# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Meerdink* [2010] QCA 273 |
| PARTIES: | **R**<br>**v**<br>**MEERDINK, Richard John**<br>(applicant) |
| FILE NO/S: | CA No 123 of 2010<br>SC No 442 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 12 October 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 30 September 2010 |
| JUDGES: | McMurdo P, White JA and Jones J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **The application is refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where applicant and co-accused jointly charged with murder – where co-accused pleaded guilty to manslaughter – where applicant and co-accused acquitted of murder and applicant convicted of manslaughter following trial – where applicant had a lengthy criminal history, including previous convictions for violence, and lacked remorse for victim – where co-accused offered to plead to manslaughter at an early date, was remorseful and had a less serious criminal history without crimes of violence – where applicant sentenced to 10 years imprisonment, resulting in a serious violent offence declaration pursuant to s 161B of the *Penalties and Sentences Act* 1992 (Qld) – where co-accused sentenced to nine years imprisonment with no serious violent offence declaration – where applicant must serve 80 per cent, that is, eight years, of sentence before being eligible for parole – where co-accused may apply for parole after four years – whether disparity between non-parole periods gave rise to a justifiable sense of |

grievance on the applicant's part – whether sentence manifestly excessive as a result of disparity

*Corrective Services Act* 2006 (Qld), s 182(2)
*Penalties and Sentences Act* 1992 (Qld), s 9(1)(a), s 161B(1)

*Lowe v The Queen* (1984) 154 CLR 606; [1984] HCA 46, applied
*Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited
*Postiglione v The Queen* (1997) 189 CLR 295; [1997] HCA 26, applied
*R v Cowie* [2005] 2 Qd R 533; [2005] QCA 223, applied
*R v Crossley* (1999) 106 A Crim R 80; [1999] QCA 223, considered
*R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365, considered
*R v Mikaele* [2008] QCA 261, considered

COUNSEL: C W Heaton for the applicant
G Cummings for the respondent

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

[1] **McMURDO P:** I agree with White JA's reasons for refusing the application for leave to appeal against sentence.

[2] **WHITE JA:** The applicant was jointly charged with Jason Andrew Pearce with murdering Wayne Warren Ruks at Maryborough on or about 4 July 2008. When they were arraigned in the circuit court at Maryborough, Pearce pleaded not guilty of murder but guilty of manslaughter. The applicant pleaded not guilty. After a trial of nine days the jury found each not guilty of murder and found the applicant guilty of manslaughter on 9 October 2009.

[3] On 13 May 2010 at Brisbane Pearce was sentenced to imprisonment for nine years with a parole eligibility date fixed at 6 July 2012 with 676 days of pre-sentence custody declared as time served between 7 July 2008 and 13 May 2010.

[4] The applicant was sentenced to imprisonment for 10 years which entailed a declaration that he had been convicted of a serious violent offence pursuant to s 161B(1) of the *Penalties and Sentences Act* 1992 (Qld). Time of 426 days in pre-sentence custody was declared relating to the period 14 March 2009 to 13 May 2010. The applicant was on parole when he committed the offence and served the balance of his term of imprisonment when he was returned to custody after his arrest for the subject offence.

[5] The applicant seeks leave to appeal his sentence on the ground that it is manifestly excessive when compared to that imposed on Pearce, such that he has been left with a justifiable sense of grievance. This disparity arises not from the different head sentences – nine years and 10 years - but as a result of the significant difference in their respective parole eligibility dates. Pearce's eligibility date means that he may apply for parole release after serving four years of his sentence; the applicant, by

virtue of s 161C of the *Penalties and Sentences Act* and s 182(2) of the *Corrective Services Act* 2006 (Qld), may not be released to parole until he has served 80 per cent of his sentence, that is, eight years.

[6] Pearce filed an application for leave to appeal against sentence but abandoned this application by notice dated 3 August 2010.

**Facts**

[7] The applicant, then aged 39, was released from prison on parole on 13 June 2008. On 3 July 2008 he had been drinking in the afternoon and evening, spending some of that time with Pearce who was then aged 36. By about 9.00 pm they were observed to be affected by alcohol but not "blind drunk". As they walked past the Post Office Hotel in Bazaar Street, Maryborough, with the applicant carrying a bladder from a cask of wine, the deceased, who was also walking in the street, made to grab the wine and followed the applicant and Pearce as they crossed the road into the grounds of St Mary's Church. The deceased was very drunk. When he died a few hours later from internal injuries his blood alcohol level was 0.338.

[8] A CCTV camera recorded the offenders entering the grounds of the church together with the deceased at about 9.15 pm.

[9] Both offenders gave an interview to police and each spoke with a covert policeman while in custody in the cells. Pearce participated with police in a walk through of the events of that night. Neither defendant gave evidence at the trial but the CCTV footage enabled the court to have a reasonable understanding of what occurred. That footage suggested that the deceased was initially welcome to join the offenders in the churchyard. They approached a bench seat in the garden. Pearce intended to smoke some marijuana and the applicant kept his distance because consuming it would have breached his parole. What happened next was disputed at the trial but it was the catalyst for the violence which followed. It appears that something that the deceased said or did caused great offence to Pearce. Pearce contended that the deceased made an homosexual advance to him, suggesting to the psychiatrist who prepared a pre-sentence report that he had been touched inappropriately. The applicant had not been offended by whatever was said or done to Pearce. The learned sentencing judge noted that the CCTV footage did not show that the deceased actually touched Pearce and expressly found that he did not. His Honour thought it likely that the deceased said something foolish to Pearce in order to induce him to share his marijuana joint and Pearce misinterpreted it as an unwelcome sexual proposition. Pearce, who had been sexually abused as a child, told the covert policeman that he "snapped". Pearce told the deceased to leave, which he did, walking towards Bazaar Street.

[10] The applicant followed the deceased and, he, in turn was followed by Pearce. A minute or so later the deceased stopped, turned around and appeared to be speaking to both men. There seemed to be a verbal confrontation and each appeared to order the deceased out of the churchyard aggressively. He left but a couple of minutes later returned and Pearce confronted him. Although his Honour noted that the CCTV footage was capable of different interpretations, he concluded that the applicant was shown restraining Pearce from going forward towards the deceased who was standing with both hands by his side and apparently talking to one or other of the offenders. He may have said something which caused further offence to Pearce. In any event, as a consequence of something said by Pearce, the

deceased started to run. Pearce chased him with the applicant following. Pearce tackled the deceased to the hard surface beside the church wall injuring his (Pearce's) leg whilst doing so. The deceased did nothing to assault either of the offenders and ended up on the ground, slightly on top of Pearce.

[11] The applicant was seen to deliver a kick to the deceased's body. It was uncontroversial that that kick delivered by the applicant was not the fatal kick to the deceased's abdomen which the medical evidence suggested caused internal bleeding from which he subsequently died.

[12] The applicant was then seen to drag the deceased in the direction of the garden bed followed by Pearce. As found by the learned sentencing judge:[1]

> "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."

His Honour noted that Pearce was wearing boots, from which it may be inferred that the applicant was not. After the beating Pearce was seen to prop the deceased up in the recovery position and make a pillow with the deceased's jacket for his head.

[13] The medical evidence was that a very forceful blow or blows to the deceased's abdomen would have been necessary to bring about the internal bleeding and eventual death. Pearce was seen to deliver a punch to the deceased's head. The majority of the deceased's injuries - cuts and abrasions - were minor and he was not rendered unconscious or comatose by any of the blows. The trial and sentence proceeded on the basis that it was impossible to tell which of the offenders had delivered the fatal blow or blows. The offenders left the churchyard and thought little more about the deceased. Concerned passersby checked the deceased but thought that he was merely drunk.

**The applicant**

[14] The learned sentencing judge noted that the applicant was educated to year nine and had a good employment history. He was married and had children but abused alcohol and illicit drugs. The learned sentencing judge had the benefit of a lengthy and very thorough pre-sentence report from psychiatrist Dr R Moyle. Dr Moyle diagnosed the applicant as suffering from polydrug abuse and dependence, noting his condition went into remission only when in prison. He also diagnosed the applicant as having an anti-social personality disorder with mild cognitive difficulties and limited frontal lobe control over impulses and emotions. That control, Dr Moyle noted, was readily reduced by a couple of alcoholic drinks.

[15] In 1986 when almost 18 the applicant was dealt with for a number of stealing charges and placed on probation. Thereafter he was steadily in trouble with the law in respect of a range of motor vehicle offences, break and enter offences and drug offences culminating in four convictions of robbery with actual violence whilst armed and in company which occurred over a two week period in March 2001 for which the applicant was sentenced to six years imprisonment. Those offences were committed when he was seriously addicted to heroin. The applicant was sentenced

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[1] AR 76.

to 18 months imprisonment in the Caboolture Magistrates Court on 13 November 2007 for unlawful use of a motor vehicle and a summary drug offence. He was on parole in respect of those offences when he committed the attack upon the deceased, having been released from prison about three weeks previously.

[16] Although the applicant's explanation for his involvement in the serious assault on the deceased was the impulse to help his friend, Pearce, the learned sentencing judge concluded that it did not explain his role in the episodes of violence that lasted on and off for several minutes when the victim was on the ground. His Honour concluded that this supported Dr Moyle's conclusion that the applicant tended to minimise his wrongdoing to deceive. Dr Moyle had also reported that the applicant obtained a "buzz" or "rush" from his violent conduct, noted particularly in the context of the armed robberies.

[17] Although the applicant had undertaken additional courses whilst on remand which showed "a preparedness to come to terms" with his substance abuse, his Honour found that he still had "a long way to go" to address factors such as alcohol abuse which influenced his anti-social behaviour. His Honour, despite the applicant's articulation of feelings of sorrow for the victim and his mother, did not accept that this was an expression of genuine remorse.

[18] Dr Moyle observed of the applicant:[2]

> "The history of his community supervision and his 5 prior prison terms reveals a different picture of his inmate behaviour [where he was compliant] and his behaviour in the community where, among other behaviours causing concern to those overseeing the conditions of parole and probation, he fails to turn up for supervision appointments, fails to allow adequate random monitoring of his use of substances, and asks for changes of CCO if he is challenged. In jail he completes psychological programs but the most recent suggest he is largely a passenger in these programs contributing little whereas his unit and work behaviour brings no criticism. There is therefore little to suggest he has recently worked on the psychosocial issues to minimise his risk of re-offending."

[19] Seeking an explanation, Dr Moyle observed:[3]

> "Of greater relevance [than family life] seems to be the effect on his character development in the later teens of associating with older men into drugs and criminal lifestyles that he came to enjoy for the 'rush' such behaviour gave him. … Therefore the pattern seems to be that he rebels against pro-social authority and enjoys antisocial offending and the use of [drugs] of abuse. He indicates such attitudes to this day and considered jail and drug abuse in the early times not as a disincentive but as a joke. He freely deceives and lies for advantage and expects others who don't check the validity of his claims to accept his word."

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2 AR 160.

3 AR 160.

As to the applicant's rehabilitation prospects, Dr Moyle commented:[4]

> "I don't see the same general plans he espouses now as being more feasible in preventing violence now as in the past but he has some plans and can study and work. Otherwise there is little evidence he can manage stressful situations as occurred at this time better now, nor is there any promise of better compliance with remediation, more personal support or less likelihood he will expose himself to at risk environments and substance misuse that are likely distabilizers if released. There is little likelihood he will suddenly develop a social conscience to morally guide his decisions in the near future so for the foreseeable future I suspect he will need external structure to guide his moral judgement. When it is time to consider release I suspect careful attention needs to be paid to a prolonged and rigidly monitored and enforced compliance with conditions on his freedom so he can be encouraged to live in a stable environment abstinent of alcohol and other drugs, and where there is respected older men to guide him where he lacked such guidance in his childhood. Of course his past behaviour, if continued, would suggest the risk is that he will try and rebel against such restrictions and live the life of 'rushes' he so enjoys while lying telling people he is compliant and doing well when offending."

**Pearce**

[20] Pearce completed an apprenticeship but found it difficult to settle into any one job. From time to time he resorted to alcohol and cannabis. He had experienced sexual abuse as a six year old at the hands of the school janitor which had a lasting effect on him. His criminal history commenced in 1992 and included property offences, minor drug offences and summary offences resulting in fines and community based orders. He had no previous convictions for assault or offences of violence although he had served short periods of imprisonment often, it seems, for unpaid fines. He was in a relationship with a woman with whom he resided at the time of the offence and had the support of his family. In March 2009, well before the trial, he offered to plead guilty to manslaughter and did so at the commencement of the trial. His plea was accepted by the prosecution as an early plea. His Honour accepted that Pearce was genuinely remorseful, indicated by the nature of his comments to the covert policeman and the early offer to plead.

[21] Dr J Flanagan prepared a pre-sentence psychiatric report about Pearce. He diagnosed him as suffering from chronic alcohol dependency, THC abuse, a generalised social anxiety disorder and a personality disorder with mixed traits. Dr Flanaghan concluded that:[5]

> "His conditions are very chronic and entrenched in his personality and lifestyle. It is certainly possible that, as a result of what has happened, he may be able to seek and benefit from psychological treatment and, as a result, change his life for the better.

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4 AR 163.

5 AR 196.

> Psychotropic medication may in fact be of some benefit to him, as may the development of a consistent therapeutic relationship with a therapist.
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> Obviously, he needs to abstain from alcohol and substances."

Dr Flanagan concluded that Pearce's prognosis was "guarded".

[22] When considering the submission by the prosecution that there should be a serious violent offence declaration made in respect of Pearce, his Honour noted that the offending was not "out of the norm" for offences of that kind and that there was no "stomping" on the deceased's head or other acts of violence apart from the kicks to his body which caused the internal bleeding.

**Approach to the sentences**

[23] The prosecution sought a sentence of 10 to 11 years imprisonment for Pearce and 11 to 12 years for the applicant. Pearce's counsel submitted for six to nine years and the applicant's for eight to nine years. The learned sentencing judge identified the range as between nine and 11 years for each offender analysing comparable sentences and particularly referring to the discussion and review of similar manslaughter cases by Holmes JA in *R v Sebo*.[6] Mr Heaton, for the applicant, accepts that his Honour correctly identified the appropriate range. Accordingly, it is not necessary, here, to refer to the decisions establishing that range.

[24] His Honour, below, referred to the judgment of Keane JA in *R v Dwyer*,[7] quoting McHugh J in *Markarian v The Queen*:[8]

> "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."

The learned sentencing judge then continued:[9]

> "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

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6 (2007) 179 A Crim R 24; [2007] QCA 426.
7 [2008] QCA 117 at [38].
8 (2005) 228 CLR 357; [2005] HCA 25.
9 AR 101.

> practically defenceless and on the ground. The fatal blow or blows were not a spontaneous, short-lived reaction."

[25] His Honour compared and contrasted the offenders, identifying those factors which distinguished them. He noted that the applicant had previous convictions for violence; had a criminal history which was overall more severe than that of Pearce; had failed to comply with past court orders consistent with Dr Moyle's assessment; was on parole at the time of the offence; and lacked genuine remorse for his victim. Pearce had a more limited criminal history without crimes entailing violence; had frankly accepted blame and was remorseful; and had offered to plead at an early date. In imposing a sentence of 10 years on the applicant his Honour was mindful that he would be required to serve 80 per cent of that sentence.

**Parity**

[26] The principle of parity in sentencing co-offenders was expressed by Dawson J in *Lowe v The Queen* as follows:[10]

> "There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. Obviously where the circumstances of each offender or of his involvement in the offence are different then different sentences may be called for. But justice should be even-handed and it has come to be recognized both here and in England that any difference between the sentences imposed upon co-offenders for the same offence ought not be such as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence or to give the appearance that justice has not been don [sic]. … This has led to the variation of sentences by courts of appeal in order to reduce the disparity between sentences separately imposed upon co-offenders even where the sentence varied was not in itself excessive. … There is always the dilemma that in order to eliminate the disparity the Court may have to reduce a sentence which it regards as proper in itself because of an inadequate sentence imposed upon a co-offender. … the interference of a court of appeal is not warranted unless the disparity is such that the sentence under appeal cannot be allowed to stand without it appearing that justice has not been done. The difference between the sentences must be manifestly excessive and call for the intervention of an appellate court in the interests of justice…"

[27] Gibbs CJ expressed his agreement with those observations in the following way:[11]

> "It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account. The fact that one co-offender has received a sentence which is more

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10 (1984) 154 CLR 606 at 623-4.

11 Ibid at 609-10.

> severe than that imposed on a co-offender whose circumstances are comparable would provide no reason in logic for reducing the former sentence, if the only question were whether that sentence viewed in isolation was manifestly excessive. … they [s 668E *Criminal Code* 1899 (Qld) and similar provisions in other States] are wide enough to empower the court in its discretion to reduce a sentence not in itself manifestly excessive in order to avoid a marked disparity with a sentence imposed on a co-offender. It may be said that the very existence of the disparity reveals that an error must have been committed, but I would prefer frankly to acknowledge that the reason why the court interferes in such a case is that it considers that the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done."

[28] Mason J, although dissenting in granting special leave and allowing the appeal, expressed the rationale for the principle of parity in these terms:[12]

> "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community."

His Honour noted that the discrepancy cannot be corrected by increasing the penalty imposed on the more leniently dealt with co-offender in the absence of a Crown appeal and:[13]

> "It has therefore been generally accepted that it is preferable to err on the side of leniency and eliminate or diminish the sense of grievance and appearance of injustice by reducing the more severe penalty in appropriate cases."

[29] Brennan J, dissenting in the outcome, noted:[14]

> "But a real sense of grievance has to be borne by an offender if the disparity between his sentence and that of his co-offender is justified: cf *Reg v Tiddy*.[15]"

[30] The High Court further considered parity in *Postiglione v The Queen*,[16] a case principally concerned with the interplay between the parity principle and the totality principle. The Court approved the several observations in *Lowe* and emphasised that as between co-offenders:[17]

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12 Ibid at 610-1.

13 Ibid at 612.

14 Ibid at 619.

15 [1969] SASR 575 at 579.

16 (1997) 189 CLR 295; [1997] HCA 26.

17 (1997) 189 CLR 295 at 303 per Dawson and Gaudron JJ; see also McHugh J at 313, citing Doyle CJ in *R v Cox* (1996) 66 SASR 152 at 159.

> "… different criminal histories and custodial patterns may be such as to justify a real difference in the time each will serve in prison. And, of course, it is necessary when applying the parity principle that like be compared with like. There may be some aspect of one offender's criminal history or custodial situation which has no counterpart in the case of his or her co-accused. If so, it may justify the imposition of a different sentence or the structuring of the sentence in such a way that it results in some difference in the period actually spent in custody."

Dawson and Gaudron JJ recognised that:[18]

> "… the head sentence is but one component of the sentences. A proper comparison involves a consideration of all components. … One component of each of the sentences involved in this case and one which is susceptible of easy comparison is the non-parole period."

The disparity between the sentences was as a consequence of different non-parole regimes for the co-offenders, a feature not present in *Lowe.*

[31] The disparity between the applicant and Pearce has come about because the legislature has mandated that a sentence of 10 years or more must be declared a serious violent offence with the consequence that 80 per cent of the term of imprisonment must be spent in prison before parole may be granted. In *R v Crossley*[19] the applicant was sentenced to 10 years imprisonment upon which s 161B operated. His co-offender was sentenced to four years imprisonment with a two year non-parole period. These starkly disparate penalties were the basis of the application for leave to appeal, since the head sentence of 10 years was not said, in itself, to be manifestly excessive. Pincus JA, with whom McPherson JA agreed, observed:[20]

> "In my opinion, the law requires that where one of two co-offenders but not the other is caught by the 80% requirement, that circumstance is to be ignored in considering parity between the two. Perhaps some judges might in practice be inclined to be less severe in fixing the head sentence on the more serious offender, in those circumstances, but there is no justification in strict principle for doing so."

[32] McPherson JA concluded that once a sentence of imprisonment of 10 years was seen as appropriate for an offender's offences, the *Penalties and Sentences Act* "took over" and dictated what the result should be:[21]

> "It was not for the sentencing judge to anticipate or evade that statutory consequence by imposing a sentence less than appropriate in an effort to maintain parity between the two co-offenders of whom the applicant happened to be one."

His Honour recognised, citing *Postiglione,* that the parity principle was a compelling factor in sentencing but added:[22]

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18 At 302.

19 (1999) 106 A Crim R 80; [1999] QCA 223.

20 Ibid at 87.

21 Ibid at 88.

22 Ibid.

> "…I do not think it can be used to overcome the explicit statutory direction in s166(1)(c) of the *Corrective Services Act* … The resulting difference in parole eligibility dates between the two offenders was the direct consequence of the operation of the statutory provisions, which it was no part of the sentencing judge's function to nullify by other means."

[33] The President noted that *Postiglione* did not call for a consideration of the effect of legislation comparable to Part 9A of the *Penalties and Sentences Act* on the parity principle and whether that principle was overridden by such statutory provisions was undecided.[23] Her Honour also noted that *Booth*[24] and *Daphney*[25] did not support an argument that the mandatory declaration should be taken into account.

[34] In *R v Cowie*[26] this court considered the interplay between s 161A and the general provisions in s 9(1)(a) that a court must impose a sentence that is "just in all the circumstances" and observed:[27]

> "… we accept that the inevitable declaration [s 161B] is relevant in the consideration of what sentence is "just in all the circumstances" in order to fulfil the purpose of sentencing which is prescribed by s 9(1), consistently with what was said in *Shillingsworth* and *Herford*."

[35] Mr Cummings, for the respondent, did not contend that Part 9A relieved the court of its obligation to impose a sentence that was "just in all the circumstances" but rather emphasised the differences between the offenders, identified by the learned sentencing judge, which justified the disparity. He particularly noted that the applicant went far beyond any need to assist a friend in attacking the deceased because there was no aggression by the deceased and no threat to Pearce.

[36] Mr Heaton did not seek to revisit *Crossley* and *Cowie.* However, in *Markarian v The Queen*[28] the High Court made clear that a sentencing court exercising its discretion correctly will, subject to legislative direction, take account of *all* the relevant sentencing factors and arrive at a single result which takes due account of them all and:[29]

> "[t]hat is what is meant by saying that the task is to arrive at an 'instinctive synthesis'."

This will necessarily involve, as *Postiglione* demonstrated, issues of parole eligibility as well as the head sentence and other relevant factors.

[37] In *R v McDougall and Collas*[30] this court, after reference to *Makarian,* identified the factors justifying sentences of 10 or more years and stated that the sentencing court could not ignore the:[31]

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23 Ibid at 82.
24 (1999) 105 A Crim R 288.
25 Unreported, Court of Appeal, Qld, No 328 of 1998, 16 March 1999.
26 [2005] 2 Qd R 533; [2005] QCA 223.
27 Ibid at [19]. To similar effect see the observation by Mullins J in *R v Witchard; ex parte A-G (Qld)* [2005] 1 Qd R 428; [2004] QCA 429 at 123.
28 (2005) 228 CLR 357; [2005] HCA 25.
29 (2005) 228 CLR 357 at 374 per Gleeson CJ, Gummow, Hayne and Callinan JJ.
30 [2007] 2 Qd R 87; [2006] QCA 365.
31 Ibid at [18].

> "serious aggravating effect upon a sentence, of an order of 10 years rather than, say, nine years. The inevitable declaration if the sentence is 10 years or more is relevant in the consideration of what sentence is "just in all the circumstances"."

[38] In *R v Mikaele*[32] Mackenzie AJA, with whom Keane JA and Douglas J agreed, observed that *Crossley*:[33]

> "is authority for the conclusion that, once a serious violent offence declaration is appropriately made in one case but not made in the other, the principle of parity that would ordinarily apply has little scope for operation."

It may be that that observation must be treated with some caution bearing in mind that there were significant differences between the relative criminality of each of the co-offenders in that case. As *McDougall and Collas* itself demonstrates, a close analysis of the participation of each offender in the offence, their antecedents and prospects for rehabilitation, will all impact on what is a just sentence. This is what the learned sentencing judge did in this case, carefully weighing the relevant factors. That his Honour did not make a declaration pursuant to s 161B(3)(b) in respect of Pearce did not require him to "avoid" the consequences of Part 9A for the applicant. The recognition of the timely plea of guilty by Pearce; his absence of past violent offending; his insight into his offending and the part that alcohol played in it; his genuine remorse; together with some positive prospects for rehabilitation, all factors largely absent in the applicant, permitted the disparity with the sentence imposed on the applicant. As Brennan J observed in *Lowe*,[34] the applicant is likely to have a sense of grievance, but it is not, objectively, justifiable, and there is no appearance that justice has not been done.

[39] I would refuse the application.

[40] **JONES J:** For the reasons stated by White JA, I too would refuse the application.

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32 [2008] QCA 261.
33 Ibid at [36].
34 (1984) 154 CLR 606 at 619.