SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hasanovic* [2010] QCA 337
PARTIES:	**R** **v** **HASANOVIC, Zinajdo** (applicant)
FILE NO/S:	CA No 150 of 2010 DC No 1397 of 2009 DC No 1626 of 2009 DC No 1946 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2010
JUDGES:	Margaret McMurdo P, White JA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Refuse leave to appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the offender was convicted of a number of offences on three separate indictments – where the offender was sentenced to imprisonment on each count to be served concurrently – where global sentence imposed – where the longest term of imprisonment was nine years for the offence of doing grievous bodily harm with intent – where the learned primary judge proffered that the appropriate sentence for such an offence was eight years but sentenced the offender to nine years to reflect the overall criminality of all the offences – where a serious violent offender declaration was made – whether the parole eligibility date was delayed beyond that which would have been attained had the applicant been sentenced to cumulative sentences for each group of offences in the separate indictments – whether the sentence is manifestly excessive *Corrective Services Act* 2006 (Qld), s 182 *Penalties and Sentences Act* 1992 (Qld), s 161B

Griffiths v The Queen (1989) 167 CLR 372; [1989] HCA 39, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v Bojovic [2000] 2 Qd R 183; [1999] QCA 206, cited
R v Eade [2005] QCA 148, cited
R v Mikaele [2008] QCA 261, cited
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: R East for the applicant
B J Power for the respondent

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

[1] **MARGARET McMURDO P**: This application for leave to appeal should be refused.

[2] The 19 year old applicant has received a heavy global sentence for his 20 indictable and 2 summary offences which spanned seven months between January and July 2008. His effective total sentence is one of nine years imprisonment with a declaration that his offence of doing grievous bodily harm with intent is a serious violent offence. The result is that he must serve seven years, two and a half months before becoming eligible to apply for parole. The sentencing judge imposed a sentence on the most serious of the offences, that of doing grievous bodily harm with intent, to reflect all the offending. As Jones J explains, the judge was entitled to adopt this global approach.

[3] There were mitigating features. The applicant was youthful. He had just turned 17 at the commencement of his offending and was still 17 when it ended. He has been severely psychologically damaged by his dysfunctional upbringing as a result of the Bosnian war. He pleaded guilty, and in respect of many of the offences at an early time. Like the sentencing judge, I hope that, with expert assistance, he has real prospects of future rehabilitation.

[4] All three spates of the applicant's offending involved some violence. Much of it occurred on bail. This Court was referred to comparable sentences for grievous bodily harm with intent where victims suffered even more severe injuries than in this case. But here, the applicant lead a gang attack of youths in a school yard during school hours and intentionally caused serious injury to one completely innocent young victim and wounded another. Significant detrimental psychological impact can be expected, not just to those victims and their families, but also to other students, staff and their families. Such conduct warranted a particularly heavy deterrent sentence. The maximum penalty for doing grievous bodily harm with intent is life imprisonment.

[5] I agree with the applicant's counsel that a sentence of eight years imprisonment with a declaration that the offence of grievous bodily harm with intent was a serious violent offence, was, in light of the mitigating circumstances, within the appropriate

sentencing range. Many judges would have structured the sentence to ensure a longer period of strict conditional community based supervision on parole, for example, an effective head sentence of nine or nine and a half years with parole eligibility after effectively serving about six or six and a half year. But the sentence imposed was not determined on any wrong principle, and nor was it outside the appropriate range or manifestly excessive. It follows that the application for leave to appeal must be refused.

[6] Like the sentencing judge, I commend the brave leadership of the teacher, Mr Oakes, who stood up to the thuggish behaviour of the applicant and came between the protagonists. When confronted by Mr Oakes' courageous authority, the applicant and his followers were exposed as weak bullies and ran off.

[7] I agree with Jones J's reasons and orders.

[8] **WHITE JA**: I have read the reasons of Jones J for refusing leave to appeal against sentence and agree with those reasons. As his Honour has noted, there were several ways in which the primary Judge could have fashioned the sentences to take account of the three groups of offences. That he chose a sentence of nine years with a serious violent offence declaration which, effectively, reflected the applicant's overall criminality cannot be said to be outside the range of a sound sentencing discretion.

[9] The primary Judge weighed appropriately the various factors in mitigation. The terrorising street crimes in the second group of offences required to be marked rather than subsumed into the final, seriously criminal, behaviour of doing grievous bodily harm with intent for which a sentence of eight years was appropriate.

[10] I agree with the orders proposed by Jones J.

[11] **JONES J**: On 24 May 2010, the applicant pleaded guilty to a number of offences which occurred over a seven month period, between January and July 2008. The offences were charged on three separate indictments and they attracted the following penalties:-

Indictment 1397/09 – 10 offences

5 x Burglary and stealing) 1 x Enter premises with intent) 1 x Enter premises and stealing) 1 x Unlawful use of motor vehicle) 1 x Fraud)	each 2 years imprisonment
1 x Assault occasioning bodily harm in company	3 years imprisonment

Indictment 1626/09 – 6 offences

2 x Robbery in company) 1 x Armed robbery in company) 2 x Attempted armed robbery in company) 1 x Attempted robbery in company)	each 3 years imprisonment

Indictment 1946/09 – 2 offences

1. Doing grievous bodily harm with intent (with serious violent offence declaration)	9 years imprisonment

2. Wounding 6 years imprisonment

All the sentences were to be served concurrently.

[12] Prior to these offences, the applicant had only one conviction for wilful damage by graffiti for which he received a caution in the Children's Court.

[13] At the time of sentencing, the applicant had spent 655 days in pre-sentence custody which period was declared to be part service of his term of imprisonment. As a result the sentence, undisturbed, would have a full time release date of 6 August 2017 with a parole eligibility date of 20 October 2015. To enable a comparison to be made, the Court requested that further information be provided for an eight year sentence with a serious violent offence declaration. Such an order would have a full time release of 6 August 2016 and a parole eligibility of 1 January 2015. The difference in parole eligibility therefore is nine months and 20 days.

[14] No challenge is made to the penalties other than to the sentence for the offence of doing grievous bodily harm with intent. But the circumstances of the other offending is relevant because the learned sentencing judge increased the term of imprisonment for that offence by one year to take account of the overall criminality of the applicant's offending. His Honour said:-

> "I consider the appropriate sentence for count 1 of indictment 1946 of 2009, the grievous bodily harm with intent, to be 8 years. Taking that and all your other criminality evidenced by the other offences into account, I impose the following sentences:...count 1 grievous bodily harm with intent you are convicted and sentenced to 9 years imprisonment."[1]

[15] No complaint is raised about the starting point for the offence of grievous bodily harm with intent being eight years imprisonment. The point raised on this appeal is whether the uplift of an additional 12 months imprisonment and the making of the uplifted sentence subject to the serious violent offence declaration results in the sentence being manifestly excessive. The result of the declaration is the applicant will not be eligible for parole until he has served 80% of that nine year period i.e. after seven years and two and a half months.

Circumstances of the offending

[16] The first indictment lists 10 offences – five counts relating to the forced entry of residences in Brisbane and stealing property which was later sold. One count of breaking and entering a motor vehicle and stealing property, one count of unlawfully using a motor vehicle, one count of fraud by representing to Peninsula Pawnbrokers that the stolen property was his, and one count of an assault on a 14 year old boy. In this latter offence, the applicant assisted a younger co-offender in a fight outside a video arcade. The applicant was still a juvenile at the time of this incident.

[17] The spate of criminal behaviour occurred in a three month period between 19 January 2008 and 11 April 2008. During that period the applicant had been apprehended by police officers on three occasions – 25 February, 4 March and 13 March when he was given notices to appear in court in respect of offences committed prior to those respective dates. In his interview with the police he made

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[1] Record book p 87/30.

full admissions. When required, he appeared in court and was granted bail. The subsequent offences were thus committed while the applicant was on bail.

[18] The second indictment raises six offences – two counts of robbery in company, one count of armed robbery in company and three counts of attempted armed robbery. These offences occurred over three days between 25 – 27 July 2008.

[19] The applicant was a member of a street gang which called itself The JJs. On 25 July 2008, the applicant in company with other members of the gang, observed an altercation between four 16 year old youths and a store owner at the Wintergarden Food Court. The applicant's group took the side of the store owner and approached the four youths and threatened to stab them. As the youths walked away the applicant approached one of them and demanded money. Under those threats, he forced the youth to go to an ATM where the youth withdrew $20 and gave it to one of the co-accused. The applicant then demanded money from the other youths. Ultimately a further $40 was handed over. One of the youths had no money and the applicant demanded he hand over his mobile phone. He was persuaded by one of the co-offenders not to pursue the demand.

[20] On the next day, the applicant was at an arcade game parlour in the city centre when he saw the youth who had previously refused to hand over the mobile phone. The applicant demanded that he pay money or now give up the phone. At this time a co-offender had a knife in his hand, this complainant offered to go to an ATM and withdraw money. As the complainant and his friend left the premises he was surrounded by members of the applicant's gang. Eventually, the two youths managed to run away from the applicant and his co-offenders.

[21] On the following day, at about 9 pm in the evening, the applicant and two co-offenders came upon four 15 year old youths sitting at a table outside a store in Woolloongabba. The applicant and co-offenders were at a bus shelter across the road and they started to abuse the teenagers. The applicant and his co-offenders crossed over to the teenagers and the applicant said to one of them, "Choose which one of you want your fingers cut off first". He then pulled out a large meat cleaver from under his shirt and held it in a threatening manner while demanding the youths hand over their money. After further threats the accused and his co-offenders desisted and left the area.

[22] The third indictment raised two offences against the applicant – one count of doing grievous bodily harm with intent and one count of wounding. On the latter he was charged with five co-offenders.

[23] The applicant and his co-offenders had been told by one of the group that his sister had been raped by a year 10 student of a Brisbane Secondary College. That claim was, in fact, untrue but the applicant and the others, knowing no better, decided to seek revenge. The applicant armed himself with the meat cleaver and with seven other gang members, who were mostly juveniles, entered the school grounds. They split into two groups of four so one group would be a backup for the other. It was lunchtime at the school and they went to the point where the year 10 students usually gathered at this time. The applicant approached the group and said, "Which of you cunts is first?" He then swung the meat cleaver striking the first complainant on the left cheek. That wound required 60 stitches and plastic surgery and the complainant was left with facial scarring.

[24] The second complainant attempted to flee but as he was doing so the applicant struck him in the back with the meat cleaver resulting in two lacerations. Though these wounds were minor they were very close to that complainant's spine.

[25] When a teacher intervened, the applicant and his co-offenders fled. He was, however, later apprehended. The meat cleaver was found in a freezer at his residence and it bore traces of the first complainant's blood. The complainants were innocent of any conduct to excite this attack. The applicant's decision to attack them was entirely random.

[26] In his initial record of interview, the applicant denied any involvement and initially was not cooperative. He did, however, agree to a hand-up committal and in relation to the first two indictments made an early indication of a guilty plea. But the final indication of a plea of guilty on the third indictment was indicated only two days before the trial. However it had the effect of avoiding a trial set down for two weeks. This was taken into account by the learned sentencing judge.

[27] What is seen from this offending is an escalating pattern of criminal behaviour, starting with housebreaking to obtain money, then to armed robbery of younger persons and finally to malicious wounding of randomly chosen victims. In the course of this crime spree the applicant had been charged with earlier offences three times. And as mentioned above, the offending was aggravated by the fact that the applicant was on bail at the time.

[28] What was offered to the Court to explain that behaviour is largely contained in a report by Mr Peter Perros, Consultant Forensic Psychologist and Clinical Neuro-psychologist, who examined the applicant on 19 May 2010 for the purpose of a pre-sentence report (ex 14).[2]

[29] The applicant was born in Bosnia-Herzegovina and was two years old when the Bosnian war broke out. He was a witness to many atrocities of that war when he was aged between 4-8 years. His father and uncle, both solders in the Bosnian army, were killed within two days of each other. His grief stricken paternal grandfather died shortly after from a heart attack. His family home was destroyed in the war and the family was moved to emergency housing. The applicant lost many of his friends and members of his extended family as a consequence of the war when they moved to find new lives elsewhere.

[30] The applicant's mother commenced a new relationship with a Bosnian man who brought the applicant and his mother to Australia in 2000. The applicant was then nine years old. A daughter was born to this relationship soon after arriving in Australia. The stepfather was an abusive violent man who frequently beat the applicant's mother in the presence of the children and he also physically abused the applicant. The stepfather left the home in the year 2000. The experiences of the war, the unresolved grief over the death of his father and the physical abuse thereafter resulted in the applicant experiencing a number of personal problems such as bedwetting and nightmares.

[31] The plaintiff's education was hampered not only by the abuse at home but also by the fact that on his arrival in Australia he could not speak any English. This also caused difficulty in making friends in the playground though he did not suffer any bullying at school. He left school after completing year 9.

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[2] Record book pp 146-154.

[32] On leaving school, the applicant found employment and new friends. Amongst his friends were some who took illegal drugs and who introduced him to that culture which included the use of cannabis, methylamphetamine and ice. The applicant adopted a lifestyle which his mother and her new partner objected to. He became chronically unemployed and unsettled. He left home in 2008 and moved into a unit at Woolloongabba where he lived with other members of the street gang. The comments of Mr Perros include the following observations:-

> "From the objective clinical perspective Mr Hasanovic's story is a text book example of what happens when a child who suffers complex trauma is missed and left untreated.
>
> Mr Hasanovic has witnessed things most of us only see on Hollywood movies, only he was living it day after day, and the sequelae of the war impacted on the whole family and continued to plague him and his family after they arrived in Australia…
>
> Mr Hasanovic's offending behaviour is linked unequivocally to posttraumatic distress, and was triggered by drug abuse and anger from being told by a friend that his sister had been raped.
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> Mr Hasanovic is a young man who faces a difficult life unless he can somehow put his traumatic past behind him and move on in a positive way."[3]

[33] The learned sentencing judge considered the opinion of Mr Perros and in particular his precautionary note about treatment which his Honour cited in the course of his sentencing remarks. It was:-

> "When Mr Hasanovic completes that treatment and is discharged back to the care of the general practitioner, at that point referral to a clinical psychologist or psychiatrist (preferably one recommended by Dr Middleton) would be highly desirable to ensure Mr Hasanovic continues to receive regular treatment and support. He must not be allowed to slip off the treatment radar as he is vulnerable and if left to his own devices he will relapse and re-offend."[4]

This passage emphasised by his Honour illustrates an understandable concern for community safety.

The hearing at first instance

[34] At the hearing below the prosecution argued for a global penalty in the range of 10-12 years[5] which carried the automatic imposition of a serious violent offence declaration. To support this submission the prosecutor referred to a number of decisions including *R v Eade*[6], *R v Nguyen*[7] and *R v Mikaele*[8] to which later reference will be made.

[35] Counsel for the applicant argued for a range of either 8-9 years without a serious violent offence declaration or 7 ½ years if a declaration was to be imposed. The

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3 Record book at p 153.
4 Record book at pp 153-4
5 Record book 1-22/50.
6 [2005] QCA 148.
7 [2006] QCA 542.
8 [2008] QCA 261.

latter penalty would result in parole eligibility only after six years.[9] He supported this submission by reference particularly to *Mikaele* (supra) and to *R v Bird & Schipper*[10].

[36] He referred to a number of other comparable sentences which do not need to be considered in detail because no challenge has been made to the adoption of eight years imprisonment for the major offence.

The issues on appeal

[37] Counsel for the applicant contends that by deciding to impose a global sentence with a serious violent offence declaration, the parole eligibility date was delayed beyond that which would have attained had the applicant been sentenced to cumulative sentences for each group of offences in the separate indictments. None of the offences in the first two indictments would have warranted the imposition of a serious violent offence declaration. The first group of offences standing alone would most probably have attracted a probation order. The second group would have at most resulted in a short term of imprisonment (1-3 years) with a parole release date no later than 12 months.

[38] The applicant concedes that the offence of grievous bodily harm with intent did warrant the imposition of a serious violent offence declaration. There was extreme violence against two entirely innocent victims, within the school grounds which ought to be safe from such intrusion. However, that declaration having been made and weighing up all the mitigating factors, the resultant sentence would have been "a high but not manifestly excessive sentence". It was the addition of a further year's imprisonment with the imposed declaration that renders the sentence manifestly excessive.

[39] Counsel for the respondent argues that the offences other than the grievous bodily harm with intent may have drawn three to four years imprisonment. The uplift of one year's imprisonment with the declaration only requires the applicant to serve an additional 9.6 months in custody and an additional 2.5 months under parole supervision. This did not take the sentence beyond the acceptable range and properly reflects the totality of the criminal conduct engaged in by the applicant. Both the uplift and the imposition of the serious violent offence declaration were part of the exercise of the sentencing discretion.

Discussion and conclusion

[40] The learned sentencing judge was faced with a difficult sentencing task. He was dealing with a large number of offences of escalating seriousness including a particularly violent crime. Against that, he had to balance considerations of the offender's youthfulness, his lack of prior criminal history, his deprived upbringing, his early cooperation with the police and indication of early pleas to some offences. The decision to make a serious violent offence declaration added a further complication which is the principal cause of this appeal. In the context of imposing concurrent sentences for the lesser offences, his Honour adopted a global approach which in principle cannot be said to be incorrect.

[41] In *Griffiths v The Queen*[11] Brennan and Dawson JJ said (at p 378):-

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9 Record book 1-33/20-40.

10 [2000] QCA 94.

11 (1989) 167 CLR 372.

> "The effective sentence which a court determines to be appropriate punishment for a series of offences can be framed, in most cases, either as sentences for the several offences to be served concurrently, or as cumulative sentences, or as sentences which are in part cumulative and in part to be served concurrently… The true thrust of the applicant's argument must be that, in a case where (serious violent offence declaration) applies to some serious offences in a series but not to others in the series, it is wrong to impose the full effective head sentence on the serious offence or offences to which (the declaration) applies. We would agree that the differing application of (the declaration) warrants consideration of the appropriateness of imposing the full effective sentence on the offence or offences, but no error of principle appears merely from the Court's having chosen that course."

[42] This is in keeping with the general approach to sentencing which was discussed in the *Veen v The Queen [No. 2]*[12] where the plural judgment (Mason CJ, Brennan, Dawson and Toohey JJ) states (at p 476):-

> "...sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty of giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and *none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case.* They are guideposts to the appropriate sentence but sometimes they point in different directions."

[43] In *Markarian v The Queen*[13] the plural judgment (Gleeson CJ, Gummow, Hayne and Callinan JJ) reads (at p 371):-

> "Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies."

[44] The question of global sentencing was dealt with in some detail by Williams JA in *R v Nagy*[14] who said (at para [39]):-

> "Where a judge is faced with the task of imposing sentences for a number of distinct, unrelated offences there are number of options

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12 (1988) 164 CLR 465.
13 (2005) 228 CLR 357.
14 [2004] 1 Qd R 63.

> open. One of those options is to fix a sentence for the most serious (or the last in point of time) offence which is higher than that which would have been fixed had it stood alone, the higher sentence taking into account the overall criminality. But that approach should not be adopted where it would effectively mean that the offender was being doubly punished for the one act, **or where there would be collateral consequences such as being required to serve a longer period in custody before being eligible for parole**, or where the imposition of such a sentence would have given rise to an artificial claim of disparity between co-offenders. That list is not necessarily exhaustive. Such considerations may mean that the other option of utilising cumulative sentences should be adopted." (my emphasis)

[45] Counsel for the applicant relies particularly on those remarks of Williams JA to suggest that by the imposition of a serious violent offence declaration on the sentence which had been uplifted to take account of overall criminality has unfavourably skewed the applicant's likely parole eligibility date because of the requirement of serving 80% of the term of imprisonment pursuant to s 182 of the *Corrective Services Act* 2006.

[46] The respondent argues that the remarks of Williams JA relate to the situation of the automatic imposition of the declaration and not where, as here, the imposition was discretionary.

[47] Even if the learned sentencing judge had adopted the course of imposing cumulative sentences, the result would have been little different once the serious violent offence declaration was made. Any cumulative sentence thereafter would have a notional starting date of 1 January 2015 and the new eligibility date would be similar to that which presently applies.

Has the sentencing discretion miscarried?

[48] The learned sentencing judge addressed the relevant considerations of the applicant's offending, his youthfulness, his personal circumstances and his relatively minor prior criminal offending. His Honour was treated to a discussion of a large number of comparable sentences. His discretion to impose a global sentence by uplifting the main sentence by one year was in accord with the common principled approach. He was undoubtedly mindful that the impact of the imposition of a serious violent offence declaration would result in a parole eligibility being delayed until the applicant had served seven years and 2.5 months of his term of imprisonment.

[49] The basis for the contention that the penalty was manifestly excessive is that if a serious violent offence declaration was to be applied to the principal penalty, that penalty should have been at the lower end of the range, namely eight years. The imposition of a declaration was sufficient to take account of the overall offending.

[50] Counsel for the respondent referred to *R v Mikaele*[15] in which a sentence of nine years imprisonment with a serious violent offence declaration was imposed on a 17 year old offender who pleaded guilty to doing grievous bodily harm with intent. This offending followed a series of offences which included armed robbery

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15 [2008] QCA 261.

and robbery in company which were dealt with at the same time. The primary judge there accepted a submission that, when imposing a serious violent offence declaration, the sentence should be towards the bottom of the established range in conformity with the approach in *R v Bojovic*[16]. The circumstances of the offending, the level of violence and the residual effect for the victim were more severe than in the present case but the primary judge there was constrained by parity issues relating to co-offenders which does not arise here.

[51] In *R v Eade*[17], a sentence of 10 years imprisonment with an automatic serious violent offence declaration was imposed for an offence of doing grievous bodily harm with intent and was not disturbed on appeal. In this case, the offending also followed a series of offences including assault occasioning bodily harm whilst armed and in company, dangerous operation of a motor vehicle causing grievous bodily harm. The 31 year old victim was violently assaulting with a hockey stick and whilst lying helpless on the ground the offender ran over him with a car. The victim sustained multiple injuries including brain damage and was rendered unemployable. The offender who had no previous convictions was 17 years old at the time and under the influence of alcohol. He had a low level intellectual capacity and a dysfunctional background. In refusing the application, the Court of Appeal observed that the effect of a serious violent offence declaration is "one of many competing factors for the sentencing Judge to consider in fixing a sentence within the appropriate range; it is not to design a sentence to avoid or reduce the effect of section 161B of the *Penalties and Sentences Act* 1992 (Qld).

[52] Considering the similarities and dissimilarities between those cases to which we have been referred and the present case, I am satisfied that the learned sentencing judge gave due consideration to the competing factors which touched upon his sentencing of the applicant. There has not been shown any error in his approach and I am not persuaded that the sentence is manifestly excessive.

[53] I would therefore refuse leave to appeal.

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16 [2000] 2 Qd R 183.

17 [2005] QCA 148.