SUPREME COURT OF QUEENSLAND

CITATION:	*R v Welham & Martin* [2012] QCA 103
PARTIES:	**R** **v** **WELHAM, Gavin Paul** (applicant) **R** **v** **MARTIN, Dianne Pearl** (applicant/appellant)
FILE NO/S:	CA No 123 of 2011 CA No 129 of 2011 SC No 72 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	20 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2012
JUDGES:	Margaret McMurdo P, Chesterman JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In CA No 123 of 2011: The application by Gavin Paul Welham for leave to appeal against sentence be refused.** **2. In CA No 129 of 2011: Dianne Pearl Martin have leave to appeal against the sentence imposed on 17 May 2011.** **3. In CA No 129 of 2011: The appeal by Dianne Pearl Martin be allowed and it be ordered that the sentence imposed on her on 17 May 2011 be amended by deletion of the declaration that the offence was a serious violent offence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant's offer to plead guilty to manslaughter was not accepted by the Prosecution – where applicant initially pleaded not guilty to

improper interference with a corpse but later changed his plea to guilty – where the deceased had made threats against the applicant and his de facto partner Martin – where applicant enlisted a third party known for his violent tendencies to assault the deceased – where a surprise attack was made on the deceased – where third party inflicted fatal injuries on deceased with a baseball bat – where applicant only became aware that the third party had armed himself moments before the attack – where applicant was present for the assault but did not inflict violence on the deceased – where applicant did not render assistance to the deceased after the attack – where applicant left deceased to die and later disposed of the body – where applicant was sentenced to eleven years imprisonment for manslaughter and two years imprisonment for unlawful interference with a corpse – where applicant seeks leave to appeal against the sentence for manslaughter only – where sentencing judge accepted that applicant had not inflicted the fatal blows – where applicant provided belated assistance to the authorities – where applicant contends the sentencing judge imposed a sentence outside the range of comparable sentences – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant/appellant Martin pleaded not guilty to manslaughter – where applicant was found guilty of manslaughter and sentenced to eight years imprisonment and a discretionary serious violent offence order was made – where applicant arranged for deceased to attend offence location and directed him to bedroom where fatal assault occurred – where applicant knew that violence was to be inflicted on the deceased – where applicant was not present during the fatal assault – where applicant appeals against the imposition of a serious violent offence declaration only – where sentencing judge gave clear reasons for arriving at an eight year term of imprisonment – where sentencing judge gave no clear reasons for the imposition of a serious violent offence declaration – whether imposition of a serious violent offence declaration made the entire sentence manifestly excessive

Criminal Code 1899 (Qld), s 8
Penalties and Sentences Act 1992 (Qld), s 161B(3)

Lacey v Attorney-General of Queensland (2011) 242 CLR 573; [2011] HCA 10, applied
R v Black [2009] QCA 198, distinguished
R v Georgiou & Ors; R v Georgiou & Anor; ex parte A-G (Qld) (2002) 131 A Crim R 150; [2002] QCA 206, distinguished

R v Hicks & Taylor [2011] QCA 207, distinguished
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Schuurs [2000] QCA 278, distinguished
R v West [2011] QCA 76, distinguished
Skinner v The King (1913) 16 CLR 336; [1913] HCA 32, applied

COUNSEL: M E Johnson for the applicant, Welham
S J Hamlyn Harris for the applicant/appellant, Martin
G Cash for the respondent

SOLICITORS: No appearance for applicant, Welham
Legal Aid for the applicant/appellant, Martin
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Daubney J that Gavin Paul Welham's application for leave to appeal against sentence should be refused and, subject to my observations below, with his Honour's reasons.

[2] I agree that Dianne Pearl Martin's application for leave to appeal against sentence should be granted and her appeal allowed to the extent of setting aside the serious violent offence declaration for the reasons given by his Honour.

[3] Both Welham and Martin were acquitted of murder but convicted of manslaughter after a trial. Welham had offered to plead guilty to manslaughter before the trial but the prosecution did not accept that offer. Whilst Martin was convicted only of manslaughter and was sentenced to eight years imprisonment, Welham was convicted of both manslaughter, for which he was sentenced to 11 years imprisonment, and interfering with the deceased's body, for which he was sentenced to two years concurrent imprisonment.

[4] Welham has applied for leave to appeal only against his 11 year sentence for manslaughter. The primary judge clearly took into account Welham's interference with the deceased's body in imposing the 11 year sentence. His Honour plainly intended to impose a global sentence to reflect the totality of Welham's offending. It is true that Welham was not the actual perpetrator of the deadly assault; that he learned that the alleged co-offender, James Larkham, was to use a baseball bat only shortly before the attack; that Welham was encouraged to commit the offence by Martin; and that the deceased had made serious threats against Welham's de facto partner (Martin) and her family. Other mitigating features included his belated cooperation with the authorities; his offer to plead guilty to manslaughter prior to the trial; and his rehabilitation since the offences. Despite these features, this Court's decision in *R v Schuurs*[1] demonstrates that Welham's 11 year sentence was not manifestly excessive. Welham was 10 years older than Schuurs when he offended and, unlike Schuurs, Welham actively engaged in subsequent callous conduct by improperly interfering with the deceased's body. The sentencing range in Welham's case was between nine and 11 years imprisonment. Although at the high end of that range, the sentence was not manifestly excessive.

[5] I agree with Daubney J's proposed orders in each case.

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1 [2000] QCA 278.

[6] **CHESTERMAN JA**: In these two applications for leave to appeal I agree with the orders proposed by Daubney J for the reasons given by his Honour.

[7] **DAUBNEY J:** On 17 January 2009, Lance Sobieralski ("the deceased") sustained fatal injuries caused by the use of a baseball bat against his skull.

[8] Gavin Paul Welham ("Welham"), Dianne Pearl Martin ("Martin") and Jonathan Marc Bromell ("Bromell") were jointly charged with the murder of the deceased. Bromell was also charged with the assault of another person. Welham and Martin were further charged with improper interference with the deceased's corpse.

[9] On 16 May 2011, after a trial by jury, Welham and Martin were found guilty of manslaughter. In the course of the trial, Welham entered a plea of guilty to interfering with the deceased's corpse, and he was also convicted of that offence. Bromell was acquitted on all counts.

[10] On 17 May 2011, the following sentences were imposed:

- Welham – 11 years imprisonment for the manslaughter, with a concurrent sentence of two years imprisonment for interfering with the corpse; pre-sentence custody of 755 days was declared as time served under the sentences;

- Martin – eight years imprisonment for the manslaughter, with a serious violent offence declaration; 116 days in pre-sentence custody was declared as time served under this sentence.

[11] Each of Welham and Martin now seek leave to appeal against the sentences imposed. In brief:

(a) Welham contends that the head sentence of 11 years was manifestly excessive;

(b) Martin does not cavil with the sentence of eight years, but contends that a serious violent offence declaration ought not have been made.

Circumstances of the offending

[12] Welham and Martin, who lived in a de facto relationship at 15 Corinna Close, Edmonton, both knew the deceased, because they had been purchasing marijuana from him for some time. A dispute had arisen between them over money.

[13] This dispute had escalated to the point that, on 16 January 2009, the deceased went to the Corinna Close house where he told Bromell, amongst other things, that he (the deceased) intended to get a gun and shoot the applicants. Welham and Martin were disturbed when they heard this. That evening, Welham and several other men, including James Larkham ("Larkham") went out looking for the deceased. On Welham's own account, he had armed himself with a tyre lever, and he told one of the others that he was "going to give [the deceased] a flogging because he had stolen from me and had threatened to kill [Martin]". They did not locate the deceased that evening.

[14] On the following day, 17 January 2009, both Welham and Martin spoke with the deceased on the telephone. A rendezvous with the deceased at a shopping centre car park was arranged. Welham and Larkham attended at the car park. Welham's admitted purpose in attending there was to give the deceased a "touch up". Welham and Larkham saw the deceased in the car park, but there was no contact – Larkham

told Welham that there were too many cameras (i.e. CCTV cameras) in the car park, and said that they had to get the deceased to go to Welham's house.

[15] Martin then telephoned the deceased and arranged for him to attend at the Corinna Close residence. When the deceased arrived, Martin met him at the door and invited him into the house. Welham and Larkham were inside the house, waiting in a bedroom. As they had gone to the bedroom, Welham had seen Larkham pick up a wooden baseball bat. Welham and Larkham were lying in wait in the bedroom, and Welham clearly knew that Larkham had armed himself with the baseball bat. Martin sent the deceased through to the bedroom. When the deceased entered the bedroom, Larkham struck him to the head with the baseball bat. The injuries suffered were to prove fatal. Martin was not in the bedroom when the deceased was struck. After striking the deceased, Larkham fled the scene.

[16] It appears that the deceased did not die immediately. In a statement to police, Welham said:

> "66. [Larkham] had taken off from the house. I dragged [the deceased] through the lounge room and kitchen towards and into the back yard. I dragged him by taking hold of his feet and dragging him. I didn't know what to do I had never seen anyone like that.
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> 67. I took him through the kitchen then the garage and into the backyard and put him under a tree on the grass. I left him on his back and he seemed to be breathing but making a gurgling noise. He was not speaking at that time."

[17] Welham and Martin cleaned up the bedroom where the attack had taken place. When Welham then checked the deceased, he was dead. Welham dragged the deceased's body to a car and put it in the boot. Welham and Martin then drove to a remote gully near the Atherton tableland. Welham threw the deceased's corpse into the gully, where it remained until 25 April 2009, when Welham took the police to the location.

[18] Evidence of blood found in the bedroom revealed the brutal nature of the attack. There was blood projected on the walls, cupboards and blinds as well as a substantial volume of pooled blood on the floor and drag marks which led towards the bedroom door. A post-mortem examination of the deceased's remains revealed many fractures to his skull and right shoulder blade. The pathologist formed the opinion that at least six and as many as eight blows were struck to the deceased's head, each resulting in a separate fracture to the skull. In addition, the pathologist identified another four separate fractures to the shoulder blade.

[19] It was accepted by the learned sentencing judge that Welham "was not the actual deliverer of that forceful blow" but that he was party to the circumstances "that brought the deceased man into the position and into the company of the person who did deliver those fatal blows".

Application by Welham

Welham's antecedents

[20] Welham was 28 years old at the time of the offending, and 30 years old when sentenced. He had a relatively minor criminal history. In 2000 he was convicted of

drug offences and fined. In 2005 he was convicted of possessing what was described as an "antique shotgun" and fined. The learned sentencing judge, however, proceeded on the basis that the undisputed evidence at trial established that Welham was dealing in drugs around the time of these offences.

The sentencing remarks

[21] The learned sentencing judge noted the violence of the injuries caused to the deceased. His Honour expressly accepted that the jury had found that Welham did not deliver the fatal blow, but was a party to the circumstances that brought the deceased into the position and into the company of the person who did deliver the fatal blows. These were the circumstances to which the learned sentencing judge had regard in imposing the sentence. His Honour referred to the background of Welham being engaged in criminal activity that led to conflict with the deceased, and that the way in which that conflict was going to be sorted out would inevitably result in violence. He noted that such violence had been offered by the deceased on the night before his death.

[22] The learned sentencing judge described Welham's response as to "up the ante", that is to seek retribution and revenge for the threats that the deceased had made, and to teach the deceased a lesson or assert Welham's authority over the deceased so that Welham could continue his criminal activity. His Honour said:

> "You engaged in a course of conduct which was intentional and rational, and it was intended to lead to violence. It included the recruiting of others to assist you in whatever your aim was."

[23] His Honour noted that the jury had "obviously accepted" that Welham's aim was in the nature of giving a lesson to the deceased, but the jury, by its verdict, had not been satisfied beyond reasonable doubt that Welham had the intent to do grievous bodily harm, or the knowledge that the perpetrator would do grievous bodily harm. His Honour noted, however, that this contemplated assault "was of such a nature that serious injury was going to be visited upon the deceased man and that death was a probable consequence".

[24] The learned sentencing judge described the means by which the injury was going to be dealt to the deceased as "disturbing", saying:

> "It was to be a surprise attack. It wasn't going to be a personal confrontation to discuss the issue. It was going to be an attack in which you engaged the services of another person, and engaged specifically because of that person's tendencies, and the attack was to be held in a private place, the bedroom of your home".

[25] His Honour also highlighted the fact that Welham knew that Larkham was armed with a baseball bat, saying:

> "It is disturbing to me also that you were aware before the attack, although it seems only very briefly, that the attacker was to be armed with a baseball bat. You could have intervened then, you could have stopped it. That might have led to a confrontation in which you lost the advantage, but it may also have prevented fatal injuries occurring."

[26] The learned sentencing judge then referred to Welham's criminal history and the fact that the evidence at the trial showed that Welham had been dealing in drugs to a significant degree.

[27] His Honour noted the late co-operation which Welham had provided to the authorities, saying:

> "You come before the Court having cooperated with the police in their investigation, but that cooperation was delayed for a period of three months. During that time the police investigation resulted in a high index of suspicion falling upon you as being involved in this death. That investigation and the resources of the State could have been spared had you cooperated at an earlier time."

[28] That being said, his Honour also noted that when Welham decided to cooperate, he did so in a "very detailed way", and also observed that this had been accepted by the jury.

[29] His Honour referred to the effect of the death of the deceased on the deceased's family, and particularly the impact on the deceased's mother of the way in which the deceased's body was dealt with and the delay in bringing to closure the discovery of his body and burial.

[30] His Honour also referred to mitigating factors, particularly rehabilitation in Welham since being in prison. His Honour also noted the potential difficulties for Welham while in prison arising from his ability to give evidence against the perpetrator of the killing of the deceased.

[31] The learned sentencing judge then referred to a number of the authorities to which he had been referred, which his Honour considered demonstrated "a typical range of between 10 years and 12 years for the sort of conduct in which you have engaged". In respect of the present case, his Honour said:

> "... I regard that range of 10 years to 12 years as an appropriate one, and I regard it as appropriate in your circumstances because of the deliberate way in which this serious assault was orchestrated; the recruiting of another to assist you, and the circumstances in which it was to be undertaken."

[32] His Honour referred to authorities to which he had been referred by defence counsel, including *R v McDougall and Collas*.[2] His Honour considered that the circumstances in that case did not have the deliberate planning which existed over a much longer period, which was a characteristic of Welham's offending in this particular case.

[33] His Honour imposed a sentence of 11 years imprisonment for the manslaughter, and a concurrent term of two years imprisonment for the offence of unlawfully interfering with the deceased's corpse.

This application

[34] Counsel for Welham conceded in this Court that there was no submission that the learned sentencing judge had erred in principle. It was, rather, a case in which he erred in the way he regarded allegedly comparable sentences, leading to the imposition of a sentence which was manifestly excessive.

[35] It was submitted that the appropriate range of penalty for Welham's offending was a term of imprisonment of eight to nine years. Both before the learned sentencing judge and this Court, counsel for Welham relied particularly on *R v McDougall and Collas* (supra). That case is, however, completely distinguishable from the present.

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2 [2007] 2 Qd R 87.

[36] In *R v McDougall and Collas*, McDougall and Collas had pleaded guilty to a number of offences, including the manslaughter of a particular person. Both McDougall and Collas were sentenced to eight years imprisonment for the manslaughter, and the learned sentencing judge in that case made a serious violent offence declaration against each of them. On appeal, the terms of imprisonment were not disturbed, and the only variation was that the serious violent offence declaration against Collas was deleted. Collas was 21 years old at the time of the offending and McDougall was 23 years old. The circumstances of their relevant offending is set out in the following passage of the judgment of the Court (Jerrard, Keane and Holmes JJA):

> "[6] Three days later they each played a part in events resulting in the death of Dean Tennant. Mr Tennant had driven to a shopping centre at Currimundi to meet a man named Daniel Page, and Mr Collas and Mr McDougall happened to be there too. Words were exchanged between Mr Page driving his vehicle, and Mr Collas driving the Commodore, and both Mr Page and Mr Collas got out of their cars. So too did Mr McDougall, and then Mr Tennant, the deceased, came upon the scene in his motor vehicle, and was heard to tell Mr Collas and Mr McDougall that "You better get back in your car or you will be fucking killed."
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> [7] That resulted in Mr Collas and Mr McDougall, at Mr Collas's suggestion, driving back to the house from which they had left to attend the shopping centre, and getting help from a Lyall McGuire, who was later charged with the murder of Mr Tennant. Mr Collas had said "Let's go back and get Lyall", and at the house he said they were going to "sort out" somebody. Mr Collas, Mr McDougall and Mr McGuire all got into Mr McGuire's four wheel drive vehicle, and Mr McDougall was carrying a long black metal bar when he got in. Mr McDougall had asked Mr McGuire for a loan of the four wheel drive, but Mr McGuire decided to come too, and to drive. They went back to the shopping centre, and saw that Mr Tennant was driving his vehicle out of the parking bay. Mr McGuire then drove his four wheel drive over a median strip and rammed his vehicle into Mr Tennant's Commodore. Mr McDougall got out of the four wheel drive, and began hitting Mr Tennant's car with the metal bar, and Mr Collas picked up a torch in Mr McGuire's vehicle, got out of it, and he also began to hit the Commodore.
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> [8] Mr Tennant alighted from his vehicle and began to move away from it, and (the Crown alleged on the sentence) Mr McGuire then ran over to him and stabbed him once in the chest with a knife. It penetrated his heart, resulting in massive blood loss, and Mr Tennant then began to run away, apparently quite fast. He was chased for a short distance by Mr McDougall, who was armed with the metal bar, and Mr McDougall heard Mr Tennant say "He stabbed me." Mr McDougall returned to Mr McGuire's four wheel drive, and reported that Mr Tennant said he had been stabbed; McGuire replied "I stabbed him all

> the way." There was nothing in the material put before the sentencing judge to suggest that up to that moment either Mr McDougall or Mr Collas knew or had reason to know Mr McGuire had a knife or had used it. Mr Collas was on the other side of the car when Mr McGuire stabbed Mr Tennant.
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> [9] Thereafter nobody helped or tried to help Mr Tennant, who managed to run about 200 m from the car park, before he collapsed and died on the roadway. The knife blade had penetrated his chest to a depth of up to 10 cm and the width of the blade would have been up to 3.5 cm. Instead, the offenders sought the help of a tow truck driver to dislodge their four wheel drive vehicle bullbar from Mr Tennant's Commodore. Throughout all this Mr Page was driving around the car park in his Subaru, pointing a replica firearm at the group, who then drove off in the four wheel drive, with the bullbar rubbing against the front tyre. Witnesses recorded the registration number of the vehicle, registered to Mr McGuire, and ultimately all three were apprehended by police.
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> [10] Mr Collas and Mr McDougall pleaded guilty to manslaughter on the basis of s. 8 of the *Criminal Code* 1899; the Crown alleged that they had an unlawful common purpose of a physical confrontation involving a serious assault on the deceased (and Mr Page too, for that matter) using weapons, and that an unlawful killing was a probable consequence of the execution of that plan. By their pleas of guilty they admitted the truth of those propositions, although neither of them actually used a weapon on Mr Tennant or directly did him any harm. The information placed before the learned sentencing judge did not reveal when Mr Collas actually learned that Mr Tennant had been stabbed; there was no information showing that he necessarily learnt that when Mr McDougall returned from chasing Mr Tennant, and described what were Mr Tennant's last words. What the material did show was that when the three offenders left the car park, Mr McGuire promptly divested himself of possession of the four wheel drive and the knife."[3]

[37] There are a number of important distinguishing features:

(a) McDougall and Collas pleaded guilty; Welham was convicted after a trial by jury;

(b) McDougall and Collas were in their early 20s, but Welham was 28 years old at the time of the offending;

(c) Welham's offending was characterised by significant pre-planning;

(d) That pre-planning by Welham included the enlistment of Larkham with the obvious intent of having violence inflicted on the deceased;

(e) Neither McDougall nor Collas knew or had reason to know that the killer had a knife or had used it; Welham knew that Larkham had armed himself with

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[3] Ibid at 6-10.

the baseball bat and made no attempt to stop Larkham from using it or to prevent the deceased from walking into a trap;

(f) Welham made no attempt to assist the deceased after the bashing. He dragged the deceased, while still alive, into the back yard and left him there to die.

[38] On any view of the matter, the nature of the offending in this case was more serious than that committed by McDougall and Collas, and a longer sentence of imprisonment than had been imposed in that case was clearly warranted in the present.

[39] Some of the authorities to which the learned sentencing judge and this Court were referred were of little assistance for the purposes of comparison. Cases such as *R v Black*[4] and *R v West*[5], involving sentences of 12 years imprisonment or more for manslaughter, were cases in which the offender had committed the act of killing.

[40] Of more assistance for present purposes are those cases in which liability has been established, or accepted, pursuant to s 8 of the *Criminal Code*[6].

[41] In *R v Schuurs*[7], a sentence of 10 years imprisonment (with a serious violent offence declaration) was not disturbed on appeal. In that case, Schuurs, who was 18 years old, and two co-offenders went to a house to collect a drug debt. Schuurs supplied the car, a .22 calibre rifle and ammunition. This was intended to be used to shoot the deceased in the leg if he did not pay. Schuurs confronted the deceased and demanded payment. The deceased then retired into the house and returned armed with a knife in each hand. Schuurs 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 victim in the chest, and killed him. Schuurs was not the offender who inflicted the fatal injury; as in this case, his liability for manslaughter derived from s 8 of the *Criminal Code*. He was convicted after trial, and sentenced to 10 years imprisonment. It is notable, however, that Schuurs was only 18 years old and did not have any relevant prior convictions. There is some similarity with the present case, in that Schuurs had clearly planned to inflict violence upon his victim in order to achieve his goals. Unlike the present case, however, Schuurs' victim was given the chance to confront his attackers, and did so armed with a knife in each hand.

[42] In *R v Georgiou & Ors; R v Georgiou & Anor; ex parte A-G (Qld)*[8], the offender was convicted of manslaughter after trial on the basis of s 8[9]. His co-offender was convicted of murder. Georgiou and his co-offender had broken into a pharmacy by breaking glass at the front of the shop. The deceased heard the glass breaking and left his nearby home to apprehend the offenders. Georgiou and his co-offender were in the vicinity of the pharmacy when a number of shots were fired, one of which struck the deceased causing his death. The fatal shot was not fired by Georgiou. It was noted in that case 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 his co-offender, whom he knew to be

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4 [2009] QCA 198.
5 [2011] QCA 76.
6 *Criminal Code* 1899 (Qld), s 8.
7 [2000] QCA 278.
8 [2002] QCA 206.
9 *Criminal Code* 1899 (Qld), s 8.

armed, in carrying out their common intention to break into the pharmacy and steal drugs. An appeal by the Attorney-General against the leniency of a sentence of eight years imprisonment was dismissed, but the Court also observed[10] that Georgiou's sentence "could certainly have been fixed at a higher level without inviting intervention on appeal".

[43] In *R v Hicks & Taylor*[11], the two applicants pleaded guilty to manslaughter. They had been with a man called Coombes intending to steal from a house they thought was occupied by a drug dealer. Taylor and Hicks stayed outside the house when Coombes went inside and, after a struggle, fatally shot an innocent man who had recently moved into the house. Hicks was 22 years old and Taylor was 20. Both had criminal histories; Taylor's included a conviction for doing grievous bodily harm. Taylor, who was regarded as the least culpable of those involved in the killing, was sentenced to eight years imprisonment with parole after serving about half of that sentence. That was not disturbed on appeal. Hicks was described as "an instigator" of the robbery, but was erroneously sentenced on the basis that he had been armed with a steering wheel lock. That led to the sentencing judge in that case wrongfully taking into account a circumstance of aggravation which was not factually correct. The sentence of 10 years imprisonment for Hicks was reduced on appeal to nine years, as one which the Court considered should be slightly higher than that for Taylor, but also needed to be in parity with the sentence imposed on Taylor. It should be noted, however, that the sentences imposed were consequent upon pleas of guilty. In the present case, Welham was convicted after trial. It was also clear that, whilst Hicks was undoubtedly involved in planning of the robbery, there was nothing like the pre-planning of violence which characterised Welham's participation in the present case.

[44] In *Lacey v Attorney-General (Qld)*[12], the plurality of the High Court reaffirmed the following statement by Barton A-CJ in *Skinner v The King*[13]:

> "If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not."

[45] I do not consider that it has been demonstrated that the sentence below was obviously excessive. The degree of pre-planning by Welham, the fact that the pre-planning necessarily involved violence, and Welham's knowledge that Larkham had armed himself with the baseball bat and did nothing to prevent the attack with the baseball bat, together with his callous treatment of the deceased after the attack, are all factors which called for a serious sentence to be imposed. It has not been argued that the learned sentencing judge acted on a wrong principle. I do not consider that it has been demonstrated that, in the exercise of the sentencing discretion, the learned sentencing judge overlooked, undervalued, overestimated or misunderstood any of the salient features in the case before him. The fact that another judge may have imposed a lesser sentence is not to the point. The test for present purposes is whether it has been demonstrated that the sentence imposed on Welham was manifestly excessive.

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10 Ibid at [101].
11 [2011] QCA 207.
12 (2011) 242 CLR 573 at [11].
13 (1913) 16 CLR 336 at 340.

[46] That has not been demonstrated in the present case, and I would refuse Welham's application for leave to appeal against sentence.

Application by Martin

Martin's antecedents

[47] Martin was 39 years old when the offence was committed and 42 years old when sentenced. She had a minor criminal history, having been convicted of drug offences in 2004, for which she was fined. In February 2009 she was convicted of further drug offences, including producing dangerous drugs. These offences appear to have been detected on 20 January 2009 when police attended upon her in the early stages of the investigation.

The sentencing remarks

[48] The learned sentencing judge observed that Martin's role was to assist the others in bringing the deceased into a situation where she knew that the deceased was going to be assaulted and likely to receive a serious injury. His Honour summarised the evidence of Martin arranging for the deceased to attend firstly at the car park and then at the house. His Honour said that Martin was aware that the attack at the house was to be a surprise attack, and was to be done by more than one person in circumstances where the delivery of serious injury was more than likely.

[49] He accepted that the offending by Martin was of a lesser degree than that of Welham, and also made allowance for co-operation she gave to police officers on 25 April 2009. On the other hand, his Honour noted that Martin had contested the charges, and had displayed little remorse. He said: "... I find that you played a significant role in seeking out the confrontation and arranging for the deceased to be brought into those circumstances where the assault of the kind I've outlined was to take place."

[50] His Honour continued:

> "Having regard to those matters, whilst your penalty will be less than your co-offender it shall not be greatly less. My orders will be that a conviction be recorded. I sentence you to eight years' imprisonment. I declare that the offence is a serious violent offence."

His Honour also declared periods of pre-sentence custody to be deemed part of the term of imprisonment.

This application

[51] As has already been noted, counsel for Martin did not take issue with the sentence of eight years imprisonment, but submitted that the learned sentencing judge erred in making a declaration as to a serious violent offence.

[52] Section 161B(3) of the *Penalties and Sentences Act* 1992 ("PSA") provides:

> "(3) If an offender is –
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> (a) convicted on indictment of an offence –
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> (i) against a provision mentioned in schedule 1; or
> (ii) of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1; and

(b) sentenced to 5 or more, but less than 10, years imprisonment for the offence, calculated under section 161C;

the sentencing court may declare the offender to be convicted of a serious violent offence as part of the sentence.[14]"

[53] It was not in issue that the offence in this case was one mentioned in the schedule to the PSA and accordingly, as the learned sentencing judge imposed a sentence of eight years imprisonment, a discretion arose for a declaration to be made that Martin was convicted of a serious violent offence as part of the sentence.

[54] In *R v McDougall and Collas* (supra), the Court made the following observations:

"[19] It is where the making of a declaration is discretionary that a difference in views has arisen about whether declarations are available as a sentencing tool, when the circumstances are not beyond the norm for that offence. The following observations may assist sentencing courts:

- The discretionary powers granted by s. 161B(3) and (4) are to be exercised judicially and so with regard to the consequences of making a declaration;
  a critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole. By definition, some of the offences in the Schedule of the Act will not necessarily – but may – involve violence as a feature, such as trafficking in dangerous drugs or maintaining a sexual relationship with a child;
- the discrete discretion granted by s. 161B(3)(4) requires the existence of factors which warrant its exercise, but the overall amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so;
- the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing;
- **the law strongly favours transparency and accessible reasoning, and accordingly sentencing courts should give reasons for making a declaration, and only after giving the defendant an opportunity to be heard on the point;**
- for the reasons to show that the declaration is fully warranted in the circumstances it will usually be necessary that declarations be reserved for the more serious offences that, by their nature, warrant them;
- without that last feature, it may be difficult for the reasons to show that the declaration was warranted;

[14] *Penalties and Sentences Act* 1992 (Qld), s 161B(3).

- where a discretionary declaration is made, the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances; accordingly the just sentence which is the result of a balancing exercise may well require that the sentence imposed for that declared serious violent offence be toward the lower end of the otherwise available range of sentences;
- **where the circumstances of the offence do not take it out of the 'norm' for that type, and where the sentencing judge does not identify matters otherwise justifying the exercise of the discretion, it is likely that the overall result will be a sentence which is manifestly excessive, and in which the sentencing discretion has miscarried; probably because of an incorrect exercise of the declaration discretion.** (Emphasis added)

[20] The considerations which may lead a sentencing judge to conclude that there is good reason to make a recommendation apt to bring forward the offender's eligibility for parole will usually be concerned with the offender's personal circumstances which provide an encouraging view of the offender's prospects of rehabilitation, as well as due recognition of the offender's co-operation with the administration of justice.

[21] The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence."

[55] The learned sentencing judge did not, in his sentencing remarks, give reasons for making the declaration. There was some brief argument about the making of a serious violent offence declaration in the course of submissions on sentence[15] and his Honour was referred by counsel for Martin to the passages in *R v McDougall and Collas* to which I have referred. Whilst his Honour's sentencing remarks amply demonstrate the matters he considered when setting the sentence of eight years imprisonment, they do not disclose his reasons for making the serious violent offence declaration.

[56] On that basis alone, I consider that Martin should have leave to appeal against the sentence imposed.

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15 Appeal Record Book pp 628-629.

[57] The question then arises as to whether this was an appropriate case for a serious violent offence declaration to be made. It is true that Martin was engaged in the pre-planning, and was an active participant in luring the deceased to the house. It is also quite clear that Martin was aware that the purpose in luring the deceased was to have violence inflicted on him. Those are matters which count towards, and justify, the sentence of eight years imprisonment. There is, however, nothing in the material to suggest that Martin knew that Larkham had armed himself with the baseball bat, or that she was aware of anything to suggest that the deceased was to be subjected to an attack of the severity which Larkham inflicted on him. In those circumstances, I do not consider that the offending of Martin went outside of the "norm" for offending of this type. I note that in *R v Hicks & Taylor* the Court set a head sentence of nine years imprisonment for Hicks and said:

> "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."[16]

[58] I similarly consider that the circumstances of the offending by Martin are not outside the norm for the offence of manslaughter where the liability for the offence arises under s 8 of the *Criminal Code*, and a serious violent offence declaration ought not be made.

Conclusion

[59] Accordingly, I would make the following orders:

1. The application by Gavin Paul Welham for leave to appeal against sentence be refused.

2. Dianne Pearl Martin have leave to appeal against the sentence imposed on 17 May 2011.

3. The appeal by Dianne Pearl Martin against sentence be allowed and it be ordered that the sentence imposed on her on 17 May 2011 be amended by deletion of the declaration that the offence was a serious violent offence.

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16 [2011] QCA 207 at [77].