SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hicks & Taylor* [2011] QCA 207
PARTIES:	**R** **v** **HICKS, Joshua Alexander** (applicant) **R** **v** **TAYLOR, Willie Michael** (applicant)
FILE NO/S:	CA No 255 of 2010 CA No 274 of 2010 SC No 152 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2011
JUDGES:	White JA and Margaret Wilson AJA and Mullins J Judgment of the Court
ORDERS:	**In CA No 255 of 2010:** **1. Application for leave to appeal against sentence granted** **2. Appeal against sentence allowed** **3. Set aside the sentence imposed for the offence of manslaughter of ten years' imprisonment and substitute a sentence of nine years' imprisonment** **4. The sentence imposed at first instance is otherwise confirmed** **In CA No 274 of 2010:** **1. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE RECORDED ON PLEA OF GUILTY – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where applicant Hicks pleaded guilty to one count of attempted armed robbery in company and one count of manslaughter – where

sentencing judge made a finding that the applicant had been involved in a prior home invasion of the same residence where the offences were committed on the basis of a written statement made by a witness who resiled from that statement on a *voir dire* before the judge – whether judge applied s 132C *Evidence Act* 1977 (Qld) in making that finding

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE RECORDED ON PLEA OF GUILTY – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where applicant Hicks pleaded guilty to one count of attempted armed robbery in company and one count of manslaughter – where the unlawful killing was committed in the course of the attempted armed robbery – where prosecution abandoned the circumstance of aggravation for the attempted armed robbery offence that the defendants were armed with an offensive weapon of a steering wheel lock – where sentencing judge did not act on the allegation that the applicant was armed with a steering wheel lock in sentencing for the attempted armed robbery – where judge took into account that the applicant was armed with a steering wheel lock in sentencing for the offence of manslaughter – whether judge erred in taking into account the circumstance of aggravation in sentencing for the offence of manslaughter

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE RECORDED ON PLEA OF GUILTY – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – WHEN GRANTED – GENERALLY – where applicant Taylor pleaded guilty to manslaughter and attempted armed robbery in company committed as part of a home invasion – where applicant Taylor was unarmed – where sentencing judge considered that applicant's Taylor's responsibility was less than that of applicant Hicks – where applicant Taylor was sentenced to seven years and eight months' imprisonment for the manslaughter and four years' imprisonment for the attempted armed robbery in company to be served concurrently – where sentencing judge structured the sentence such that the parole eligibility date was slightly short of the half-way mark – where notional head sentence of eight years was reduced to seven years and eight months to take account of pre-sentence custody which could not be declared as time served – where sentence structured in this way rather than suggesting parole after a third – where applicant Taylor contends that insufficient allowance was made for his plea of guilty – whether sentence was manifestly excessive

Corrective Services Act 2006 (Qld), s 184, s 209
Criminal Code 1899 (Qld), s 8, s 590AA
Evidence Act 1977 (Qld), s 132C
Penalties and Sentences Act 1992 (Qld), s 15, s 156A

R v D [1996] 1 Qd R 363; [1995] QCA 329, considered
R v Georgiou & Ors; R v Georgiou & Anor; ex parte A-G (Qld) [2002] QCA 206, considered
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, considered
R v Schuurs [2000] QCA 278, cited

COUNSEL:

In CA No 255 of 2010:
J J Allen for the applicant
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SOLICITORS:

In CA No 255 of 2010:
Legal Aid Queensland for the applicant
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In CA No 274 of 2010:
Legal Aid Queensland for the applicant
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[1] **THE COURT**: The applicants Willie Michael Taylor and Joshua Alexander Hicks pleaded guilty to the manslaughter of Leo John Coutts and to attempted armed robbery in company committed on 12 October 2007.

[2] Taylor was sentenced as follows:

(a) for the manslaughter, seven years and eight months' imprisonment with a parole eligibility date of 8 April 2012;

(b) for the attempted armed robbery in company, four years' imprisonment.

The sentences were concurrent, and 772 days of pre-sentence custody between 8 April 2008 and 19 May 2010 were declared time already served under the sentences.

[3] Hicks was sentenced as follows:

(a) for the manslaughter, ten years' imprisonment with a declaration that he had been convicted of a serious violent offence;

(b) for the attempted armed robbery in company, four years' imprisonment.

The sentences were concurrent, and 89 days of pre-sentence custody between 11 February 2008 and 9 May 2008 were declared time already served under the sentences.

[4] Each of the offenders seeks leave to appeal against sentence.

The facts

[5] The offences were committed at a property at ("the Caboolture premises") on 12 October 2007. Some months earlier Coutts, an elderly widower, had purchased the property from Terry Barry and taken up residence there.

[6] Terry Barry and his cousin Russell Barry were drug dealers. On 21 December 2006 Terry Barry was still living at the Caboolture premises. Knowing that there were substantial sums of money concealed in the walls of the house, Russell Barry took part in a home invasion of his cousin's house to recover a drug debt of $30,000. He drove to the vicinity with two other men, and let them off. They broke into the house, assaulted Terry Barry, threatened his wife and stole $30,000. No criminal charges were brought in relation to that incident.

[7] In October 2007 Wayne Rocky Coombes (aged 27), Taylor (aged 20) and Hicks (aged 22), formed a common unlawful purpose to rob the householder at the Caboolture premises, whom they believed to be Terry Barry. They travelled to the vicinity in a vehicle provided by Hicks and driven by Russell Barry (aged in his late 30's), who dropped off Coombes, Taylor and Hicks. When they arrived there, Coombes entered the house, armed with a gun, while the others waited outside. After a struggle, Coombes shot Coutts dead. They all returned to the car, and Russell Barry drove to his home, where they all went their separate ways.

The charges

[8] Coombes, Taylor and Hicks were named as co-offenders on an indictment presented on 9 February 2009. They were all charged with one count of murder, and with one count of attempted robbery with three circumstances of aggravation: being armed with a dangerous weapon – a firearm; being armed with an offensive instrument – a steering wheel lock; and being in company with each other.

[9] On 28 April 2010 Coombes pleaded guilty to both counts. He was still to be sentenced when Taylor and Hicks were sentenced.

[10] Russell Barry was apparently charged with the same offences. He went to trial on a separate indictment on 13 July 2010. Coombes had provided a statement to the police, but then refused to give evidence at Russell Barry's trial. On 20 July 2010, the trial judge directed that verdicts of not guilty of murder, manslaughter and attempted armed robbery be entered.

[11] Russell Barry gave police a statement implicating Taylor and Hicks in the offences. The statement was given on 24 September 2008, but not signed until 16 March 2009.

[12] In his statement Russell Barry said that Hicks helped organise the home invasion at the Caboolture premises in December 2006, so that he (Russell Barry) could recover the debt of $30,000 owing to him. Russell Barry drove Hicks and two others to the house for that home invasion, and later shared the proceeds with Hicks and the others. In relation to the attempted robbery of the same house in October 2007, Russell Barry admitted driving Coombes, Hicks and Taylor to the vicinity, but denied any knowledge of what they intended to do, and said that when Hicks got out of the car he had a yellow steering wheel lock in his hands.

[13] On 6 October 2010 there was a *Basha* inquiry into Russell Barry's evidence, when he declined to give evidence in accordance with his statement. He claimed that what he had put in the statement was what police had suggested to him, that Hicks had not been involved in the 2006 home invasion, and, in relation to the events in October 2007, that Hicks had not had a steering wheel lock.

[14] The arraignment of Taylor and Hicks took place on 8 October 2010. When arraigned on the charge of murder, each entered a plea of not guilty of murder, but guilty of manslaughter. On the attempted armed robbery charge, they were not arraigned with respect to the circumstance of aggravation that they were armed with an offensive weapon (the steering wheel lock). Each pleaded guilty as arraigned. The prosecution accepted the pleas in discharge of the indictment.

[15] Taylor and Hicks were sentenced on 11 October 2010 by the judge who had presided over the *Basha* inquiry five days earlier. The prosecutor and counsel for each of Taylor and Hicks were different counsel from those who later appeared on these applications for leave to appeal against sentence.

[16] The statement of Russell Barry signed on 16 March 2009 was admitted into evidence on the sentencing of Taylor and Hicks.

[17] The sentencing judge said –

> "Both of you pleaded guilty, a fact I am obliged to take into account but at a late stage, only two or three working days before the trial was due to commence."

[18] Taylor and Hicks pleaded guilty to manslaughter on the basis that unlawful killing was a probable consequence of the unlawful purpose to rob the occupant of the property. The sentencing judge remarked –

> "My reading of the circumstances is that the pleas were occasioned by the realisation that Russell Barry would be called as a witness in the trial, and despite his obvious reluctance to testify, his hostility would become apparent and his detailed statement implicating you in the offences would be tendered and the jury invited to accept it as a true account."

Taylor's sentence

[19] Taylor was the youngest of the participants. His motive for becoming involved was not established. He was not particularly intelligent, and apparently just went along with the others with whom he had been keeping company. He was unarmed.

[20] He had a criminal history which included an offence of causing grievous bodily harm when he was aged 17. For that he had been sentenced to 12 months' imprisonment to be served by way of an intensive correction order; however, he breached the order and on 9 February 2007 he was re-sentenced to 12 months' imprisonment with 81 days' pre-sentence custody being declared time already served under the sentence and with a parole release date of 23 March 2007. Thus he was on parole when he offended on 12 October 2007. He had one month and nine days of parole left to him, which was automatically cancelled when he was sentenced for the manslaughter and attempted armed robbery.[1]

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1 *Corrective Services Act* 2006 (Qld) s 209.

[21] Taylor declined to be interviewed by police. At a time when a caution had not been administered to him, he admitted going to the Caboolture premises. He said he did not know that Coombes had a gun, and that he was sorry he had gone there.

[22] At his committal his counsel cross-examined the arresting police officer.

[23] He gave evidence against Coombes on a *voir dire* associated with Russell Barry's trial, but he refused to give evidence at the trial. His conversation with an undercover police officer while he was in the cells was covertly recorded. That recording was ruled inadmissible against him on a hearing under s 590AA of the *Criminal Code* 1899 (Qld).

[24] The prosecutor submitted that Taylor should be sentenced to eight years' imprisonment with parole eligibility after three years. He did not seek a declaration of the commission of a serious violent offence. Taylor's counsel seemed to accept that a head sentence of eight years would be appropriate, but submitted that, because of pre-sentence custody which could not be declared time already served under the sentence, the sentence should be seven years and eight months, or seven years and seven and a half months, with parole eligibility on 8 April 2011.

[25] The sentencing judge considered that Taylor's responsibility overall was less than that of Hicks, whom he regarded as an instigator of the robbery. In arriving at the sentence he imposed on Taylor for manslaughter, his Honour adopted a notional sentence of eight years' imprisonment with parole eligibility at the half-way mark. During the prosecutor's submissions, his Honour said he thought sentencing Taylor to eight years' imprisonment for manslaughter would be "very light", although in his sentencing remarks he described it as being "quite moderate in the circumstances".

[26] Taylor had spent time in pre-sentence custody – 772 days between 8 April 2008 and 19 May 2010 which could be declared time already served under the sentences, and a further 145 days which could not be so declared. To take account of this his Honour reduced the head sentence to seven years and eight months with parole eligibility on 8 April 2012. His Honour said –

> "I fix the parole eligibility date at 8 April 2012, a date four years after your arrest. The sentence is notionally one of eight years and parole should occur at the half-way mark. I make that order rather than suggesting parole after a third which is common where there has been a plea of guilty because the offence was committed while you were on parole and because of your previous conviction for violence.
>
> I regard the notional sentence of eight years as being quite moderate in the circumstances. To ameliorate it even more, on making you eligible for parole after serving three years would not do sufficient justice to the seriousness of the offence."

Submissions – Taylor

[27] Taylor's counsel made no complaint about the appropriateness of eight years as the starting point for the sentence for manslaughter. But he submitted there was no basis for fixing the parole eligibility date at any point later than three years. He submitted that the sentencing judge erred in three respects:

(a) in undervaluing the pleas of guilty;

(b) in failing to alert counsel he was considering imposing a sentence which was unusual and which was not sought by either counsel – that is, fixing parole eligibility at other than one-third of the term of imprisonment; and

(c) in imposing a sentence outside the applicable range disclosed by comparable cases.

The value of the pleas of guilty

[28] A plea of guilty is taken into account on sentence in recognition of the offender's willingness to assist the administration of justice and also, sometimes, as indicative of remorse. Generally, an early plea will be given greater weight than a late one. However, the real question is not so much how far ahead of the likely trial date the plea was indicated, as whether the plea should be considered a timely one in all the circumstances.

[29] Where an offender is charged with a more serious offence than that to which he ultimately pleads guilty and for which he is sentenced, the timeliness of the plea should be judged in the context of when the prosecution indicated it would accept a plea to the lesser charge in discharge of the indictment.

[30] Taylor was facing a charge of murder on the basis of s 8 of the *Criminal Code*. The prosecution case against him had definite weaknesses. It relied on a statement by a co-offender in relation to whom there had been a directed verdict of not guilty and who had resiled from his statement. Taylor had made some admissions, but that was at a time when he had not been cautioned, and there was really nothing from which the jury could assess his role.

[31] There was no evidence that the prosecution had been willing to accept a plea of guilty to manslaughter at an earlier time.

[32] In all the circumstances Taylor's pleas were timely ones.

Parole eligibility

[33] Usually an offender becomes eligible for parole after serving half of his sentence.[2] If there is a declaration that he has committed a serious violent offence, he must serve 80 per cent of his sentence (or 15 years in the case of murder) before becoming eligible for parole.[3] Where he is sentenced to more than three years' imprisonment not for a serious violent offence or a sexual offence, the Court may fix the date he will be eligible for parole.[4]

[34] Where the offender pleads guilty and the sentencing judge has a discretion in fixing a parole eligibility date, there is a general practice of adopting the one-third mark as an appropriate starting point.[5] However, it is for the sentencing judge to decide whether in all the circumstances of the case the sentence should be ameliorated by reason of the plea of guilty, and if it is to be, how this should be done. He or she may consider it more appropriate to reduce the head sentence, or to suspend it partially. If he or she decides to fix an early parole eligibility date, it need not necessarily be set at the one-third mark.

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2 *Corrective Services Act* 2006 (Qld) s 184.
3 *Corrective Services Act* 2006 (Qld) s 182.
4 *Penalties and Sentences Act* 1992 (Qld) s 160C.
5 *R v Ungvari* [2010] QCA 134, [30]; *R v Mayall* [2008] QCA 202, [29].

[35] This Court has previously held that where a Court imposes a sentence of less than three years' imprisonment and fixes a parole release date beyond the half-way mark, then, in the interests of accessible reasoning, it should give reasons for doing so.[6] Similarly, where the term of imprisonment is more than three years, and parole eligibility is set beyond the half-way mark, reasons should be given.

[36] In the present case the sentencing judge explained in his sentencing remarks why he was fixing the parole eligibility date as he did. The complaint is that his Honour did not forewarn counsel of his intention, particularly given that both the prosecutor and defence counsel submitted that there should be parole eligibility after three years. While it would have been desirable for his Honour to have done so, he did not err in not doing so.

[37] Taylor's counsel did not contend before this Court that the parole eligibility date was other than effectively at the half-way mark. His Honour structured the sentence in a way that took account of the pre-sentence custody which could not be declared time already served. Taking into account the time that was able to be so declared, the parole eligibility date of 8 April 2012 is a little short of the half-way mark of a sentence of seven years and eight months.

[38] One matter not expressly adverted to in submissions before the sentencing judge was that the concurrent sentences imposed on 11 October 2010 were necessarily cumulative on the one month and nine days which Taylor still had to serve for his previous offending.[7] When that is taken into account, the parole eligibility date is in fact a little more favourable to Taylor than it would otherwise have been.

Comparable cases

[39] In *R v Schuurs*[8] the offender and two co-offenders went to the house of the deceased, purportedly to collect a drug debt. Schuurs (aged 18) supplied a car which he drove to the scene and a .22 calibre rifle and ammunition, which was apparently intended to be used to shoot the deceased in the leg if he did not pay. He confronted the deceased and demanded payment. The deceased then retired into the house and returned armed with a knife in each hand. The applicant retreated to a position behind the car and instructed one of the co-offenders to shoot the deceased in the leg. The co-offender shot the deceased in the chest and killed him.

[40] *Schuurs* was not the offender who inflicted the fatal injury: like Taylor, his liability derived from s 8 of the *Criminal Code*. He was convicted after a trial and sentenced to ten years' imprisonment with an automatic declaration that he had committed a serious violent offence. He sought leave to appeal against his sentence, principally on the ground of lack of parity with the third co-offender who pleaded guilty to manslaughter. His application was unsuccessful, Davies JA observing that he was fortunate not to have been convicted of murder.

[41] We do not accept the submission of counsel for Taylor that, looking at *Schuurs*, it is difficult to see that the sentence imposed on Taylor could be described as "very light". While Taylor pleaded guilty and his criminality may have objectively been

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6 *R v Kitson* [2008] QCA 86 at [18].

7 *Penalties and Sentences Act* 1992 (Qld) s 156A subsections (1)(a)(i) and (b)(ii), (2). See also *R v Booth* [2001] 2 Qd R 393; [1999] QCA 100. There was no submission that the accumulation of the sentences made the overall period of imprisonment excessive.

8 [2000] QCA 278.

a little less serious than Schuurs', those differences were sufficiently recognised in the different sentences imposed.

[42] *R v Georgiou*[9] was another case in which the offender was convicted of manslaughter after a trial on the basis of s 8 of the *Criminal Code*. A co-offender, Edwards, was convicted of murder. Georgiou and that co-offender broke and entered and stole from the premises of a pharmacy. They gained entry by breaking glass at the front of the shop. The deceased heard the glass breaking and left his nearby home with a view to apprehending the offenders. Georgiou and the co-offender were on the street or footpath in the vicinity of the pharmacy when a number of shots were fired, one of which struck the deceased causing his death. Edwards fired the fatal shot. The court observed that Georgiou was not a man of great intelligence or imagination and he may not have actually foreseen the extent of the risk involved in accompanying a man like Edwards, whom he knew to be armed, in carrying out their common intention to break into the pharmacy and steal drugs.

[43] Georgiou was sentenced to eight years' imprisonment. An appeal by the Attorney-General against the leniency of the sentence was dismissed. The Court of Appeal observed that his sentence could certainly have been fixed at a higher level without inviting intervention on appeal, but having regard to the approach then taken to Attorney's appeals against sentence, it declined to interfere.

[44] The facts of *Georgiou* were comparable with those of Taylor, and in our view the decision in that case supports the notional sentence of eight years as not manifestly excessive.

[45] In *R v McDougall and Collas*[10] both McDougall and Collas pleaded guilty to manslaughter and to wilfully and unlawfully damaging a motor vehicle, as well as to other charges. Their pleas to manslaughter were on the basis of s 8 of the *Criminal Code*. For manslaughter, each was sentenced to eight years' imprisonment with a serious violent offence declaration. On appeal, McDougall's sentence was upheld, but the serious violent offence declaration against Collas was set aside. Thus he would have to serve half the head sentence before becoming eligible to apply for parole.

[46] It is not helpful to compare the non-parole period in *Collas* with Taylor's, because although Collas had a limited criminal history, he was also sentenced for two additional, separate offences, including a serious example of road rage.

Conclusion in respect of Taylor

[47] In all the circumstances, fixing Taylor's parole eligibility date at the half-way mark of the notional sentence of eight years did not result in the imposition of a sentence that was manifestly excessive.

[48] Taylor's application for leave to appeal against sentence should be refused.

Hicks' sentence

[49] Hicks had previously been convicted in the Magistrates Court for offences of wilful damage, public nuisance, enter dwelling and commit indictable offence, possession

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9 *R v Georgiou & Ors; R v Georgiou & Anor; ex parte A-G (Qld)* [2002] QCA 206.

10 [2007] 2 Qd R 87; [2006] QCA 365.

of suspected stolen property, imposition, minor drug offences, and breaches of probation and community service orders. He had not previously been convicted of any offence of violence.

[50] Following legal advice, Hicks declined to be interviewed by the police in relation to the attempted armed robbery and murder of Mr Coutts.

[51] At his committal, the arresting officer and two other police officers were required for cross-examination by Hicks' representative.

[52] Hicks was an associate of Russell Barry. Terry Barry had given evidence at the trial of Russell Barry to the effect that he knew Hicks because he had seen him at Russell Barry's house and on one occasion in 2005 Russell Barry had brought Hicks to Terry Barry's house to help pick up a roller door and they played pool in the shed. Terry Barry did not know either Coombes or Taylor. Terry Barry was unable to identify the two men who were involved in the home invasion at the Caboolture premises in December 2006.

[53] The prosecutor made the express submission that the sentencing judge could not proceed with the sentence on the basis of Hicks having been involved in the home invasion committed at the same address in December 2006 in which Terry Barry was robbed of about $30,000. He noted Russell Barry's evidence at the *voir dire* that it was only because he was offered some inducement by the police that he said in his statement that Hicks was involved in the December 2006 home invasion. The prosecutor did, however, submit that the prior home invasion of the residence at the Caboolture premises went to the issue of the knowledge of Hicks and the submission was made:

> "… that Mr Hicks would have been privy to the information that – as to the intended target, the address of the target, the availability of cash and the likelihood of resistance."

[54] The prosecutor's submissions were carefully framed to rely on Hicks' knowledge of the earlier home invasion, rather than his actual participation in it.

[55] The prosecutor's submission was that Hicks was "a little bit more higher up in terms of his involvement in what occurred" than Taylor. The prosecutor stated:

> "In the case of Hicks, he was also present but also it's fair to say that he organised the attendance of himself and other offenders at [the Caboolture premises] for the purpose of commission of the offence."

[56] In addition, the prosecutor described Hicks' involvement in the subject offences as telephoning Russell Barry to drive the vehicle that took Hicks, Taylor and Coombes to the vicinity of the Caboolture premises, providing his father's car for that purpose and that Hicks sat in the front seat and provided directions to Russell Barry.

[57] The prosecutor dealt with Hicks' involvement in the plan to rob Terry Barry in these terms:

> "Certainly, with respect to [Russell] Barry being acquitted, the prosecution can't advance any factual allegation inconsistent with what the jury have already found. So, really, the knowledge of the intended target and the address of the target and the availability of cash and the expectation of resistance comes from Mr Hicks alone

> and, on that basis, I would submit he was and can be sentenced on the basis that he was the protagonist in the plan to rob the occupant of [the Caboolture premises], and that was who he thought, and others believed, was Terry Barry.
>
> So for that reason, I would submit that he would – a higher sentence would be warranted in his case and that it would be something less than 10 years, but certainly more than what is imposed – whatever your Honour decides with respect to Mr Taylor."

[58] The prosecutor was wrong in suggesting that he could not advance any factual allegation that was inconsistent with the acquittal of Russell Barry, as that acquittal in Russell Barry's separate trial did not prevent the prosecution from relying on evidence relating to Russell Barry's involvement in the proposed robbery that may have been relevant to the sentencing of Hicks. The sentencing judge was not misled by the prosecutor's error, as he acknowledged during the sentencing submissions that he was not bound by the acquittal of Russell Barry to assume that Russell Barry knew nothing about the incident. Even though the prosecutor was in error about the effect of Russell Barry's acquittal, it seems that his submissions in context were directed at the comparative responsibility of each of Hicks, Taylor and Coombes for the offences and that, among them, Hicks was the one who had the greater responsibility for planning the robbery. The prosecutor submitted that Hicks should be sentenced to a longer sentence for the manslaughter than imposed on Taylor, but "it would be something less than 10 years."

[59] Hicks' counsel at the sentence submitted that the head sentence for Hicks should be in the range of eight to nine years' imprisonment for the manslaughter offence and that the sentence imposed on Hicks could be a little higher than that imposed on Taylor, because Hicks was a little older and that the robbery came about as a result of Hicks being owed a couple of thousand dollars by Coombes for a drug debt. Hicks' counsel informed the sentencing judge that his instructions were that Hicks was not the instigator, but that it was Coombes. Hicks' counsel conceded that Hicks acknowledged participating in the plan to rob the resident at the Caboolture premises. In an exchange with Hicks' counsel, the sentencing judge observed:

> "I know all the facts, at least I know those facts. But on the evidence that I've been given the only person who knew – the only one of the three who went to the house on 12 October – he knew that or believed that Terry Barry lived there and that money could be got easily – was Hicks, wasn't it?
>
> …
>
> I know, I know, but on the evidence the only person who knew that there was money to be - or believed that there was money to be got easily from that house was Hicks who'd been there before and got some easy money."

[60] There was a further exchange with Hicks' counsel in which the sentencing judge made it clear as to why the sentencing judge considered that it was Hicks rather than Coombes who proposed the robbery of the house that Hicks believed was Terry Barry's house:

> "HIS HONOUR: Hicks, on Barry's evidence, Russell Barry's evidence, had been involved in the previous successful raid. It

> doesn't strike me as being too speculative of an inference that Hicks suggested to Coombes that they go and get the moneys that would Coombes to pay off his debt..
>
> [COUNSEL FOR HICKS]: I'm instructed that it was suggested by Coombes as a way of paying – well, as a way of Coombes dealing with debts but also of paying Mr Hicks.
>
> HIS HONOUR: Well, in a sense that's equally plausible except that there's nothing that I've been given that suggests that Coombes knew about the source of money in Mr Coutts' house, or believed he knew about the – sorry – he knew about the money that was believed to be there."

[61] Despite the sentencing judge's clear indication of his view that Hicks possessed information about the proposed target of the robbery which was integral to the planning of the robbery, Hicks did not seek to give evidence before the sentencing judge to support the submission made on his behalf that it was Coombes who was the instigator of the robbery.

[62] Hicks' counsel acknowledged that the decision to plead guilty to manslaughter was made after the *Basha* inquiry in respect of Russell Barry's evidence. The sentencing judge inferred that the pleas were occasioned by the realisation that Russell Barry would be declared a hostile witness in the trial against Hicks and Taylor and Russell Barry's statement about Hicks' role in the proposed robbery would then be evidence before the jury.

[63] The sentencing judge proceeded to sentence on the basis that Hicks was one of the men involved in the home invasion in December 2006 in which Terry Barry was assaulted and robbed of $30,000 and each man involved received $7,500. In the course of sentencing, the sentencing judge observed:

> "I do not regard you as being equal in responsibility. It seems to me that, Taylor, your responsibility overall is less than Hicks'. You appear to have been equally involved in Mr Coutts' house in the sense that you both went there with Coombs [sic] to participate in the robbery and you both stayed outside.
>
> It seems to me though that you, Hicks, were an instigator if not the instigator of the robbery. You were owed $2,000 by Coombs [sic] as a result of a drug deal or drug deals. According to Russell Barry, you yourself were involved in drug dealing.
>
> Given what facts are available, the likely inference is that you, knowing of the easy success of the first home invasion, suggested another as a means of providing Coombs [sic] with money to pay you back the money he owed.
>
> You, Hicks, were the only one of the three who knew where Terry Barry had lived. You knew Terry Barry. Coombs [sic] did not. There is no evidence that Taylor did. There is some evidence that you were armed with a metal bar of some kind; Taylor was unarmed.
>
> Russell Barry was obviously aware of what was planned. He drove the other men to the vicinity of Mr Coutts' house. Why he went or

> what he hoped to get from it is not known. He himself was charged with murder but acquitted on a directed verdict.
>
> [Counsel] who appears for you, Hicks, points out that the circumstances of aggravation in the attempted robbery charge that you were armed was abandoned by the Crown which accepted your plea to attempted robbery in company only. That does not make Russell Barry's evidence that you were armed with a steering wheel lock irrelevant on the charge of manslaughter. But for your instigation of these offences, Mr Coutts would be alive."

[64] The sentencing judge noted that the factors in favour of Hicks including his limited prior criminal history which did not include any offence of violence, his youth, and pleas of guilty, but found they were substantially outweighed by the need for deterrence and denunciation, the seriousness of the offences and their consequences. When the sentencing judge imposed the sentence on Hicks of ten years' imprisonment for the offence of manslaughter, he noted that it carried with it the automatic declaration that Hicks had been convicted of a serious violence offence and observed that the difference in sentence between Taylor and Hicks reflected Hicks' greater responsibility for Mr Coutts' death.

Submissions – Hicks

[65] Hicks' counsel submitted that the sentence imposed on Hicks was excessive, having regard to the sentence on Taylor and was also manifestly excessive having regard to Hicks' liability on the basis of s 8 of the *Criminal Code*. In addition, Hicks' grounds of appeal included that the sentencing judge erred by:

(a) taking into account facts disputed by the applicant that were not alleged by the prosecution as part of its case;

(b) making findings of fact disputed by the applicant on the basis of a statement by Russell Barry;

(c) findings that the statement of Russell Barry was sufficiently reliable to act upon in the sentencing proceedings without any proper or sufficient basis for such a finding;

(d) making findings of fact adverse to the applicant in a manner which did not comply with the requirements of s 132C of the *Evidence Act* 1977 (Qld).

[66] The findings of fact that are the subject of these grounds of appeal are particularised as:

(i) Hicks had been involved in the prior home invasion of Terry Barry and had obtained money as a result of the commission of such offence;

(ii) at the time of the commission of the offences for which Hicks was sentenced, he was armed with a steering wheel lock.

The significance of the prior home invasion

[67] Russell Barry's statement signed on 16 March 2009 and the evidence given by Russell Barry on the *voir dire* were information properly before the sentencing

judge in accordance with s 15 of the *Penalties and Sentences Act* 1992 (Qld). The sentencing judge was entitled to take into account the observations he made of Russell Barry when he gave evidence on the *voir dire*. The sentencing judge made it clear during the sentencing submissions that he was not disposed to believe the evidence of Russell Barry on the *voir dire* to the effect that much of what was in his statement signed in March 2009 was untrue.

[68] There was therefore evidence before the sentencing judge that was capable of supporting his conclusion about Hicks' participation in the December 2006 home invasion. That the sentencing judge applied the requirements of s 132C of the *Evidence Act* 1977 (Qld) was reflected in the observation in the course of delivering his sentencing remarks that Russell Barry's statement signed in March 2009 appeared "sufficiently reliable" to act upon.

[69] Although the sentencing judge concluded that Hicks was one of the men involved in the prior home invasion, an analysis of the sentencing remarks shows that the finding was a step in the process of the sentencing judge's reasoning to make the finding that Hicks was involved in the planning of the robbery and thereby the instigation of the offences for which he was being sentenced.

[70] Even without the express finding that Hicks had been involved in the prior home invasion, there was other evidence that the sentencing judge accepted that supported his Honour's conclusion that Hicks was involved in the planning of the robbery and the instigation of the offences. That was the evidence that Hicks was the only one of Coombes, Hicks and Taylor who knew where Terry Barry had lived, and that Hicks was acquainted with Terry Barry, when neither Coombes nor Taylor were.

[71] It was suggested that the sentencing judge had made a finding that Hicks was the sole instigator of the robbery. The actual finding made by the sentencing judge was that Hicks was "an instigator". The sentencing judge may have speculated that Hicks was the instigator, but stopped short of making such a finding. The statement addressed by the sentencing judge to Hicks that "But for your instigation of these offences, Mr Coutts would be alive" was made in the context of the finding that Hicks was an instigator (but not the sole instigator) of the robbery.

[72] A fair reading of the sentencing remarks shows that the sentencing judge did not seek to punish Hicks for his involvement in the December 2006 home invasion in a way that offends against the principles summarised in *R v D*[11] and, particularly, that conduct should not be taken into account on a sentence that would establish a separate offence of which the person to be sentenced had not been convicted.

[73] To the extent that Hicks' ground of appeal is based on the sentencing judge's finding that Hicks had been involved in the October 2006 home invasion of the same residence, appealable error has not been shown.

The steering wheel lock

[74] The respondent on the application for leave to appeal against sentence submitted that at no point did the sentencing judge make a positive finding that Hicks was armed with a steering wheel lock when the offences were committed. The sentencing judge expressly recognised that he could not act on Russell Barry's allegation that Hicks was armed with a steering wheel lock in relation to the

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11 [1996] 1 Qd R 363, 403-404; [1995] QCA 329.

attempted robbery offence, because that circumstance of aggravation was abandoned by the prosecution. In saying that did not make Russell Barry's evidence that Hicks was armed with a steering wheel lock "irrelevant" on the charge of manslaughter, his Honour made it plain that he regarded the allegation as one that could be taken into account in sentencing Hicks for the offence of manslaughter. It must have been one of the matters that resulted in his Honour's decision to impose a sentence that was in effect substantially harsher than the sentence he imposed on Taylor for the same offence.

[75] The offence of manslaughter was committed in the course of the same events that were the subject of the attempted armed robbery where the circumstance of aggravation that the defendants were armed with an offensive instrument, namely a steering wheel lock, was abandoned by the prosecution. In *R v D*[12] this Court held that an act, omission, matter or circumstance may not be taken into account in sentencing if the circumstances would then establish a circumstance of aggravation of which the person to be sentenced has not been convicted. Accordingly, in sentencing Hicks for the armed robbery offence, the sentencing judge ought not to have taken into account Russell Barry's assertion in his statement that Hicks was armed with a steering wheel lock.

[76] To take the allegation that Hicks was armed with the steering wheel lock into account for the offence of manslaughter that was committed in the course of the attempted robbery (and for which Hicks was being sentenced at the same time as the attempted robbery offence) had the effect that Hicks was, in substance, sentenced for the circumstance of aggravation for which he was not convicted in respect of the attempted robbery offence. The distinction made by the sentencing judge in taking that factual matter into account for the manslaughter offence was an error, when Hicks' conduct outside the residence was relevantly the same for both offences. The error was not insignificant because of the disparity between the sentences imposed on Hicks and Taylor, as the sentence of imprisonment of ten years for Hicks was not only longer, but automatically carried with it a serious violent offence declaration.

[77] It follows that the sentence for the manslaughter offence must be set aside and a sentence imposed which reflects the findings by the sentencing judge, other than that Hicks was armed with a steering wheel lock. Consistent with the submissions made by both the prosecutor and Hicks' counsel at first instance, Hicks' sentence for the manslaughter should be slightly higher than that for Taylor, but also needs to be in parity with the sentence imposed on Taylor. That suggests a head sentence of nine years' imprisonment for Hicks' offending. That is supported by the comparable cases of *Schuurs* and *Georgiou*, after taking into account that those cases were sentences after trial. As the circumstances of the offence are not outside the norm for the offence of manslaughter where the liability for the offence arises under s 8 of the *Criminal Code*, it follows that the discretion should be exercised against making a serious violent offence declaration for Hicks' conviction of the offence of manslaughter. The sentence of nine years' imprisonment should be substituted for the sentence imposed by the sentencing judge on Hicks for the manslaughter offence. In the circumstances, no further amelioration of the sentence is warranted, and the sentence for the attempted robbery offence and the pre-sentence custody declaration should otherwise be confirmed.

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12 [1996] 1 Qd R 363, 403-404; [1995] QCA 329.

Conclusion in respect of Hicks

[78] Hicks' application for leave to appeal against sentence should be granted; the appeal against sentence should be allowed; for the offence of manslaughter, a sentence of nine years' imprisonment should be substituted for that imposed by the sentencing judge; and the sentence imposed at first instance should otherwise be confirmed.

Orders

[79] In CA No 255 of 2010 (Hicks' application):

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.
3. Set aside the sentence imposed for the offence of manslaughter of ten years' imprisonment and substitute a sentence of nine years' imprisonment.
4. The sentence imposed at first instance is otherwise confirmed.

[80] In CA No 274 of 2010 (Taylor's application):

1. Application for leave to appeal against sentence refused.