SUPREME COURT OF QUEENSLAND

CITATION:	*R v West* [2011] QCA 76
PARTIES:	**R** **v** **WEST, Nicholas John** (applicant)
FILE NO/S:	CA No 183 of 2010 SC No 4 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	21 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2011
JUDGES:	Fraser JA, Margaret Wilson AJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That the application for leave to appeal against sentence be granted;** **2. That the appeal be allowed; and** **3. That the sentence imposed on 23 July 2010 be varied by deleting the order for imprisonment for 15 years and in lieu thereof ordering that the applicant be imprisoned for 13 years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant found guilty of manslaughter – where attack of at least seven severe blows to the top of the head as well as blows to other parts of the body – where applicant sentenced to imprisonment for 15 years – where declaration that applicant had been convicted of a serious violent offence – where pre-sentence custody of 595 days declared time already served – where applicant contends sentence manifestly excessive having regard to sentences imposed upon other offenders – where applicant contends for a sentence of around 12 years – whether sentence of 15 years manifestly excessive *R v Bates; R v Baker* [2002] QCA 174, considered *R v Beacham* [2006] QCA 268, considered *R v Corry* [2006] QCA 203, considered

R v Meerdink [2010] QCA 273, considered
R v Mooka [2007] QCA 36, considered
R v Richmond-Sinclair [2009] QCA 98, considered
R v Schubring; ex parte Attorney-General (Qld) [2005] 1 Qd R 515; [2004] QCA 418, considered
R v Sebo; ex parte A-G (Qld) [2007] QCA 426, considered
R v Sheedy [1999] QCA 446, considered
R v Walker (1992) 13 Cr App R (S) 474, cited

COUNSEL: J Hunter SC for the applicant
M J Copley SC for the respondent

SOLICITORS: Purcell Taylor Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MARGARET WILSON AJA**: The applicant, Nicholas John West, has applied for leave to appeal against sentence. He was charged with the murder of his uncle, Christopher Alexander John Hiles, on 6 December 2008. After a trial in the Supreme Court he was found not guilty of murder but guilty of manslaughter.

[3] The applicant was sentenced to imprisonment for 15 years, and a declaration that he had been convicted of a serious violent offence was made. Pre-sentence custody of 595 days was declared time already served under the sentence.

[4] The applicant does not assert any specific error by the sentencing judge, but contends that the sentence was manifestly excessive having regard to sentences imposed upon other offenders.

[5] The deceased had recently taken up residence next door to the applicant's home. The applicant had described him as a "paedophile" and was unhappy about living in such close proximity to him. There was no evidence led at trial that the deceased was in fact a paedophile.

[6] The applicant was employed by an earthworks company, which operated from premises only a couple of kilometres from his home. On the day of the killing he spent the morning working, driving a tip truck for his employer. He ceased work at about 11.00 am, and then he and some of his workmates commenced drinking at their employer's premises. By mid-afternoon he was heavily intoxicated, but according to his workmates he was in a relatively docile frame of mind.

[7] At about 4.00 pm the applicant got into a truck owned by his employer and drove off.

[8] He arrived home heavily intoxicated, in an angry mood, and threatened his girlfriend that he would "smash [her] fucking head into the gate" if she came near him. She left and walked down to some nearby shops.

[9] Another employee, alarmed at the applicant's conduct in view of his level of intoxication, followed him home in another vehicle. On the way there, he saw the

applicant's girlfriend walking away from the house apparently upset. He could not raise anyone at the house, although he saw the deceased, who seemed to be doing some cleaning in a shed at the neighbouring property. The workmate drove back to the employer's premises.

[10] When the workmate arrived back at the employer's premises, he was immediately asked to return to the applicant's address in response to an urgent phone call for help. He did so and upon arrival found the applicant standing just outside the shed, apparently angry, agitated and exhausted. A man was lying motionless on the shed floor with a flywheel on top of his head and shoulder area. The applicant said words to the effect of –

> "Get out of here, I've killed him."

[11] The applicant was aggressive towards his workmates and threatened to hit one; he then launched an assault on another, punching and kicking him. When someone attempted to go to the deceased to render assistance, the applicant said words to the effect –

> "Oh, he's a paedophile. Fucking leave him alone."

According to one of the workmates, after fighting with one of his colleagues, the applicant jumped up and down a couple of times on the flywheel on top of the deceased, saying as he did so –

> "You paedophile cunt."

[12] The applicant's girlfriend gave evidence that when she returned 15 – 20 minutes after leaving, she saw him jumping up and down on the deceased's chest. The deceased was making "gurgling" or "drowning" noises. She telephoned the partner of one of the applicant's workmates and asked for help.

[13] Police arrived a little later to find the applicant apparently asleep in his house.

[14] The applicant's attack on the deceased was brutal, involving at least seven blows of severe force to the top of the head as well as other blows to other parts of the body. It continued after the deceased was disabled. The flywheel became a weapon in the attack.

[15] There was nothing in the evidence to suggest any provocative conduct by the deceased, that the applicant was acting in self-defence, or any potential authorisation, justification or excuse.

[16] The applicant was heavily intoxicated with alcohol. Further, he told a psychiatrist (who examined him for the purposes of a report tendered on sentence) that two days before the incident he had injected about a gram of amphetamine intravenously, and that he had not slept for two days.[1] As the learned sentencing judge observed, the jury's acquittal on the count of murder was obviously a result of their not being satisfied beyond reasonable doubt that he had the necessary intention to kill or to do grievous bodily harm.

[17] The learned sentencing judge observed that there was no explanation for the change in the applicant's mood and behaviour between the time he was at his employer's premises and when he arrived home. His Honour said:

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1 Exhibit 17 in the trial, Report of Dr Barbara McGuire.

> "The death of the deceased was a consequence of an attack of great savagery. A number of blows were inflicted to the man's head and other parts of the body. Some of these blows were inflicted by the heavy piece of equipment which is in evidence. The damage done to the deceased's body, particularly his head, is shown graphically in the photographs which have been tendered. They reflect, as I have just said, what was an act of great savagery."

[18] As counsel for the respondent submitted, the applicant demonstrated no remorse. He did not plead guilty to manslaughter, despite the strong case against him. Before the trial there were discussions between the prosecution and the defence about whether the Crown would accept a plea of guilty to manslaughter. Defence counsel indicated that if the Crown would do so, he would obtain instructions from his client. However, the prosecutors indicated that they would not accept such a plea at any stage.

[19] The applicant was aged 32 at the time of the offence, and 33 at the time of sentence. He had a comparatively minor criminal history, including convictions for assault occasioning bodily harm, a weapons offence and drug offences in the 12 months preceding the homicide. Those offences had been dealt with in a Magistrates Court which had imposed fines.

[20] Counsel for the applicant submits that the sentence was manifestly excessive. In his oral submissions he suggested that a sentence "in the vicinity of the 12 year mark" would have been appropriate.

[21] Counsel for the respondent submitted that the sentence imposed was within range for two reasons – the offence was in the most serious category of manslaughter and there was no plea of guilty.

Analysis of comparable decisions

[22] The maximum penalty which may be imposed for manslaughter is life imprisonment. The circumstances constituting the offence vary greatly and so do the sentences. In *R v Walker*[2] Lord Lane CJ said:

> "It is a truism to say that of all crimes in the calendar, the crime of manslaughter faces the sentencing judge with the greatest problem, because manslaughter ranges in its gravity from the borders of murder right down to those of accidental death. It is never easy to strike exactly the right point at which to pitch the sentence."

[23] *R v Bates & Baker*[3] and *R v Corry*[4] were examples of that category of manslaughter which warrants a very long term of imprisonment, albeit shy of the maximum life imprisonment.

[24] In *Bates & Baker* the applicants were charged with murder, but pleaded guilty to manslaughter, albeit belatedly. They also pleaded guilty to assault occasioning bodily harm to another victim. In Bates' case the prosecution's decision to accept

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2 (1992) 13 Cr App R (S) 474, 476.
3 [2002] QCA 174.
4 [2006] QCA 203.

a plea of guilty to manslaughter rather than proceeding on the murder charge was apparently out of concern that evidence as to the quantity of alcohol and drug in his body could have made it difficult to prove the requisite intention beyond reasonable doubt. At the time of the offences Bates was almost 20 years old and Baker, his ex-girlfriend, was 16 years and 8 months. Baker took umbrage at being called a "slut" when she refused to pay for the repair of scratches to the bonnet of a car she had climbed on. She invoked Bates' assistance to mete out retribution. They entered the deceased's home where Bates gave him a vicious battering, urged on by Baker. It included kicking and punching whilst the deceased was on the ground, and after he staggered to the bathroom, kicking him in the head causing him to fall to the floor where the attack resumed. Baker joined in stomping and kicking the deceased's head. He died of head injuries. Neither of the offenders showed any true remorse, although they did facilitate the course of justice by their pleas of guilty. Both were young. Bates had previously been convicted of assault occasioning bodily harm for which he was given 18 months' probation. Baker had no criminal history. On appeal Bates' sentence of life imprisonment was reduced to 18 years imprisonment and Baker's sentence of 12 years imprisonment was undisturbed.

[25] *Corry*[5] went to trial for murder. He was found not guilty of murder, but was convicted of manslaughter on a re-trial. He invaded the deceased's house at night armed with a knife and a meat cleaver. Fuelled by drugs, he attacked the deceased in a brutal manner inflicting at least 14 significant wounds before leaving him to bleed to death. There was evidence suggesting that he was motivated to avenge a perceived insult to a woman who had been his girlfriend for a few days and who had previously been in a relationship with the deceased. The sentencing judge determined that 18 years imprisonment was the appropriate penalty, but reduced it to 17 and a half years on account of time spent in pre-sentence custody which could not be declared time served for the manslaughter. An application for leave to appeal against sentence was dismissed.

[26] In some of the cases cited by counsel for the applicant the offender was sentenced on the basis of provocation.

[27] In *R v Sebo; ex parte Attorney-General*[6] the offender, then aged 28, was charged with the murder of his 16 year old girlfriend. He was found not guilty of murder but guilty of manslaughter. After she taunted him about her lack of fidelity, he stopped the car in which they were travelling, told her to get out and then attacked her by the roadside with a steering wheel lock causing severe injuries. Afterwards he took her to hospital where she died two days later. He was sentenced to 10 years imprisonment, which was not disturbed on an appeal by the Attorney-General.

[28] *R v Schubring; ex parte Attorney-General*[7] was another Attorney's appeal against sentence. The offender pleaded guilty to manslaughter at the start of his murder trial, and he was sentenced on the basis of provocation. After a long and acrimonious domestic argument, he bashed his wife into unconsciousness before garrotting her with a dog leash. The Court accepted that his conduct was attended by deliberation and observed that he had an intention to kill and a lack of remorse which gave the manslaughter a grave complexion. The sentencing judge imposed seven and a half years imprisonment, which was increased on appeal to 10 years.

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5 [2006] QCA 203.
6 [2007] QCA 426.
7 [2004] QCA 418.

[29] In *R v Richmond-Sinclair*,[8] a prisoner was charged with the murder of a fellow inmate. The jury found him not guilty of murder but guilty of manslaughter. The applicant and the deceased fought and were separated by prison officers. They were walking to their respective cells when the applicant stopped for a drink of water. As he did so, the deceased made a remark that revived their earlier dispute. The applicant reacted by punching the deceased twice to the head, knocking him to the ground and then kicking him and stomping on his head causing a fractured skull and a fatal brain injury. At trial he denied responsibility and showed no remorse. The applicant was only 21, but he had a disturbing criminal history, including armed robbery and other offences committed whilst in prison. He had breached an intensive correction order in respect of the robbery and was in custody at the time of the killing after his arrest on warrant. The trial judge had to re-sentence him for the armed robbery as well as sentence him for the manslaughter. Taking into account his overall criminality, a sentence of 12 years for manslaughter was imposed. This was not disturbed on appeal.

[30] In other cases on which counsel for the applicant relied the offender was psychiatrically disturbed.

[31] *Sheedy*[9] went to trial for murder but was convicted of manslaughter. He and the deceased were both residents of a boarding house. The deceased climbed into the applicant's room through a window, perhaps to remonstrate with him about some conduct earlier that evening. The deceased, who was drunk, naked, unarmed and much smaller than the applicant, had "no means of inflicting any but the slightest harm on the applicant". For some time he was heard calling out for help. The applicant set upon him with a knife, stabbing him 15 times. Four of the wounds were potentially fatal and there were 11 other deep penetrating wounds. The applicant was a schizophrenic. His illness had abated by the time of the offence, but a psychiatrist who examined him considered he had some residual symptoms which made him overly prone to aggression. The Court concluded that this explained the lack of proportionality of his response. The sentencing judge imposed a term of 12 years, which was reduced to 10 years on appeal.

[32] *Beacham*[10] pleaded guilty to manslaughter and robbery in company with personal violence after the Mental Health Court had found him of diminished responsibility. He was 32 years old, with a lengthy and concerning criminal history, mainly for drug and dishonesty offences when he killed a drug supplier in what the Court described as "an appalling display of thuggery and predatory behaviour". He hated paedophiles, and thought the deceased was one. Further, he believed the deceased had sold him cannabis contaminated with fly spray. He went with someone else to the deceased's home, with the intention of assaulting and subduing him so that the associate could remove property. He punched the deceased to the ground before injecting him with temazepam, and when the deceased had lost consciousness he tied his hands and feet together tightly behind his back before kicking him to the head and throat area seven or eight times and inserting a plastic spider in his anus. The cause of death was asphyxiation, contributed to by head injuries and the temazepam. The sentencing judge imposed a term of 13 years imprisonment, which was reduced to 12 years on appeal.

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8 [2009] QCA 98.
9 [1999] QCA 446.
10 [2006] QCA 268.

[33] Other cases on which counsel for the applicant relied were less serious than the present case.

[34] In *R v Meerdink*[11] the applicant and a co-accused were charged with murder. The co-accused pleaded guilty to manslaughter. They were both acquitted of murder, and the applicant was convicted of manslaughter following his trial. The applicant had been released on parole only three weeks before the homicide. He and his co-offender went with the intoxicated deceased to a church yard, where an argument developed. He and his co-offender violently assaulted the deceased for six or so minutes, delivering kicks and punches in a prolonged and cowardly attack. One kick the applicant delivered was to the deceased's abdomen; it caused internal bleeding from which he died. The applicant had a significant criminal history and enjoyed the "rush" or "buzz" he got from violent conduct. He lacked remorse and seemed a poor candidate for rehabilitation. His co-offender did not have any significant criminal history and had, of course, pleaded guilty. His co-accused was sentenced to nine years imprisonment with a parole eligibility date effectively four years from his incarceration. The applicant was sentenced to 10 years imprisonment and he was declared to have committed a serious violent offence. The applicant's principal complaint was about parity. The sentence was undisturbed on appeal.

[35] In *R v Mooka*[12] the applicant pleaded guilty to manslaughter. He was playing pool at an RSL Club when he was angered by something the deceased said. He confronted the deceased aggressively, and with some deliberation walked around a pool table, seized a cue and returned, before striking the deceased one blow to the head. The applicant was grossly intoxicated and had overreacted to whatever it was the deceased had said. After the killing he punched a security guard and, swinging a chair, challenged other patrons to a fight. Then he went to another venue where he gratuitously punched a stranger in the back of the head. He had a bad criminal history including offences of violence and terms of imprisonment. At the relevant time he was on probation for three offences of assault occasioning bodily harm. The sentencing judge approached the matter on the basis of a notional starting point of 12 years which she reduced to 10 years. This was not disturbed on appeal.

Conclusion

[36] As counsel for the applicant submitted, the killing was not accompanied by any significant premeditation or planning. There was an inexplicable change in the applicant from when he left his place of employment albeit heavily intoxicated but apparently in a docile frame of mind to shortly afterwards when he returned home and was so aggressive towards his girlfriend that she left the house. He then launched a brutal and relentless attack on his uncle, inflicting at least seven blows of severe force to the top of the head as well as other blows to other parts of the body. The attack continued after his uncle was disabled. Some of the blows were inflicted by the flywheel, which was a heavy piece of machinery.

[37] Not surprisingly the homicide had a devastating affect on the deceased's family.

[38] Counsel for the respondent submitted the offence falls into the category of vigilante type behaviour. That is so. Moreover, there was no evidence led at trial to support his belief that his uncle was a paedophile.

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11 [2010] QCA 273.

12 [2007] QCA 36.

[39] Appalling as the applicant's conduct was, it was not as serious as that in *Corry* and *Bates & Baker*. In my view a sentence in the range of 12 to 14 years would have been appropriate.

[40] The applicant did not have a criminal history of any great seriousness although it did include a previous conviction for an offence of violence (which had attracted only a very modest penalty by way of fine).

[41] He showed no remorse and was convicted after trial.

[42] In my view proper punishment would be a term of imprisonment of 13 years.

[43] I would order that:

(1) the application for leave to appeal against sentence be granted;

(2) the appeal be allowed;

(3) the sentence imposed on 23 July 2010 be varied by deleting the order for imprisonment for 15 years and in lieu thereof ordering that the applicant be imprisoned for 13 years.

[44] **ATKINSON J**: I agree with the reasons for judgment of Margaret Wilson AJA and the orders proposed by her Honour.