SUPREME COURT OF QUEENSLAND

CITATION:	*R v Davy* [2010] QCA 118
PARTIES:	**R** **v** **DAVY, Raymond Paul** (applicant)
FILE NO/S:	CA No 324 of 2009 SC No 779 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2010
JUDGES:	Holmes, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – applicant pleaded guilty to manslaughter and sentenced to 11 years and six months imprisonment – sentence concurrent with five years imprisonment for two counts of fraud and one count of arson – sentence cumulative upon a one year, one month and nine day term of imprisonment – applicant lacked intention to cause death or grievous bodily harm due to intoxication – prosecution unable to establish how the deceased was killed – applicant killed the deceased whilst attempting to obtain the deceased's PIN number to access the deceased's money – applicant disposed of the deceased's body, burnt his car and fraudulently misappropriated his credit cards following the deceased's death – applicant had a lengthy prior criminal history – applicant submitted a late guilty plea – applicant argued sentence manifestly excessive in the absence of violence and any intention to harm – whether sentence manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – applicant argued he

was erroneously sentenced on the basis that the death occurred due to his criminal negligence – whether applicant was sentenced on the basis of manslaughter by criminal negligence

Criminal Code 1899 (Qld), s 285, s 303

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
R v Bates; R v Baker [2002] QCA 174, considered
R v Bayliss (1987) CCA 27, considered
R v Clark; ex parte A-G [1999] QCA 438, considered
R v Dwyer [2008] QCA 117, considered
R v Frame [2009] QCA 9, cited
R v Haack [1999] QCA 76, cited
R v Huebner [2006] QCA 406, considered
R v Lacey; ex parte A-G (Qld) [2009] QCA 274, considered
R v Mooka [2007] QCA 36, cited
R v Sebo; ex parte A-G (Qld) (2007) 179 A Crim R 24; [2007] QCA 426, cited
R v Walsh [2008] QCA 391, cited

COUNSEL: The applicant appeared on his own behalf
M J Copley SC for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the order he proposes.

[2] **MUIR JA:** The applicant pleaded guilty to manslaughter and on 2 December 2009 was sentenced to imprisonment of 11 years and six months. Five years spent in pre-sentence custody were declared imprisonment already served under the sentence. The sentence imposed was concurrent with a sentence of five years imprisonment imposed on 23 June 2006 on each of two counts of fraud and one of arson. However, it was made cumulative upon another term of imprisonment of one year, one month and nine days.

[3] In the sentencing hearing, during which the learned sentencing judge was careful to ensure that the guilty plea was made voluntarily and to make clear the basis on which it was made, her Honour said, addressing the applicant and referring to a statement of facts:

> "… I understood that you had a difficulty with this because some words were put into it at the request of an earlier set of lawyers who were acting for you. And I was proposing to proceed on the basis that you endorsed on Monday what Mr Campbell said were your lawyers instructions at that stage, that they held unequivocal and unambiguous instructions that you killed Mr Rogers in circumstances amounting to manslaughter, and that your evidence explicitly contradicted - sorry - that your plea of guilty explicitly contradicted the sworn evidence that you'd given before Justice Fryberg and you repudiated that evidence. And I was going to proceed on the basis of

> what I understood the un-controverted facts were, and that was that you were in the company of Mr Rogers; you were affected by [heroin]; you did have a desire to access his money and get his - use his ATM card - that was part of the factual circumstances. And that the Crown cannot prove the means of Mr Rogers' death, but you are linked to that death by some act or omission that you did - they can't prove what it is."

[4] Her Honour subsequently explained that she was proceeding on the basis that the applicant had no intention to cause death or grievous bodily harm "because he was intoxicated by [heroin]" and on the basis that after the deceased was killed, the applicant disposed of his body, burnt his car and fraudulently misappropriated his credit cards.

[5] The applicant was 40 years of age at the time of the offence and 46 years of age when sentenced. He had a lengthy prior criminal history, which mostly related to offences against property and escapes from custody. He had been sentenced to various terms of imprisonment of up to two years duration, excluding the terms of imprisonment of five years imposed on 23 June 2006.

[6] At the sentencing hearing there was no dispute about the fact that the 73 year old deceased was killed by the applicant in circumstances in which the applicant was attempting to obtain the deceased's PIN number for his credit cards in order to obtain access to his money. After the deceased's death, the applicant did obtain about $30,000 from the deceased's bank account.

[7] It is convenient to now address the grounds of appeal.

Ground 1 - the sentence was manifestly excessive in the absence of violence and any intention to harm

[8] In manslaughter cases "the sentencing Judge's discretion is comparatively wide. It must be because, as often noted, the circumstances of manslaughters are infinitely various".[1]

[9] The prosecution, because of lack of evidence of the circumstances in which the deceased was killed, was unable to establish that the killing occurred in a brutal, protracted or degrading way. It established, however, that the killing was accompanied by circumstances of aggravation. The applicant's conduct was aggravated by his attempts to conceal the death, his disposal of the deceased's body in a State forest where it remained undiscovered for about two and a half months, and by the fact that the death was caused in the course of an attempt by the applicant to extort or steal money from the deceased. The sentencing judge took into account the late plea of guilty and the applicant derived the benefit of his sentence being made concurrent with the five year terms.

[10] Although the applicant was able to rely on his drug-induced condition to argue that he had no intention to kill, that condition in no way acts in mitigation of the offence of manslaughter.[2] The sentencing judge also had regard to the comparative vulnerability of the applicant's elderly victim.

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1 *R v Mooka* [2007] QCA 36 cited with approval in *R v Dwyer* [2008] QCA 117 at [33] and see also *R v Whiting; ex parte Attorney-General* [1995] 2 Qd R 199.

2 See the discussion by de Jersey CJ in *R v Dwyer* [2008] QCA 117 and *R v Haack* [1999] QCA 76.

[11] The sentence imposed on the applicant is supported by *R v Dwyer*.[3] In that case, the application for leave to appeal by an applicant who was 22 at the time of the offence was refused. The applicant had a significant criminal history. When intoxicated, he felled the deceased with a blow and kicked him several times. The deceased, who died of cardiac arrest, was 51 years of age. The applicant had the advantage of an early plea of guilty. In his reasons, Keane JA referred to a review of sentences "for a brutal killing with limited provocation by a relatively young man without previous criminal history who has co-operated with the administration of justice" conducted by Holmes JA in *R v Sebo; ex parte A-G (Qld)*[4] and noted her Honour's conclusion that in such cases the sentence "might properly have fallen between 9 and 12 years".

[12] The applicant, who was self represented, contended that his offending was less serious than that of the applicants in *R v Dwyer* and *R v Sebo*, and in many other cases to which he referred, where the death of the victim resulted from a violent act or acts by the offender. In some of these cases the sentence imposed varied from eight to 10 years.

[13] The applicant relied in particular on *R v Lacey; ex parte A-G (Qld)*[5] in which the offender's sentence was increased from 10 years to 11 years on an Attorney's appeal. The applicant in *Lacey* did kill his victim with a hand gun but was only 20 years of age at the time of the offence with a relatively minor criminal history. He had spent approximately two years in pre-sentence custody so that, for practical purposes, his sentence was one of 13 years imprisonment. It was said, in effect, in the reasons of the majority, that a sentence of 15 years would have been within the appropriate range but that the lower sentence was imposed because it accorded with the sentence sought by the prosecutor at first instance.

[14] In *Lacey*, reference was made to *R v Bates; R v Baker*[6] and *R v Bayliss.*[7] In *Bates*, the 20 year old applicant had fatally injured his victim in "a vicious battering" in which his co-accused, Baker, a 16 year old female, had joined. On appeal, Bates' life sentence was reduced to 18 years and Baker's sentence of 12 years was undisturbed. Both applicants had made late pleas of guilty.

[15] The 15 year sentence imposed on the 18 year old applicant in *Bayliss* for manslaughter, committed by his killing his victim when firing his rifle in "an indiscriminate way", was not disturbed on appeal.

[16] Another decision referred to by the applicant was *R v Huebner*.[8] The applicant in that case, who was sentenced to 12 years imprisonment for manslaughter, killed his victim in the course of employing bondage or similar sexual practices in "pursuit of his deviant interests". The sentencing judge observed that were it not for the applicant's guilty plea and the need to observe the totality principle (other sentences, including cumulative sentences of four years, had been imposed), a "significantly higher sentence" would have been warranted. The application for leave to appeal against the sentence was dismissed.

[17] *R v Clark; ex parte A-G*[9] was referred to in *Huebner*. The 24 year old offender in that case with a minor criminal history, who had offered to plead guilty to

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3 [2008] QCA 117.
4 [2007] QCA 426 esp at [18].
5 [2009] QCA 274.
6 [2002] QCA 174.
7 (1987) CCA 27.
8 [2006] QCA 406.
9 [1999] QCA 438.

manslaughter, was found guilty of manslaughter after a murder trial. He failed to have an 11 year sentence set aside on an Attorney's appeal. The means by which he had killed his young female victim, who was found floating in a river with a weight attached to her, were unknown.

[18] It is not profitable to explore the decisions referred to by the applicant any further. The above discussion is sufficient to confirm the accuracy of the observation in *R v Mooka* quoted earlier. It was said in the reasons of the majority in *Lacey*[10] that:

> "For the reasons explained by Hayne J in *AB v The Queen*, in a passage quoted in the reasons in Appeal No. 123 of 2009, there is normally little to be gained by subjecting the offending conduct in each case to exhaustive analysis in an attempt to establish an exact relationship or proportionality between the sentence imposed in one case and the sentence imposed in another.
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> Williams JA in his reasons in *R v Bates; R v Baker*, after observing that 'Sentencing for manslaughter is always difficult', explained:
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> > 'It has often been said that the offence of manslaughter covers a wide variety of circumstances in which a person has been unlawfully killed. Because of that it is difficult to speak of a range of punishment applicable to the offence, and it explains why it is sometimes difficult to reconcile one sentence of manslaughter with another. Many crimes of manslaughter involve what could be described as a one on one situation. In many such instances there are complicating features such as provocation, excessive self-defence and a single blow (with or without a weapon) delivered in a highly emotional situation. Such cases can readily be distinguished from a planned gang attack on a relatively defenceless person in a remote locality. There is an even greater abhorrence generally in society when such an attack is carried out with retribution as its main object'."
> > (footnotes deleted)

[19] The passage from the reasons of Hayne J in *AB v The Queen*[11] referred to earlier, addressing an argument that the sentencing judge should have reduced the sentence to allow for a circumstance not raised on the sentencing hearing, is:

> " … There are several flaws in the argument.
> First, it assumes that sentencing an offender is some mechanical or mathematical process. It is not. Nobody can identify, let alone define, some precise relationship between the complex and infinitely various elements that bear upon what sentence is to be imposed on an offender such as this appellant. No calculus will reveal some mathematical relationship between this appellant's remorse, the harm he has inflicted on his victims and society's denunciation of what he did to them. A sentencing judge can do no more than weigh these and the many other

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10 *R v Lacey; ex parte A-G* (Qld) [2009] QCA 274 at [177] and [178].

11 (1999) 198 CLR 111 at 156.

> factors (such as retribution and deterrence) that bear upon the question and express the result as several terms of imprisonment to be served, wholly or partly concurrently or consecutively. Remorse, harm, denunciation, retribution and deterrence – in the end, all these and more must be expressed by a sentencing judge in units of time. That is a discretionary judgment. It is not a task that is to be performed by calculation. Resort to metaphors such as 'discount' or 'allowance' must not be taken as suggesting that it can be." (footnotes deleted)

[20] The applicant's offending conduct is substantially different from the offending conduct in the cases just referred to. *Clark* provides the closest comparison and supports the sentence imposed. The offender in *Clark* was relatively young with a minor criminal history and had the benefit of what was, in practical terms, an early guilty plea. The fact that the sentence of 11 years in *Clark* was not increased on an Attorney's appeal does not warrant the conclusion that the Court considered a higher sentence was not within the range of a sound sentencing discretion.

[21] The applicant in the present case is a mature man with a bad criminal history who only cooperated with the administration of justice to a very limited extent. His actions were motivated by greed and were not provoked.

[22] Counsel for the respondent also relied on the fact that the applicant on the sentencing hearing intimated that he would be "happy" with an 11 and a half years term of imprisonment. It was submitted, relying on the observations of Keane JA in *R v Walsh*,[12] that this concession made the argument that the sentence was manifestly excessive difficult to sustain. The observations in *R v Walsh* and in *R v Frame*,[13] referring to *R v Walsh*, were based on the principle that a party is ordinarily bound by the conduct of his case at first instance. That principle, however, applies with rather greater force in relation to sentence appeals where the applicant had legal representation or could otherwise have been expected to have reached a properly informed conclusion about the relevant sentencing considerations.

[23] If I had concluded that the sentence imposed was outside the range of a proper sentencing discretion, I would not have felt constrained by the applicant's concession. But, as the above discussion shows, the sentence was not manifestly excessive.

Ground 2 – the prosecution concedes that it was unable to prove the act that caused the deceased's death but the act must be proved before an accused can be convicted of manslaughter

[24] The plea of guilty established that an act or acts committed by the applicant was, or were, a substantial or significant cause of death.

[25] There is no substance in this ground.

Ground 3 – the prosecution's sentencing submission "as per the factual basis for sentencing ie: 'the withholding of medication' was no longer the reliance of

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12 [2008] QCA 391 at [23].

13 [2009] QCA 9 at [6].

the Crown (sic) as per the record, therefore the agreed facts were superfilious (sic)".
The applicant's plea was prompted by his acceptance that he failed his duty of care pursuant to s 285 of the *Criminal Code* with the consequence that the matter had to be dealt with under s 303 of the *Criminal Code*.

[26] The sentencing judge did not proceed on the basis that the statement of facts was agreed and could be relied on. She made that perfectly plain and explained the basis on which she was proceeding. It is desirable to say a little about how this matter unfolded. The applicant was initially convicted of murder. He appealed successfully against that conviction.

[27] At a sentencing hearing on 9 March 2009, the prosecutor, in discussion with the sentencing judge, rejected the proposition that the agreed facts left it open to infer that the basis of the guilty plea was negligent manslaughter. The prosecutor said that the "agreed basis" was that the applicant "had done something for the purpose in paragraph 2 [of a statement of facts] and that contributed to death". Paragraph 2 stated, "The reason for this [the applicant significantly contributing to the death of the deceased] was so the [applicant] could get [the deceased's] PIN numbers". The applicant gave evidence to the effect that he pleaded guilty because he felt responsible for the deceased's death and was sorry for one of the witnesses. He said he didn't know how ill the deceased was because of his affectation by drugs and although the deceased asked him to take him home, he delayed doing so because of his drugged condition. In consequence of this evidence, the judge set aside the guilty plea.

[28] On 30 November 2009, the applicant informed the Court through his counsel that he was ready to plead guilty to manslaughter. The prosecutor stated that he had been informed by the applicant's counsel that he held "unequivocal and unambiguous instructions that the [applicant] killed [the deceased] in circumstances amounting to manslaughter" and that the accused understood that the plea of guilty "explicitly contradicts the sworn evidence that the [applicant] gave" on 9 March 2009 and that "he now repudiates that evidence". The prosecutor said that it was on that basis that the Crown accepted the plea. The applicant was asked whether there was anything he wished to say about the prosecutor's statement and whether he was happy with it. He said, "I am. I am …". Later, in the course of the hearing, the applicant's counsel said he no longer had "clear and unambiguous instructions" and he sought leave to withdraw.

[29] The prosecutor informed the judge during the 30 November hearing that the prosecution was relying on the admission of the applicant that he caused the death in circumstances in which he was "putting pressure upon [the deceased] to get access to [the deceased's] money". In the afternoon of that day, defence counsel informed the judge that he was renewing his application for leave to withdraw. The hearing resumed on 2 December 2009. The sentencing judge referred to the statement by the prosecutor set out in paragraph [3] above. The applicant accepted that he repudiated the evidence given by him before Fryberg J and he confirmed that he acknowledged his guilt. The applicant did not contend that he should be sentenced on the basis of manslaughter by criminal negligence. There is thus no justification for any suggestion that the applicant should have been sentenced on the basis that the death occurred as a result of his criminal negligence.

Ground 4 – the applicant did not receive a fair hearing "due to a threat by [the prosecutor] to withdraw the acceptance of the plea, to fully place [his] case before her Honour …"

[30] This submission appears to be to the effect that because of the alleged threat, the applicant did not lead evidence and/or advance arguments that he would have led or advanced in the absence of such a threat. There was no threat. The prosecutor merely stated the basis on which the plea was accepted and on which the prosecution would be proceeding. The applicant was free to accept or reject the basis on which the prosecution intended to proceed: he accepted.

[31] Perusal of the transcript shows that the sentencing judge conducted the hearings with commendable care and made certain that the applicant had the opportunity of making any submissions he wished. In addition, the sentencing judge explored with the applicant evidentiary matters she thought may have operated in his favour.

[32] This ground has not been made out.

Conclusion

[33] As any appeal would have no reasonable prospects of success, the application for leave to appeal should be refused.

[34] **FRASER JA:** I agree with the reasons of Muir JA and the order proposed by his Honour.