be apparent, I do not accept all of these submissions. I do not find that Mr Meerdink has been genuinely remorseful for his actions. He has tended to minimise his role in the assaults that actually killed Mr Ruks, and not adequately confronted the fact that his lack of control over his impulses contributed to the death of Mr Ruks.

[54] Mr Meerdink's criminal history includes the four offences of violence committed in March 2001. Although these are the only acts of violence in his criminal history and the armed robberies were committed when he was a heroin addict, they distinguish his prior criminal history to that of Mr Pearce. In addition, the killing of Mr Ruks occurred when Mr Meerdink was on parole.

Pearce submissions

[55] Counsel for Mr Pearce notes that it was Mr Ruks' return to the churchyard and some verbal insult that reignited the anger of Mr Pearce and Mr Meerdink. I accept that as part of the factual narrative. Their respective and collective response was out of all proportion to the insult given. Counsel for each defendant do not submit otherwise.

[56] Counsel for Mr Pearce in fact submits in terms that "the actions of the deceased provide no excuse", and acknowledges that there was a delay between the time when Mr Ruks offended Mr Pearce near the bench seat and the return of Mr Ruks to the churchyard when matters escalated.

[57] Counsel for Mr Pearce submits that Mr Pearce indicated from a very early stage his desire to accept responsibility for the death of Mr Ruks, and that Mr Pearce pleaded guilty at the earliest opportunity. A submission to the prosecution to accept a plea to manslaughter had been rejected. He submits that Mr Pearce should be given credit for his plea not only so far as co-operation with the administration of justice is concerned, but also as an indication of his remorse.

[58] Counsel for Mr Pearce submits that the range for an offence such as the present is six to nine years and that a sentence in the order of seven to eight years is

appropriate with a recommendation for post-prison community based release after two and a half to three years, in recognition of his early guilty plea.

Sentencing range

[59] It has been said on many occasions that the circumstances of manslaughter cases will vary widely.

[60] The authorities were reviewed by Holmes JA in *R v Sebo* (2007) 179 A Crim R 24 and there is no purpose in repeating the review of authorities. I shall, however, refer to the authorities relied upon by counsel in this matter.

[61] *R v Matthews* [2007] QCA 144 was a plea of guilty on ex officio indictment for manslaughter. In a fit of amphetamine-induced rage Matthews strangled the deceased because he wrongly believed that she had been involved in a burglary at his home which had led to his wife's suffering a miscarriage when she gave chase to burglars. Both the applicant and the deceased had consumed excessive amounts of drugs and alcohol prior to the death. The applicant was 31 years old and had a lengthy criminal history, including armed robbery with actual violence at the age of 18 and assault occasioning bodily harm. He was sentenced to 10 years imprisonment for the manslaughter. The offence occurred in 2001 and there was a five year delay before he was interviewed by police. He admitted responsibility and told police that he squeezed the deceased's neck as hard as he could because he was in a "blind rage". The prosecution accepted the plea to manslaughter on the basis that it could not prove intent, given the combined effects of intoxication and blind rage on the applicant. The applicant was said to have exhibited evident remorse, urged his wife to tell the truth and made a full confession to the police. The Court of Appeal observed that the applicant was responsible for the "brutal death of a young woman, causing great grief to her mother and brother". It was relevant that no weapon was involved and that there was at least "perceived provocation". The deceased's drug toxicity was a significant factor in her death. There was some uncertainty about the deceased's cause of death and the applicant chose not to take advantage of that area of doubt. The Court of Appeal concluded that an analysis of the cases did not justify a starting point for the head sentence as high as 13 years before taking into account circumstances in the applicant's favour. A sentence of nine years imprisonment was ordered to reflect the seriousness of the offence and factors in mitigation. There were no features which were sufficient to warrant the imposition of a Serious Violent Offender declaration.

[62] Counsel for the prosecution submits that the violence in this matter is on a par with that in *Matthews* and that the defendants persisted in their violence. The prosecution further submits that the defendants have not displayed the same high level of co-operation with the authorities that Mr Matthews did. In response, counsel for the defendants submit that their respective actions did not have the high level of brutality displayed in *Matthews* of choking someone to death or the high level of brutality shown in many other cases in which the deceased suffers serious head injuries or fractures. I accept that the conduct of the defendants in this matter was not as life-threatening as the conduct of Matthews, and did not involve use of a weapon or kick to the deceased's head.[1] However, each defendant's behaviour was brutal and assaults were inflicted, on and off, over a period of minutes.

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[1] Cf *R v Mooka [*2007] QCA 36 in which the deceased received a blow to the head from a full swing with a pool cue in circumstances in which the deceased did nothing and said nothing provocative.

[63] The prosecution refers to *R v Johnson ex parte Attorney-General (Queensland)* [2007] QCA 76, whilst conceding the case is not directly on point. The case was said to illustrate an example of an unprovoked attack by a group on innocent bystanders. It was a case of gratuitous violence, causing loss of life. It involved a youthful offender whose sentence was increased to seven years. I find the authority to be of little assistance.

[64] The prosecution relied on *R v Dwyer* [2008] QCA 117 in which a sentence of 10 years imprisonment was not disturbed on appeal. The applicant in that case and the deceased were involved in an argument. The applicant felled the deceased with a punch and then kicked him several times. Shortly later the applicant saw that the deceased was not breathing. He rejected his girlfriend's advice to call an ambulance. He failed to call for help for the deceased for at least an hour after he had rendered him comatose. The deceased suffered multiple facial fractures and died of cardiac arrest. Medical evidence that emerged shortly before the trial concerning the cause of the heart attack that led to the deceased's death prompted the applicant to agree to plead guilty to manslaughter. The applicant was 22 years old at the time of the offence and 24 when sentenced. He had a significant criminal history including assault causing bodily harm when he was 18. He also committed offences of assault and going armed so as to cause fear. In imposing a sentence of 10 years imprisonment for manslaughter the sentencing judge remarked upon the disturbing callousness of what the applicant had done in not seeking help for at least an hour. Dwyer's lack of remorse, reflected in the callousness of his conduct after he had beaten the deceased into a state of unconsciousness, distinguished his circumstances from those in *Matthews*. His reaction to having rendered his victim comatose was said to reveal "a degree of callous indifference towards others which the learned sentencing judge was entitled to regard as a matter of serious concern so far as the need to protect the community from the applicant's aggression was concerned". That callousness was said to be very much of a piece with other offences he had committed.

[65] Counsel for the defendants submit that the same features of callous indifference towards the deceased after the attack are not evident in this matter. Mr Meerdink has fewer convictions for violence and that, unlike Dwyer, Mr Pearce has no convictions for violence. I accept the submission that Dwyer displayed a far greater degree of callous indifference for the victim of his attack than either Mr Meerdink or Mr Pearce did in this case. They did not render their victim comatose by the kind of head injuries that Mr Dwyer inflicted upon his victim. Another distinguishing feature is that Dwyer's was a late plea of guilty, whereas Mr Pearce offered to plead guilty at an early stage and Mr Meerdink made an offer to plead guilty.

[66] Reference was made to *R v Richmond-Sinclair* [2009] QCA 98. The jury found the applicant not guilty of murder, but guilty of manslaughter in circumstances in which he had stomped on his victim's head whilst being held on remand in a correctional centre. The stomp was inflicted with intent to cause grievous bodily harm, but the jury was not satisfied that provocation had been excluded. The applicant continued to deny responsibility throughout the trial, including denying having stomped on the deceased's head. He showed no remorse. The trial judge sentenced the applicant to 12 years imprisonment but this head sentence took into account an offence of armed robbery. The trial judge said that had she been dealing only with the manslaughter the appropriate range would have been 11 to 12 years. The sentence of 12 years was intended to reflect the totality of the applicant's criminality for both offences

and to represent a sentence that was not "crushing on the applicant's prospects for eventual rehabilitation and release". The applicant was 21 years of age when he committed the offence.

[67] The circumstances of the offence in that case are more serious than this case. There was intent to cause grievous bodily harm and a denial of having stomped on the deceased's head. There was no plea of guilty and no remorse.

[68] The Court of Appeal referred to *R v Sebo* which involved the use of a steering wheel lock as a weapon on a young and relatively defenceless victim and "the limited nature of the provocation" which triggered Mr Sebo's fatal assault. In *R v Richmond-Sinclair* (supra) at [43] the Court of Appeal observed that when Holmes JA concluded in *Sebo* that his sentence might properly have fallen between nine and twelve years, her Honour was speaking of a sentence "for a remorseful offender who has made a timely offer to plead guilty to manslaughter".

[69] The applicants cite *R v Bojovic* [1999] QCA 206. That was a case of over-reaction by way of self-defence. The appellant killed his victim by punching him in the face a number of times after the other man, who was quite drunk, had acted provocatively and had thrown a punch at the appellant. The evidence suggested that there were about five heavy blows inflicted leading to a fracture to the deceased's skull. The assault did not continue once the deceased was helpless. The incident was "the product of a short, sharp reaction" that arose through over-reaction in the course of self-defence. The fact that the appellant did not continue his attack after his victim had become helpless was said to distinguish it from a number of other cases relied upon by the prosecution. Mr Bojovic had a fairly extensive criminal history including two convictions for assault and two for assault occasioning bodily harm. On appeal his sentence of 10 years imprisonment was reduced to eight years.

[70] I regard the objective circumstances of this case as more serious than that of *Bojovic*. The fatal injuries that were inflicted upon Mr Ruks when he was on the ground were not by way of an over-reaction by way of self-defence to a punch or other assault committed by Mr Ruks. There were two attackers and their attack continued after Mr Ruks was in a helpless situation.

[71] *R v Tientjes ex parte Attorney-General* [1999] QCA 480 was another case of excessive self-defence. The applicant responded to a single blow from the deceased. He responded with a number of punches and his violent response continued even after the deceased was on the ground. Its prolonged nature was an aggravating circumstance. The deceased sustained extensive injuries to his head, body and limbs and died from a subdural haematoma consistent with a kick to his head or with his head striking the pavement. On an appeal by the Attorney-General a sentence of imprisonment of four and a half years was increased to seven years. Unlike Bojovic, Mr Tientjes did not have a history of previous violence. Before the sentencing judge the prosecution contended for a sentence of seven to eight years imprisonment and the Court of Appeal concluded that an appropriate sentence would be one at the lower end of that range. It is to be noted that the matter was an appeal by the Attorney-General, that the decision was delivered more than 10 years ago, that there was only one assailant and that the assault, whilst more serious in leading to death through head injuries involved an over-reaction in the course of self-defence. The respondent in that case was 36 years of age and had only one

relevant prior conviction, being a conviction for assault occasioning bodily harm for which he had been fined several years earlier.

[72] *R v George ex parte Attorney-General (Qld)* [2004] QCA 450 arose after fights broke out in the vicinity of a hotel. Witnesses described the respondent as being "totally out of control at the time". The victim was leaning against a motor vehicle. The respondent delivered a single punch to his face. The defendant fell heavily to the ground, striking the back of his head on concrete. The fatal blow was unprovoked and described as "brazen" because it was inflicted whilst police were present. The respondent was 21 at the time with a relevant criminal history that included two counts of assault occasioning bodily harm for which he was fined and a conviction for occasioning grievous bodily harm for which he was sentenced to four months imprisonment, wholly suspended. He pleaded guilty and was sentenced to eight years imprisonment with parole eligibility after serving three years and three months. The Court of Appeal increased the sentence to nine years imprisonment.

[73] *R v Simeon* [2000] QCA 470 was a case in which the applicant, who was then aged 27, attacked another man at a party because he thought that the victim had struck the applicant's son. The deceased was head-butted, punched and kicked. The deceased ceased breathing. The cause of his death was probably a blow below and behind his right ear. Medical opinion was that the force applied was only moderate. The attack was described as "brutal and violent" and "directed at a man who, by reason of his heavy intoxication of alcohol, was defenceless." Mr Simeon was sentenced to seven years and six months imprisonment. The Court of Appeal remarked after reviewing authorities that the head sentence, "although by no means a light one in the circumstances, cannot properly be reduced". There was no parole recommendation made by the sentencing judge. However, the Court of Appeal stated that the applicant's reaction to the crime appeared to have been "an unusually grief-stricken one" that resulted in a depressive illness. The applicant was said to have been overcome by remorse. Accordingly, the Court of Appeal added a recommendation that the applicant be considered for parole after having served two years and nine months.

[74] *R v Duncombe* [2005] QCA 142 involved an unprovoked attack on a 47 year old man who was asleep on a bench. The applicant punched the deceased in the face. Another caused him to fall to the ground with some force. The victim was a complete stranger. Mr Duncombe was also sentenced for other conduct. The sentence of 10 years that was imposed was found not to be outside the range of a sound sentencing discretion. Mr Duncombe was 22 years old at the time of the offence. In his favour were an early plea of guilty, co-operation with the authorities and efforts at rehabilitation.

[75] The authorities reviewed by Holmes JA in *Sebo* include cases in which the applicant intended to cause at least grievous bodily harm but were found guilty of manslaughter because of the defence of provocation under s 304 of the *Criminal Code* 1899. Nevertheless, as was pointed out by the Court of Appeal in *Dwyer* (supra) at [35] the authorities reviewed in *Sebo* were not confined to cases where the partial defence of provocation reduced the offence from murder to manslaughter.

[76] In arriving at a sentencing range in the circumstances of this case one starts with the simple and tragic fact that each applicant's alcohol-fuelled aggression caused the death of a human being. The death may have been caused by the combined effects of their blows or a single blow by one offender in circumstances in which he was aided by the other. On any view, the death was from a cowardly attack on a defenceless and drunk individual. It was not an over-reaction in self-defence to a punch. Whatever original offence Mr Ruks caused was removed in time and was not the immediate cause of the violence that was unleashed on him. He returned to the scene and there was probably verbal abuse on his part directed to both defendants. Mr Pearce, you may have over-reacted to this abuse because of matters personal to you. However, that cannot explain the persistence in assaulting Mr Ruks.

[77] In *Dwyer* (supra) at [38] Keane JA (as his Honour then was and with whom the Chief Justice and Douglas J agreed) stated:

> "The function of the criminal law being the protection of the community from crime, the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others. When the facts are such as to incline the judge to leniency, the prisoner's record may be a strong factor in inducing him to act, or not to act, upon this inclination."

[78] Denunciation of violence towards defenceless individuals and the need for community protection are highly relevant circumstances. I recognise that no weapon was involved and that you should be sentenced on the basis that neither of you intended to kill or cause grievous bodily harm to the deceased. The injuries you inflicted and which caused Mr Ruks' death were serious but, unlike other cases, they were not caused by a stomp to his head or blows that fractured his skull. However, the assaults by way of kicking and punching to Mr Ruks' body, and which caused his death, took place when he was practically defenceless and on the ground. The fatal blow or blows were not a spontaneous, short-lived reaction.

[79] Unlike the offender in *Dwyer* you did not render your victim comatose and prevent him from receiving assistance in circumstances in which you knew he was unconscious. You did not know that he had sustained a fatal injury and, despite the cowardly nature of the attack, you, Mr Pearce, placed the deceased in a recovery position and used his jacket as a pillow. However, otherwise you left him to his fate.

[80] The circumstances of your offending and considerations of denunciation, community protection and deterrence lead me to conclude that the sentencing range is between nine and 11 years imprisonment in each of your cases.

[81] In arriving at a sentence within that range I must take account of your personal circumstances and points of distinction. These include the fact that you, Mr Meerdink, have previous convictions for offences of violence, being armed robberies that you committed when you were a heroin addict in 2001, whereas Mr Pearce has no previous criminal history for violent offences. Mr Meerdink, your

previous criminal history is more serious than that of Mr Pearce and your failure to comply with previous court orders is consistent with Dr Moyle's assessment of you. You were on parole at the time Mr Ruks was killed. A further, important point of distinction is your lack of genuine remorse for your victim.

[82] I take account of the fact that sentencing you to imprisonment for 10 years or more will require you to serve 80 per cent of that sentence.

[83] I take into account the circumstances of mitigation that were advanced on your behalf. I conclude that the appropriate sentence in your case is one of 10 years imprisonment.

[84] Mr Pearce, your early offer to plead guilty and your actual plea of guilty entitle you to favourable consideration for your co-operation with the criminal justice system. You might have taken the chance that the jury would be left in doubt to the effect that Mr Ruks died from a single blow that Mr Meerdink delivered and that you would not have been found guilty as a party to his offence. However, you chose to plead guilty and I find that your plea is consistent with remorse for your actions.

[85] In your case, I consider that an appropriate sentence is one of nine years imprisonment.

[86] Counsel for the prosecution has not identified any features which persuade me to impose a serious violent offender declaration in your case Mr Pearce. The violence inflicted on Mr Ruks was greater than in single punch cases. However, neither that feature nor any other feature takes the case "out of the norm" in the sense referred to in *McDougall and Collis* [2006] QCA 365 at [19]; and see *Matthews* (supra) at [25]. The learned Crown prosecutor submitted that if I did not make a serious violent offender declaration I should not fix a parole eligibility date. However, I consider that your early offer to plead guilty and your plea of guilty warrants a recommendation that you be eligible for parole after serving four years. The 676 days that you have spent in pre-sentence custody will be taken into account in fixing a parole eligibility date.

Sentence

Mr Meerdink

[87] I order that you be imprisoned for a period of ten years. As a result, I declare pursuant to s 161B of the *Penalties and Sentences Act* that you have been convicted of a serious violent offence.

[88] Pursuant to s 159A of the *Penalties and Sentences Act* I declare that the 426 days in pre-sentence custody between 14 March 2009 and 13 May 2010 be deemed time already served under the sentence.

Mr Pearce

[89] I order that you be imprisoned for a period of nine years.

[90] I take into account your plea of guilty. I order that the date you be eligible for parole be fixed at 6 July 2012.

[91] Pursuant to s 159A of the *Penalties and Sentences Act* I declare that the 676 days in pre-sentence custody between 7 July 2008 and 13 May 2010 be deemed time already served under the sentence.