SUPREME COURT OF QUEENSLAND

CITATION:	*R v Richardson* [2010] QCA 216
PARTIES:	**R** **v** **RICHARDSON, Jamie Kenneth** (appellant/applicant)
FILE NO/S:	CA No 287 of 2009 CA No 79 of 2010 DC No 2001 of 2009 DC No 2067 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2010
JUDGES:	Fraser and White JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is granted.** **3. The appeal is allowed and the sentences imposed below set aside.** **4. The appellant is sentenced to:** **a. eight years imprisonment for the armed robbery in company committed on 20 September 2007;** **b. seven years imprisonment for the robbery committed on 31 December 2007;** **c. 18 months imprisonment for the unlawful use of a motor vehicle to facilitate the commission of an indictable offence; and** **d. 18 months imprisonment for the dangerous operation of a vehicle.** **All sentences to be served concurrently.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where appellant convicted after trial of one count of robbery whilst pretending to be armed with a firearm and in company – where evidence implicating the appellant was a DNA sample – where evidence before court of possibility of secondary transference of DNA – whether jury were entitled to exclude the possibility of secondary transference as an explanation consistent with the appellant's innocence

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where sentencing judge re-opened another sentence of imprisonment for armed robbery imposed on the applicant because the sentencing judge in that matter had not been referred to the applicant's criminal history in New South Wales – where sentencing judge imposed a term of imprisonment of five years for this armed robbery and declared it to be a serious violent offence pursuant to s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld) – where sentencing judge imposed a cumulative term of imprisonment of four years for the offences in relation to the re-opened sentence – whether the serious violent offence declaration should have been made – whether the sentences taken together and applying the totality principle were too high, even without with the declaration – whether sentence manifestly excessive

Corrective Services Act 2006 (Qld), s 182(2), s 184(2), s 185(4)
Penalties and Sentences Act 1992 (Qld), s 161B(3), s 188

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
The Queen v Hillier (2007) 228 CLR 618; [2007] HCA 13, cited
R v Bradford [1997] QCA 391, considered
R v Brennan [2001] QCA 253, considered
R v Crofts [1999] 1 Qd R 386; [1998] QCA 60, cited
R v F [2000] 2 Qd R 331; [1999] QCA 131, cited
R v Irving [2001] QCA 472, considered
R v Keating [2002] QCA 19, considered
R v Lund [2000] QCA 85, followed

R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, followed
R v Orchard [2005] QCA 141, followed

COUNSEL: M J Woodford, with A C Freeman, for the appellant/applicant
M J Copley SC for the respondent

SOLICITORS: Family Law Doyle Keyworth & Harris for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of White JA. I agree with those reasons and the orders proposed by her Honour.

[2] **WHITE JA:** On 22 October 2009 the appellant was found guilty after a trial of one count of robbery whilst pretending to be armed with a firearm and in company. The robbery occurred at the Australia Post Office on Racecourse Road, Hamilton, shortly before midday on 20 September 2007.

[3] The evidence implicating the appellant in the offence was a DNA sample, the major component of which matched the appellant's DNA. The two Post Office employees were unable to identify the offender although they provided general descriptions, one of which had an element said to be inconsistent with the appearance of the appellant.

Appeal against conviction

[4] The sole ground of the appeal is that the verdict is unreasonable and cannot be supported having regard to the weakness of the identification evidence. The approach by an appellate court when the verdict is challenged as unreasonable is as pronounced in *M v The Queen*[1] and confirmed in *MFA v The Queen*.[2] An appellate court must consider the whole of the evidence to decide if it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the charged offence.

[5] In summary, security cameras in the Post Office showed the offender entering the Post Office with an accomplice who acted as lookout. The offender made no attempt at heavy disguise but had the hood of his jumper over his head and was wearing darkened glasses. He jumped over a counter which separated the employees from the public and went out of the view of the security camera, through a back door. He then appeared at the counter and is seen opening the door from the staff side of the counter, going into the public area and exiting the Post Office, together with the lookout. DNA was found on the staff side handle of the door. No other useful DNA material was obtained from objects seen by either the camera or the employees to be touched by the offender. No one was charged over the robbery.

[6] Some 16 months later a swab taken from the appellant on 16 January 2009 was compared to the results of the testing on the door handle and was found to be consistent. At the trial, an expert in DNA analysis, Ms Jacqueline Wilson, gave

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1 (1994) 181 CLR 487; [1994] HCA 63.
2 (2002) 213 CLR 606; [2002] HCA 53.

evidence that DNA could be deposited by secondary transference, for example, an unknown person could have obtained the appellant's DNA by handling an object containing the appellant's DNA and then inadvertently transferred the appellant's DNA to the door handle. Ms Wilson could say nothing about the age of the DNA deposited on the door handle.

[7] It was the appellant's submission at trial and on appeal that the jury could not be satisfied beyond reasonable doubt that there was no innocent explanation for his DNA being on the door handle. The appellant did not give evidence.

The evidence

[8] On Thursday 20 September 2007 at about midday Susan Hollis was the acting supervising officer working at the front counter of the Australia Post Office in Racecourse Road, Hamilton. The only other employee at the Post Office that day was Leslie Senior. At the time of the robbery, she was in the back office putting cash cleared from her till into the safe where it would later be collected by Armaguard, before going out for lunch.

[9] The Post Office opened onto the footpath with sliding glass doors. There was access from the staff counter to the customer area through a door about five feet high, which went about half way to the ceiling. Entry from the customer side through the door was by code. On the staff side, the door could be opened by a handle. Behind the staff counter on the back wall, there was an access door to a back office which was normally kept locked but at the time of the offence was open.

[10] Ms Hollis finished serving a customer who left the Post Office. At that time, there were no other customers in the store and Ms Hollis collected some cheques and was taking them into the back office. The offender came up beside her yelling "Get the fuck down. I'm going to blow your fucken head off". He held something to the side of her head in a plastic bag. Initially Ms Hollis thought he was joking until she saw the lookout man, whom she described as "big".

[11] The CCTV cameras in the customer area of the Post Office recorded two men entering the Post Office from outside. One hung around the entrance and was clearly a lookout. The other was seen to place his hand on the counter and vault over it into the staff area behind the counter.

[12] After the offender shouted at Ms Hollis to "get down" again, she crouched down and the offender approached Ms Senior. She, at first, thought he was a disgruntled customer. The offender ordered her to open the safe and give him the money. Ms Senior explained that employees could not open the safe as it required two keys and one was held by Armaguard. Ms Hollis confirmed this to the offender who then, according to Ms Hollis, tested the safe himself by trying to "jig" it open. Ms Senior recalls him touching the handle on the safe drawer to confirm what he had been told.

[13] The offender ordered Ms Senior to the floor and returned, with Ms Hollis, to the counter area and ordered her to put all the money from the tills into a bag which he held open. She did as she was ordered. The offender stayed crouched behind the counter during this time. He put his hand into one of the tills to ensure all the money had been removed. The offender ordered Ms Hollis to "get down" and he left through the door from the staff area into the customer area and then exited the

store. The whole activity took only a few minutes. Ms Hollis telephoned security, Ms Senior locked the front door, and the police arrived within 15 minutes.

[14] Ms Hollis described the offender as taller than she was. She was five feet six and wearing high heeled boots. There was some evidence that he was 174 centimetres tall. She described him as "white, pale skinned"[3] and of athletic build. He was wearing a red jumper with a hood covering his head and dark glasses. He was generally crouched over with his head down throughout the incident. She described the lookout offender as quite big and wearing an orange shirt or jumper. She said she did not get a good look at his face. Ms Hollis agreed that it would, depending on how tall a person was, be possible to put an arm over the top of the door and open it by pulling the handle but she had never known of anybody doing so.

[15] Ms Senior described the offender as wearing a red sweatshirt with a hood up and sunglasses. He was screaming at her. She described him as approximately five foot ten or five foot eleven, of muscular build, and "a dark-skinned gentleman"[4] with black hair. She was of the view he was not Caucasian.

[16] The jury were shown the CCTV footage of the robbery. There was no camera in the back office. A Scenes of Crime police officer attended at the Post Office at 12.15 pm and, amongst other investigations, took finger print swabs from the front counter area, the front cash register, the safe handle and the inside of the counter door. There was no dispute about the continuity of those swabs which were then conveyed for DNA analysis to the Queensland Health Forensic and Scientific Services on 25 September 2007. On 27 January 2009 a reference sample of DNA from the appellant was delivered to the centre. The swab from the counter door contained a mixed DNA profile and indicated the presence of DNA from at least three people. Ms Wilson was able to separate the DNA and obtain a major component. That component matched the DNA profile obtained from the reference sample of the appellant. The minor DNA profile did not contain sufficient information to be compared with any reference DNA profile. The probability of the major DNA profile coming from somebody other than someone closely related to the appellant, the jury were told, was approximately one in 970 billion, based on Queensland Caucasian data.

[17] The swab from the front counter produced a mixed partial DNA profile and indicated the presence of DNA from at least three contributors. It could not be separated into major and minor DNA profiles and, because of the partial nature of the DNA profile and the uncertain numbers of contributors, Ms Wilson was unable to make any reliable conclusions as to any potential contributor. Similarly, a mixed partial DNA profile was obtained from the cash register drawer which did not contain sufficient information to make any reliable comparison. A DNA profile was not obtained from the swab sample from the safe handle.

[18] In cross-examination Ms Wilson explained secondary transference of DNA to the jury. It was possible for a third person to pick up an object that, for example, the appellant had handled and his DNA could be transferred to that person who could subsequently touch another surface and thereby transfer his DNA to that surface without the appellant ever physically touching that surface. Ms Wilson agreed that it would not be possible to tell whether DNA collected for testing was obtained through secondary transfer or direct transfer nor to determine its age.

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3 AR16.

4 AR32.

Discussion

[19] The appellant submitted that the possibility of secondary transference raised an explanation consistent with innocence that could not be rejected by the jury. That might have been the case if there were no other evidence than that the major component of the DNA left on the counter door handle was consistent with that of the appellant. In *The Queen v Hillier*,[5] Gummow, Hayne and Crennan JJ said:

> "Often enough, in a circumstantial case, there will be evidence of other matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal."

[20] The top of the door between the staff and the public area of the Post Office was about five feet above the floor. A person tall enough might have been able to put an arm over the top of the door and then have used the handle to open the door. Ms Hollis had never seen anyone do so. No members of the public came through that doorway legitimately to transact their business. In Ms Senior's estimation the door would be opened and closed perhaps less than six times a day.

[21] It was submitted that if the appellant was the offender, he would have left DNA on the counter when he used his hand to vault over it and/or on the handle of the drawer in the safe when he rattled it and/or in the till when he checked to see if any money was left behind. DNA was deposited on the counter and in the till but it was not possible to obtain a profile.

[22] The idea that the offender or some other person innocently had contact with the appellant and then touched the door handle thus depositing some of the appellant's DNA was something that the jury could consider. But, additionally, the jury had the benefit of the CCTV footage which they could compare with the general physique of the appellant. Furthermore, the swab from the door handle was taken immediately after the offence was committed and the staff side of the door was not a place to which members of the public normally had access. The theory of secondary transference was just that and the jury were entitled to consider that it was inherently unlikely that a person would reach over and touch the handle on the door, which was used up to six times a day, and inadvertently transfer the appellant's DNA.

[23] The employees' description of the offender was reasonably consistent with the appellant, save for the evidence of Ms Senior that he had dark skin, a matter about which she was apparently in conflict with Ms Hollis and also with the CCTV footage. She was not asked about the degree of darkness of the offender's skin.[6] The jury were entitled to consider that Ms Senior was in error in her description given the circumstances but otherwise accept the Crown evidence. There were no other circumstances which reasonably excluded the appellant. When considering all of the evidence the jury could be satisfied beyond reasonable doubt that he was the offender. The appeal should be dismissed.

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5 (2007) 228 CLR 618 at 638; [2007] HCA 13 at [48].

6 It may be noted in passing that the appellant's complexion is described as "olive" in his South Australian criminal history, AR183.

Sentence application

[24] The applicant also seeks leave to appeal against the sentence imposed on him.

[25] After the jury returned a guilty verdict on 22 October 2009 the learned trial judge adjourned the sentence to enable an application to be made by the prosecution to re-open a sentence of imprisonment for armed robbery imposed on him by another District Court Judge on 31 July 2008 in respect of offences committed on 31 December 2007,[7] because that Judge had not been referred to the applicant's serious, relevant, criminal history in New South Wales and, also, to enable a psychiatric report to be prepared.

[26] On 12 March 2010 the learned sentencing judge imposed a term of imprisonment of five years for the armed robbery at the Hamilton Post Office on 20 September 2007 and declared it to be a serious violent offence pursuant to s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld), to be served cumulatively upon the re-opened sentence, which related to an armed robbery and other lesser offences committed on 31 December 2007. His Honour sentenced the applicant to four years for that armed robbery and lesser concurrent sentences for the other offences. The terms of imprisonment for those offences commenced on 9 February 2008 when the applicant was held in custody solely in relation to those offences and 173 days of pre-sentence custody was declared. No parole eligibility date was fixed in relation to the four year term.

[27] Counsel agree that the effect of those orders is a combined sentence of nine years imprisonment and that the earliest date at which the applicant could be eligible for release on parole would be after serving six years in prison. It arises in this way: the parole eligibility on the sentence of four years imposed for the newsagency robbery, since no date was fixed, occurs after serving one-half of the term of imprisonment,[8] that is, two years; and, since the term of imprisonment of five years for the Hamilton Post Office robbery included a serious violent offence declaration, it required the applicant to serve 80 per cent of that sentence,[9] that is, four years.

[28] The applicant contends that the sentences imposed result in a sentence which is manifestly excessive on two bases, namely, that the serious violent offence declaration ought not to have been made and that the sentences, taken together and applying the totality principle, were otherwise too high even without the declaration.

Criminal history

[29] The applicant was born on 24 August 1979 at Penrith in New South Wales. He had an extensive criminal history as a child in New South Wales, particularly for driving and stealing offences. Putting to one side less serious offences, on 9 March 1998 he was sentenced in the Penrith District Court to a minimum term of two years and an additional term of two years for entering a building with intent to rob and robbery in company. On 24 July 2001, when he was almost 22, he was sentenced to a term of imprisonment of four and a half years with a three year non-parole period in the Sydney District Court for aggravated stealing from the person and inflicting actual

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7 The Bramble Heights newsagency robbery.

8 *Corrective Services Act* 2006 (Qld), ss 184(2), 185(4).

9 *Corrective Services Act* 2006 (Qld), s 182(2).

bodily harm. On 5 September 2003 in the Blacktown Local Court he was imprisoned for 12 months and disqualified from driving for two years for driving recklessly.

[30] On 7 July 2005 he was sentenced in the Southport Magistrates Court to 18 months imprisonment suspended after nine months with an operational period of three years for stealing. He escaped from custody on 1 November 2005 and went to South Australia where he committed further criminal offences. A sentence of 18 months imprisonment was imposed on 15 September 2006 by the District Court of South Australia and in October 2006 he was extradited to Queensland. On 9 November 2006 he was sentenced to a term of imprisonment of six months for the escape and the nine months remaining on the suspended sentence was activated. He was granted parole on 9 August 2007. On 24 August 2007 he was granted bail in respect of summary offences. As has been related, on 20 September 2007 he robbed the Hamilton Post Office and on 31 December 2007 he robbed the newsagency at Bramble Heights. He was returned to custody to serve the remainder of the sentence for which he had been granted parole until 8 February 2008.

The re-opened sentence offending

[31] On 31 December 2007 the applicant stole a car and robbed a newsagency at Bramble Heights near Margate. He entered the shop brandishing a wheel lock with which he smashed a glass receptacle on the front of the counter and demanded money. He left with the money from the till, driving at a fast pace. A police chase ensued at high speed which came to an end when the applicant was caught attempting to escape on foot after crashing the car.

[32] The applicant pleaded guilty to armed robbery on ex officio indictment before Judge Clare in the District Court and received a sentence of four years for the armed robbery and lesser concurrent sentences for the motor vehicle offences. Her Honour ordered parole eligibility on 9 August 2009 and declared 173 days from 9 February 2008 to 31 July 2008 as time served under the sentence. Her Honour had not been referred to the applicant's New South Wales criminal history which contained armed robbery offences and for that reason, the prosecution sought to have that sentence re-opened under s 188 of the *Penalties and Sentences Act* 1992 (Qld). The defence was content to support the application since the applicant could then be sentenced on the basis that he had committed two armed robberies within three months and the totality principle would operate.[10]

The sentence

[33] The learned sentencing judge had the benefit of a detailed psychiatric report prepared by Dr K Calder-Potts dated 9 December 2009 in which he set out the applicant's disadvantaged childhood of physical and sexual abuse and gross parental neglect. Dr Calder-Potts noted a long history of drug and alcohol dependency/addiction. The applicant had been seriously unwell with delusional ideation about a conspiracy to harm him and auditory hallucinations for some years. It was not until he was seen by Prison Mental Health Services in 2008 that he was commenced on anti-psychotic medication which, in due course, led to the alleviation of his symptoms.

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[10] *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70; *R v Crofts* [1999] 1 Qd R 386 at 387; (1998) 100 A Crim R 503; *R v F* [2000] 2 Qd R 331 at 332 per Pincus JA.

[34] Dr Calder-Potts provisionally diagnosed the applicant with schizophrenia (paranoid type) with amphetamine, marijuana and alcohol dependence; an anti-social personality disorder with some narcissistic features; and the possibility of acquired brain injury when he was about 11 when he was severely injured in a motor vehicle accident. Dr Calder-Potts concluded:[11]

> "Mr Richardson will require long term psychiatric supervision and management. This treatment and management will be provided by Prison Mental Health during the period of his incarceration but following his release he should be referred to Community Mental Health Services for further follow up and supervision with regards his medication."

On the question of rehabilitation Dr Calder-Potts observed:[12]

> "Mr Richardson recognises the adverse effects of his upbringing and his substance abuse and currently seems willing to engage with rehabilitative services. This can be initiated whilst in prison but following his release he may benefit from a parole period during which rehabilitation in a drug and alcohol facility could be one of his conditions of parole."

[35] The prosecutor below sought a sentence of five years imprisonment for the newsagency robbery and six years cumulative upon that sentence for the Hamilton Post Office robbery with a serious violent offence declaration for that offence and a declaration of 173 days served, making a total sentence of 11 years imprisonment. Defence counsel sought a sentence of seven to eight years for the total course of misconduct, that no serious violent offence declaration be made and that a parole eligibility date be fixed after serving three years and six months imprisonment and the 173 days declared.

[36] In his extensive and careful sentencing remarks, the learned sentencing judge noted the applicant's bad criminal history including for like offences and the aggravating features that he was on parole and bail when he committed the Hamilton Post Office robbery some six weeks after release from custody. A little more than two months later, he noted, the applicant robbed the newsagency. His Honour further noted that the applicant's offending had not decelerated in time, although he did observe that the earlier robberies had been committed years previously and were serious. After considering the passage in Dr Calder-Potts' report to which reference has been made, the learned sentencing judge said:[13]

> "However, it is clear that you cannot be regarded, at this stage, as a person who has been successfully rehabilitated. Indeed, the evidence from the psychiatrist shows that you are very much at the commencement of the process of rehabilitation and the success of that process is far from assured."

[37] The learned sentencing judge considered that the applicant remained a risk of re-offending and the protection of the community was a relevant consideration when

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11 AR213.
12 AR214.
13 Supplementary AR81-82.

considering the appropriate sentences. He noted that in just over a two year period, commencing on 1 November 2005 until he was apprehended for the current offences, he had escaped from lawful custody, committed offences as an escapee and committed offences in breach of a suspended sentence, bail and parole. His Honour recognised that the cause of the offending was the applicant's drug addiction and noted that for that reason, rehabilitation would be difficult. He added that it was important to impose a sentence that was not crushing and that he should consider the totality of the offending conduct. His Honour then proceeded to consider the Post Office offence and the newsagency offences separately and nominated the appropriate sentence for each offence. Standing alone, he would have sentenced the applicant to a term of imprisonment of six years for the newsagency robbery and a sentence of between seven and eight years for the Post Office robbery. Bearing in mind the totality of the criminal conduct, his Honour regarded a sentence of nine years to be warranted. He structured the sentences by re-sentencing the applicant for the newsagency offences first with a head sentence of four years imprisonment from 31 July 2008[14] and declared the 173 days. For the Post Office robbery, although prior in time, he sentenced the applicant to a term of imprisonment of five years cumulative upon the newsagency robbery sentence. He made no parole eligibility order in respect of the newsagency offences.

[38] His Honour then considered whether to make a serious violent offence declaration. After canvassing the authorities he accepted that the circumstances of the robberies did not take them outside the norm for robbery offences and there was no gratuitous violence involved. His Honour concluded that the community needed protecting because the applicant was a risk of re-offending due to his psychiatric state and his long standing drug addiction which had not been addressed, together with his long criminal history for like offending.

Ought the serious violent offence declaration have been made?

[39] The legislative provision which enables a sentencing court to declare a conviction to be a conviction of a serious violent offence[15] provides no guidance as to the factors which will enliven the discretion. This Court has considered the ambit of the discretion on many occasions[16] but it suffices to consider only *McDougall and Collas*.[17] In *McDougall and Collas*, the Court, referring to observations in *Markarian v The Queen*[18] that the sentencing process is an integrated one directed to the determination of a just sentence, stated that the exercise of the discretion conferred by s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld) falls to be exercised "as part of, and not separately from, the conclusion of the process of arriving at a just sentence".[19] The Court set out a number of relevant considerations

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14 The date upon which the prior sentence that he was serving, and was returned to prison to complete, expired.

15 *Penalties and Sentences Act* 1992 (Qld), s161B(3).

16 *R v Collins* [2000] 1 Qd R 45; [1998] QCA 280; *R v Bojovic* [2000] 2 Qd R 183; [1999] QCA 206; *R v DeSalvo* (2002) 127 A Crim R 229; [2002] QCA 63; *R v Everleigh* [2003] 1 Qd R 398; [2002] QCA 219; *R v Bidmade* [2003] QCA 422; *R v A* [2003] QCA 538; *R v Orchard* [2005] QCA 141; *R v Cowie* [2005] 2 Qd R 533; [2005] QCA 223; *R v BAW* [2005] QCA 334; *R v BAX* [2005] QCA 365; *R v Lewis* (2006) 163 A Crim R 169; [2006] QCA 121; *R v Mitchell* [2006] QCA 240; *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365; *R v Riseley; ex parte A-G (Qld)* [2009] QCA 285.

17 *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365.

18 (2005) 228 CLR 357; [2005] HCA 25.

19 *R v McDougall and Collas* [2007] 2 Qd R 87 at 95; [2006] QCA 365 at [17].

to the making of a serious violent offence declaration when the circumstances of the offending are not beyond the norm for that offence. They include:[20]

"● the discretionary powers granted by s. 161B(3) and (4) are to be exercised judicially and so with regard to the consequences of making a declaration;

a critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole. By definition, some of the offences in the Schedule to the Act will not necessarily – but may – involve violence as a feature, such as trafficking in dangerous drugs or maintaining a sexual relationship with a child;

● the discrete discretion granted by s. 161B(3)(4) requires the existence of factors which warrant its exercise, but the overall amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so;

● the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing;

● the law strongly favours transparency and accessible reasoning, and accordingly sentencing courts should give reasons for making a declaration, and only after giving the defendant an opportunity to be heard on the point;

● for the reasons to show that the declaration is fully warranted in the circumstances it will usually be necessary that declarations be reserved for the more serious offences that, by their nature, warrant them;

● without that last feature, it may be difficult for the reasons to show that the declaration was warranted;

● where a discretionary declaration is made the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances; accordingly the just sentence which is the result of a balancing exercise may well require that the sentence imposed for that declared serious violent offence be toward the lower end of the otherwise available range of sentences;

● where the circumstances of the offence do not take it out of the "norm" for that type, and where the sentencing judge does not identify matters otherwise justifying the exercise of the discretion, it is likely that the overall result will be a

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[20] Ibid at 96-97 [19].

> sentence which is manifestly excessive, and in which the sentencing discretion has miscarried; probably because of an incorrect exercise of the declaration discretion."

[40] Considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually:[21]

> "… be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed."

The Court continued:[22]

> "In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question, and, so, outside "the norm" for that type of offence."

In *Riseley*,[23] a manslaughter case, Keane JA, with whom the other members of the Court agreed, set out and endorsed the guidance offered in *McDougall and Collas*.[24]

[41] What influenced the learned sentencing judge principally to make a serious violent offence declaration in this case was the applicant's past criminal history and the question mark which hung over his rehabilitation. In *Orchard*, McPherson JA observed:[25]

> "… I am by no means persuaded that, in declaring the applicant's conviction under count 5 to be of a serious violent crime, his past record in that regard was relevant. A power to declare an offender "to be convicted of a serious violent offence" does not seem to me readily to lend itself to saying that his past offences makes it so if, apart from particular features of the offence or perhaps offences under consideration, the addition of such a declaration would not be justified. The structure of s 161B(3) appears to be directed to the particular offence being so declared, with the declaration being made (as the statutory provision expresses it), 'as part of the sentence' imposed for that offence, and not for other offences for which he had been sentenced on earlier occasions: cf *R v Powderham* [2002] 2 Qd R 417, 421."

It is, furthermore, important to recognise that the applicant's criminal history of convictions for similar offences occurred many years previously – some eight to nine years - which the learned sentencing judge acknowledged. The details of that offending were not provided so it was unclear if there were features which would take them outside the norm for the offence of armed robbery. The learned sentencing judge accepted that there were no features about these two offences of

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21 Ibid at 97 [21].
22 Ibid.
23 *R v Riseley; ex parte A-G (Qld)* [2009] QCA 285.
24 Ibid at [42].
25 [2005] QCA 141 at [6].

armed robbery which took them outside the norm, terrifying as they were to the victims.

[42] In some circumstances a court may be warranted in taking into account the protection of the community in making the serious violent offence declaration but, in truth, the concern here was that the applicant may not be rehabilitated from his drug addiction and/or, implicitly, may not be compliant with his anti-psychotic medication and in that circumstance may commit further crimes on release. That does not seem to me to be a sound reason for exercising the discretion conferred by s 161B(3). Such a concern about re-offending must be true of any offender with a significant criminal history. The sentence imposed must still be just in all the circumstances. It will be a matter for the parole authorities to ascertain whether, at the appropriate time, the offender is a safe candidate for release on parole. But, to ascertain if the declaration together with the periods of imprisonment imposed do provide a just sentence, the sentences must be considered overall.[26]

[43] His Honour was particularly assisted by comparable decisions in which two or more robberies had occurred. In *R v Keating*,[27] a decision which the learned sentencing judge found particularly helpful, the applicant was convicted of seven counts of armed robbery, two of attempted armed robbery and one of unlawful use of a motor vehicle with a circumstance of aggravation, one count of common assault and two counts of fraud. All offences except the last were committed over a nine day period. Sentences of eight years were imposed with respect to the robbery counts, shorter terms on the others and a declaration of a serious violent offence made. The applicant was aged 23 and had a serious heroin addiction. The nine offences involved robbery or attempted robbery with the common feature that the applicant was armed with a syringe apparently filled with blood. All the targets were small businesses in which one person was working alone and most of the victims were relatively young females. No actual physical violence was used, short of producing the syringe and waving it about, but threatening words were used and the victims were very frightened. The applicant had a lengthy criminal history but none apparently for previous robberies.

[44] In the course of his judgment Thomas JA said:

> "Generally speaking, a serious violent offender [sic] declaration may be appropriate when a need is perceived to protect the community and where circumstances of the commission of the offence and particularly the violence accompanying its commission may make such a declaration appropriate. A single isolated act of violence may sometimes be thought to be less likely to attract a declaration than a case involving repeated commission of offences or a case where an offender's criminal history is one that tends to show the offence in a serious light so that a need is perceived to protect the community. These are mere random observations on the application of an unfettered discretion."

His Honour noted that whilst the evidence did not disclose whether the syringe was actually filled with infected blood or some other substance, the victims could hardly

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[26] *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25.

[27] [2002] QCA 19.

be expected to assume it was anything else. His Honour described them as "particularly repugnant crimes". The submission had been made that the offending behaviour was caused by the applicant's addiction to heroin and his offending was a secondary consequence of desperation caused by that human weakness. In other words, he sought to be identified as a drug addict rather than a robber. His Honour observed that that was no answer because of the difficulty of permanent rehabilitation of such a person and the risk of associated re-offending. There had been a plea of guilty on ex officio indictment and a voluntary confession to the other robberies when apprehended. The appropriate range was said to be between eight and ten years and the imposition of eight years with a serious violent offence declaration was said to be in accordance with the authorities. Ambrose J particularly emphasised the great many robberies to justify the sentence and declaration.

[45] In *R v Brennan*,[28] a decision to which the learned sentencing judge had regard, the applicant was convicted after a trial of armed robbery and sentenced to 12 years imprisonment with a serious violent offence declaration. The applicant entered a TAB agency wearing sunglasses and a cap and armed with a black metal gun looking like a semi-automatic, approximately 10 inches long. The material did not reveal whether the gun was real, or, if real, whether it was loaded, but the applicant pointed the gun at the face of the attendant, threatening to shoot if he was not given money. The applicant came over the counter and started grabbing money from the drawer. The complainant attendant, notwithstanding that he was fearful for his life, grabbed a stool and hit the applicant with it several times. The applicant left with about $560 and drove off as a passenger in a utility.

[46] The applicant was aged 36 and had a substantial criminal history but had not committed any offence for about eight years. The most serious of his previous offending was stealing with actual violence whilst in company on two occasions. He otherwise had a criminal history with no serious offending. Davies JA observed that armed robbery is always a serious offence and the threat to shoot and kill if money were not handed over and the apparent capacity to do so were particularly serious aspects. His Honour noted that the complainant was able to retreat from the line of fire, which caused the Court to doubt the extent to which the applicant intended or was even capable of causing serious harm. The Court concluded, on a review of the comparable authorities, that twelve years was manifestly excessive and imposed a sentence of eight years and maintained the serious violent offence declaration because of the threat to shoot and kill on more than one occasion, the apparent capacity to carry out those threats and the offender's previous criminal history of violence.

[47] In *R v Irving*,[29] the applicant was sentenced to imprisonment for nine years for the armed robbery of a bank. The offender went into the bank wearing a balaclava and other clothing which disguised him. He was holding a sawn-off semi-automatic rifle with which he menaced the two tellers and the two customers in the bank. He pointed the rifle at the first teller, placed a bag on the counter and demanded "all the cash"; similarly, with the second teller. He then took the filled bags and moved out, pointing the firearm at one of the customers as he left. When arrested he made full admissions and pleaded guilty. He was aged 38 and was a long term heroin addict. The victims of the crime suffered a great deal of distress.

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28 [2001] QCA 253.

29 [2001] QCA 472.

[48] The applicant had an extensive criminal history and the offence was committed while on parole for a similar offence. He had been imprisoned for six years for robbing a bank with actual violence while pretending to be armed and was released on parole about 18 months before the current offence was committed. A short time before the bank robbery he was fined for possessing a knife in a public place. Since 1974 the applicant had an almost continuous history of offences, mainly thieving and being armed with offensive instruments, burglary, receiving and drug offences. He had served many prison sentences. The complaint was that the sentence was cumulative on the balance of a six year sentence imposed for an earlier robbery, making a total period of imprisonment of 11 years. McPherson JA observed that while the sentence could have been moderated, that it was not was not an appellable error.

[49] Another decision which has relevance is *R v Bradford*,[30] where a sentence of eight years for armed robbery in company with violence was not interfered with. The applicant and a youth aged 15 entered a service station at Cairns. Both had their faces covered with cloth with eye holes and each was armed with a machete. The applicant demanded the sole attendant present hand over money and threatened to kill him if he did not. While the attendant was kneeling on the ground placing money from the till into the applicant's pockets, the applicant hit him with the blunt end of the machete. He then struck him a second time. A small amount of money and some cigarettes were obtained before they left. The attendant required treatment for the injury to his head. The applicant was intercepted some hours later. He had a criminal history which included a prior conviction for stealing with actual violence while armed with an offensive weapon and he had also been convicted of an assault occasioning bodily harm. The range was said to be eight to ten years.

[50] The applicant in *R v Lund*[31] was convicted after a plea of guilty to one count of armed robbery for which he was sentenced to six years imprisonment and a serious violent offence declaration made. After considerable pre-planning on the day of the robbery the applicant directed his co-offender to carry out the robbery in a fish shop and gave him scissors with which to menace the victims. The applicant, who acted as a lookout, met the co-offender after the robbery outside. The co-offender handed over the money to the applicant, who decamped with the money. The robbery had a lasting effect on the two female employees in the shop. The applicant was aged 32 with a substantial criminal history involving some drug related offences, stealing, driving offences in Queensland and South Australia and, in New South Wales, significant offences including multiple counts of assault and robbery with an offensive weapon. When he was being sentenced for the latter offences he asked for three counts of armed robbery and two counts of stealing to be taken into account. He had also escaped from lawful custody.

[51] McPherson JA concluded that a head sentence of seven years, reduced to six years to reflect the plea of guilty and to maintain parity with the co-offender who was sentenced to four years (there was a s 13A aspect to that sentence), was not manifestly excessive. His Honour, with whom Davies and Pincus JJA agreed, thought, however, that the circumstances of the robbery and the past criminal history did not warrant the declaration. McPherson JA observed:

> "The relevant part of the *Penalties and Sentences Act* gives little detailed assistance in determining how the discretion to make the

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30 [1997] QCA 391.

31 [2000] QCA 85.

> declaration is to be exercised. However, if it was intended to apply more or less automatically to all robberies of what I might call the corner store type, it is difficult to see why the discretion was conferred at all. The legislature must have been aware of the frequency with which those robberies are occurring and coming before the Courts when the relevant part of the Act was introduced.
>
> In terms of actual violence and seriousness, this offence was really no worse than most others of its type. In my respectful opinion, exercise of the declaration-making power under s 161B(3) should, in general, be reserved for cases of robbery possessing some special feature that mark them off from others and calls for the additional punishment that is involved in these cases."

His Honour noted the lapse of time, some 10 to 11 years, between the earlier robbery offences and the current offences. Pincus JA noted that it was about five years from the offender's release from prison, during which time he had not committed any particularly serious offences. He was persuaded that the gap in time between the serious previous offences and the present offences was significant and operated against the imposition of the declaration. Similarly, Davies JA agreed that neither the violence involved in the offence nor the combination with the offender's previous criminal history were of sufficient seriousness to justify the making of the declaration.

Discussion

[52] The applicant had been in custody solely in relation to the newsagency robbery from 9 February until 31 July 2008 when he was sentenced by Judge Clare so that, although that robbery occurred second in time, there was reason for dealing with that sentence first when it was re-opened. There were several approaches which the learned sentencing judge could have taken to these sentences. One would have been to impose concurrent sentences since they were very close in time, and in doing so, to take into account the time served, as well as the plea on ex officio indictment. That his Honour did not was not an error, but it did make fashioning sentences which were just in all the circumstances more difficult, in my respectful view. His Honour recognised the totality principle by reducing the sentence for the newsagency robbery by two years, from that which he would have otherwise imposed, and the Post Office robbery by two to three years. This resulted in an overall sentence of nine years. He then made a serious violent offence declaration in respect of the Post Office robbery.

[53] In my view, the learned sentencing judge fell into error when he made a serious violent offence declaration in respect of the robbery of 20 September 2007. The learned sentencing judge gave far too much weight to the applicant's previous criminal history for like offences which had occurred well in the past and to the uncertainty of rehabilitation and the need to protect the community in the event that the applicant's rehabilitation was unsuccessful. The former is not, on the whole, a relevant consideration[32] and neither is the latter.[33] The applicant's rehabilitation, with respect, is a matter that can be left to the parole authorities who can

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32 *R v Orchard* [2005] QCA 141 at [6] per McPherson JA.

33 *R v Keating* [2002] QCA 19 per Thomas JA.

monitor the applicant's progress. There was a sufficient glimmer of hope in Dr Calder-Potts' report to his Honour to have some confidence in the gradual rehabilitation of the applicant now that he is receiving mental health care whilst in custody.

[54] That error means that the sentences must be set aside and this Court must exercise the sentencing discretion afresh.[34] The authorities to which I have referred would suggest a head sentence of eight to nine years without a serious violent offence declaration for two robberies without gratuitous violence by an offender with a significant criminal history, where there was the added aggravation of bail and parole breaches and the positive factor of an early plea of guilty.

[55] These offences were very close in time and ought for that reason to be punished with concurrent terms of imprisonment. That means that time in pre-sentence custody which was almost six months cannot be declared but should be taken into account. There is the mitigating circumstance of the ex officio plea of guilty to the later offences and the aggravating feature of disregard by the applicant of his parole and bail conditions. When these are balanced, a sentence of eight years imprisonment for the Post Office armed robbery in company offence committed on 20 September 2007 should be imposed and a sentence of seven years imprisonment for the newsagency robbery committed on 31 December 2007. For each of the unlawful use of a motor vehicle to facilitate the commission of an indictable offence and the dangerous operation of a vehicle committed on 31 December 2007, a sentence of 18 months imprisonment should be imposed. All of the offences should be served concurrently.

[56] I would make no parole eligibility order. The applicant will be eligible to apply after he has served half of the period of imprisonment.[35]

[57] Mr Woodford and Ms Freeman appeared pro bono for Mr Richardson. Their careful submissions were of considerable assistance in disposing of the appeal and application.

Orders

[58] The orders I make are:

1. The appeal against conviction is dismissed.

2. The application for leave to appeal against sentence is granted.

3. The appeal is allowed and the sentences imposed below set aside.

4. The appellant is sentenced to:

   (a) eight years imprisonment for the armed robbery in company committed on 20 September 2007;

   (b) seven years imprisonment for the robbery committed on 31 December 2007;

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34 *AB v The Queen* (1999) 198 CLR 111 at 160 per Hayne J; [1999] HCA 46 at [129].

35 *Corrective Services Act* 2006 (Qld), s 184(2).

(c) 18 months imprisonment for the unlawful use of a motor vehicle to facilitate the commission of an indictable offence; and

(d) 18 months imprisonment for the dangerous operation of a vehicle.

All sentences to be served concurrently.

[59] **MULLINS J:** I agree with White JA.