SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pollock* [2012] QCA 231
PARTIES:	**R** **v** **POLLOCK, Andrew Murray** (applicant)
FILE NO/S:	CA No 66 of 2012 SC No 1037 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2012
JUDGES:	Muir and White JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where applicant unlawfully killed his father in 2004 – where applicant, on his fourth trial for murder, was acquitted of murder and convicted on his own plea of manslaughter in 2012 – where applicant previously sentenced at a sentence reopening in 2006 to two years imprisonment for an armed robbery committed in 1999 – where that sentence was ordered to be served concurrently with the sentence of life imprisonment – where submitted sentence imposed for manslaughter offended the principle of totality – where submitted applicant's two year sentence for the robbery overstated the criminality of the offending conduct – where submitted sentencing judge gave excessive weight to applicant's criminal history and to the fact he was on bail when he killed his father – whether sentence manifestly excessive *Corrective Services Act* 2006 (Qld), s 182(2) *Penalties and Sentences Act* 1992 (Qld), s 161A(a)(ii) *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, cited *Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, considered

Pop v The Queen (2000) 116 A Crim R 398; [2000] WASCA 283, considered
R v Basso & Frazzetto (1999) 108 A Crim R 392; [1999] VSCA 201, cited
R v Corcoran [2004] QCA 441, considered
R v Del Arco [1994] QCA 70, cited
R v DeSalvo (2002) 127 A Crim R 229; [2002] QCA 63, cited
R v Dwyer [2008] QCA 117, considered
R v Gray [1977] VR 225; [1977] VicRp 27, cited
R v Harris (2007) 171 A Crim R 267; [2007] NSWCCA 130, considered
R v MAK (2006) 167 A Crim R 159; [2006] NSWCCA 381, considered
R v Mills [2008] QCA 146, considered
R v MP [2004] QCA 170, considered
R v Murray [2012] QCA 68, considered
R v Ogborne [2006] QCA 236, cited
R v Sanderson [2003] QCA 338, cited
R v Schubring; ex parte Attorney-General (Qld) [2005] 1 Qd R 515; [2004] QCA 418, cited
R v Sebo; ex parte A-G (Qld) (2007) 179 A Crim R 24; [2007] QCA 426, considered

COUNSEL: S J Keim SC, with A E Cappellano, for the applicant
A W Moynihan SC for the respondent

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

[1] **MUIR JA:** The applicant, on his fourth trial for the murder of his father, was acquitted of murder and convicted on his own plea of manslaughter. That was on 14 March 2012. The killing occurred on 31 July 2004. On 15 March 2012, the applicant was sentenced to imprisonment for 10 years with the consequence that, by operation of s 161A(a)(ii) of the *Penalties and Sentences Act* 1992 (Qld), an automatic serious violent offence declaration took effect with the consequence that the applicant is required, by the operation of s 182(2) of the *Corrective Services Act* 2006 (Qld), to serve 80 per cent of his term of imprisonment before being eligible for parole. The applicant had been sentenced at a sentence reopening on 9 November 2006 to two years imprisonment for an armed robbery committed on 7 March 1999 when he was 17. That sentence was ordered to be served concurrently with the sentence of life imprisonment. The 832 days spent in pre-sentence custody between 31 July 2004 and 9 November 2006 were declared time already served. However, as a result of the reopening of the sentence, the two year period was declared time served for that offence. The 2,054 days spent in custody between 1 August 2006 and 15 March 2012 in respect of the sentence were declared time served.

[2] The circumstances of the subject offence were described by the sentencing judge as follows:

> "The means you adopted warrant the description brutal and savage. In the early hours of the morning, while it was still dark, you hit your father about the head at least three times with a substantial rock from the garden wall. The rock weighed about seven kilograms. When you killed him, he had ascended the garden wall into a garden area, probably, on my assessment, on the way to seek refuge at the neighbour, Mr Hart's place.
>
> On the evidence you were sober at the time, although your father's blood alcohol reading was .251. Your counsel has suggested that the prior provocation from your father was at a high level. Your father angry and intoxicated had barged into your bedroom and fought you. The fight continued out into the garden and just before you killed him he offered the verbal taunt.
>
> At the trial a substantial theme was the turbulence of the household where confrontation and extremely bad language were commonplace. One needs to assess any insult offered by the father in that robust framework. The Crown prosecutor has submitted that the provocation was minor. I cannot reliably assign a precise description to it, beyond observing that in the estimation of the jury it was sufficient to exclude a conviction for murder."

[3] The applicant applies for leave to appeal against the sentence on grounds that it was manifestly excessive. Counsel for the applicant argued that the sentence imposed for the manslaughter offence offended the totality principle articulated, in particular, in *Mill v The Queen*.[1]

[4] It was submitted that the applicant's two year sentence for the robbery overstated the criminality of the offending conduct. The circumstances of the offending were that the applicant and his co-offender entered a convenience store late at night disguised and armed with steak knives. They threatened the person or persons in the store and escaped with money out of the till. The applicant, who was then a drug addict, committed the robbery to feed his habit. The applicant was not charged by the police in relation to the offence until March 2004, by which time he had given up his drug habit, gone back to school, finished his schooling and was holding down a steady job. He made full admissions and the matter proceeded by ex-officio indictment.

[5] Counsel for the applicant made the following further submissions. The robbery sentence was imposed in circumstances in which a concurrent sentence of two years had little practical effect. The effect, however, is now very different as, by the time the applicant was sentenced for manslaughter, he had served the whole of the term imposed for the robbery. Had the applicant been sentenced for the armed robbery alone, it was likely that he would have had to serve no more than seven months in actual custody. Taking into account the combined criminality of the two offences and the mitigating factors, the sentence imposed was manifestly excessive as it failed to give effect to the totality principle.

[6] It was submitted also that the sentencing judge gave excessive weight to the fact that the applicant was on bail at the time he killed his father. It was argued in that

---

1 (1988) 166 CLR 59 at 66 – 67.

regard that the robbery had been committed over five years before the killing and that the bail was granted to allow the ex-officio indictment procedure to be put in place. The unpremeditated killing did not indicate "contempt for or disregard of the system of law under which bail was granted";[2] nor that the applicant was prepared to offend notwithstanding that he had been granted liberty pending a trial;[3] nor that the killing was committed in open defiance of the law;[4] nor that there was "in reality a continuation of the criminal conduct, the subject of the earlier charges …".[5]

[7] The primary judge was also said to have erred in placing excessive weight on the applicant's prior criminal history.

[8] In analysing comparable sentences, counsel for the applicant referred to *R v MP*,[6] in which the range of sentences in manslaughter cases involving the death of a father figure was identified as nine to 11 years. Reference was made also to *R v Corcoran*,[7] *R v Mills*[8] and *R v Sebo; ex parte A-G (Qld)*.[9] It was contended that the applicant's offending was less serious than that of the offenders in each of these cases. I am unable to accept that proposition.

[9] *Corcoran*, who was 23 at the time of offending and had a substantial criminal history, failed to obtain leave to appeal against a sentence of nine years imprisonment accompanied by a serious violent offence declaration. He ran amok when heavily intoxicated and stabbed his elderly father-in-law who suffered a major heart attack when operated on for his knife wounds. The prosecution accepted that it could not be proved that there was an intention to kill or cause grievous bodily harm.

[10] *Mills* was a tragic case in which Mills, who had no criminal history, strangled his wife with an electrical cord after a domestic argument. In the course of the argument, the deceased threw a mobile phone at Mills, struck him on the head and hand with the cord and told him that, as a result of her having sex with men in nightclub toilets, he "should have AIDS by now too". Mills was a small business proprietor and the couple had two young children. It was not held that the sentence of 10 years imprisonment imposed by the sentencing judge was manifestly excessive, but the sentence was set aside as the sentencing discretion had miscarried and a sentence of nine years imprisonment was substituted. Keane JA observed that the "escalating violence … was not entirely of his own making: it was the deceased who introduced the electrical cord into the struggle … and that the provocation … was not limited to sexual jealousy".[10]

[11] In *Sebo*, an Attorney-General's appeal against the sentence of ten years imprisonment with a consequent declaration of a serious violent offence imposed on the 28 year old offender for the manslaughter of his 16 year old girlfriend was unsuccessful. The offender, taunted by his victim with claims of having slept with a number of other men, struck her multiple times in the head with a steering wheel

---

2 *R v Gray* [1977] VR 225 at 229.
3 *R v Basso & Frazzetto* [1999] VSCA 201.
4 *Pop v The Queen* [2000] WASCA 283.
5 *Pop v The Queen* [2000] WASCA 283 at [89] – [90].
6 [2004] QCA 170.
7 [2004] QCA 441.
8 [2008] QCA 146.
9 [2007] QCA 426.
10 *R v Mills* [2008] QCA 146 at [25].

lock both before and after she had fallen to the ground. He then took her to a hospital. He had no prior convictions and offered a timely plea of guilty to the offence of manslaughter and cooperated in the conduct of the trial. In her reasons, Holmes JA, Keane JA and Daubney J agreeing, said:[11]

> "The worst features of the killing in this case were its brutality, the youth and relative defencelessness of the victim, and the limited nature of the provocation which triggered it. (The fact that the fatal assault occurred in a public place seems to me, in this particular context, to have no aggravating effect.) The mitigating factors were the respondent's relative youth, his co-operation and his lack of any previous criminal history. What the cases cited demonstrate, in my opinion, is that having regard to all of those features, the sentence might properly have fallen between 9 and 12 years. A sentence of 10 years imprisonment, which carried the requirement that the respondent serve 80 per cent of it, was plainly not inadequate. There is no basis on which this court should interfere with the learned sentencing judge's exercise of discretion."

[12] As appears from the above, this Court found that the 10 year sentence was not manifestly inadequate, not that a higher sentence would have been unjustified.

[13] Holmes JA earlier referred to *R v DeSalvo*,[12] in which Macpherson JA had remarked that:

> "For a homicide resulting from a deliberate act like the stabbing in this case, the appropriate head sentence falls properly within the range of 10 to 12 years imprisonment."

[14] Reliance was placed also on *R v Murray*,[13] in which it was concluded on appeal that the sentence (nine years imprisonment, coupled with a serious violent offence declaration) was not manifestly excessive. The applicant in *Murray*, like the applicant here, was sentenced on the basis that although he had intended to kill the deceased, he was criminally responsible only for manslaughter because of provocation. The 40 year old offender was frustrated by the cleaning work he was doing for the deceased and irritated by the deceased's conduct. Provoked by the deceased's swinging a hammer at him harmlessly, he struck the deceased "repeated vicious blows to [the] head" with a hammer. He had a number of relatively minor convictions for dishonesty offences. Applegarth J remarked, citing *Sebo*, that a head sentence of nine years imprisonment was at the lower end of the generally applicable range of between nine and 12 years.

Consideration

[15] The fact that the circumstances in which the manslaughter was committed do not fit neatly into any of the categories mentioned by counsel for the applicant does not necessitate the conclusion that the fact that the offence was committed while the applicant was on bail in respect of another violent offence was not of significance. Counsel for the respondent pointed out that it was orthodox to order the terms of

---

11 At [18].
12 (2002) 127 A Crim R 229.
13 [2012] QCA 68.

imprisonment imposed for an offence while on bail to be served cumulatively on the term imposed for the earlier offence.[14] It is the fact that, at the time he killed his father, the applicant had recently been charged with a far less serious, but nevertheless violent, offence and was on bail. He had thus received a cogent reminder of his earlier antisocial conduct and was aware that he awaited sentencing.

[16] It is perhaps implicit in the applicant's argument that the armed robbery offence, particularly having regard to the applicant's youth when he committed it, was so minor in relation to the offence of murder, of which he was originally convicted, that the lesser offence was effectively subsumed by the greater. If that was the applicant's argument, it is not grounded in principle. The two offences were separate in time and different in nature. Subject to the application of the totality principle, cumulative sentences would normally be appropriate. Authorities, such as *R v Harris*,[15] emphasise the need for the adequate punishment of separate offences. Once the conviction for murder was quashed, the applicant stood to be sentenced for the armed robbery without reference to any other charge he may have been facing. The applicant elected to have all the time spent in pre-sentence custody declared time spent serving the sentence for robbery even though it appeared that his intention was always to plead guilty to manslaughter. The consequence of this conduct was that by the time he was sentenced for manslaughter, the sentence served for the robbery had diminished relevance.

[17] The principle on which the applicant seeks to rely is articulated in the following passage from the judgment of the Court in *Mill v The Queen*:[16]

> "The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp. 56-57, as follows (omitting references):
>
> > 'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong["]; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".'

---

14 *R v Del Arco* [1994] QCA 70.

15 [2007] NSWCCA 130.

16 (1998) 166 CLR 59 at 62 – 63.

> See also Ruby, *Sentencing*, 3rd ed. (1987), pp. 38-41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

[18] It was explained in *R v MAK*:[17]

> "[A]n extremely long total sentence may be 'crushing' upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint."

[19] These principles do not suggest to me that there was any inflexible rule which required the sentencing judge to adjust the sentence to be imposed having regard to the time served for an entirely different offence, as if the applicant had been sentenced for both offences at the same time. Nevertheless, the sentencing judge, as was appropriate, recognised the relevance of the totality principle and took it into account. He observed that the sentence of 10 years imprisonment he was proposing "makes sufficient allowance for the totality principle in the circumstances of this case".

[20] I will now address the submission that the appropriate sentence for the manslaughter was nine years with a serious violent offence declaration from which, to apply the totality principle, the two years served for the armed robbery should have been deducted. I have already discussed the argument based on the totality principle. The applicant's contention that a sentence of 10 years with a serious violent offence declaration is manifestly excessive but a sentence of nine years with such a declaration is within the permissible sentencing range impliedly suggests that sentences for manslaughter are, or ought be, arrived by a process of fine calibration. That, of course, is not the case.

[21] In *R v Dwyer*,[18] Keane JA observed:

> "An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, is to be deprecated as involving the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process. In *Markarian v The Queen*,[19] Gleeson CJ, Gummow, Hayne and Callinan JJ said:
>
> > '… As has now been pointed out more than once, there is no single correct sentence. And judges at first instance

---

17 [2006] NSWCCA 381 at [17].
18 [2008] QCA 117 at [37].
19 (2005) 228 CLR 357 at 371.

> are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.'" (citations omitted)

[22] The proposition has been advanced in a number of decisions that the relevant sentencing level, after allowing for a plea of guilty for a manslaughter sentence, in circumstances where the prosecution has failed to negate provocation, is nine to 12 years imprisonment.[20] As the discussion of the authorities in the reasons of Holmes JA in *Sebo* and the separate reasons of the Chief Justice and McMurdo P in *Ogborne* indicate, sentences imposed for manslaughter, even after pleas of guilty, cover a very broad spectrum which includes sentences well in excess of 12 years imprisonment. The authorities and principles to which I have referred to above do not, in my view, support the contention that the subject sentence was manifestly excessive or in any way affected by error. The weapon of choice, a seven kilogram rock, suggested an intention to kill rather than cause grievous bodily harm. The deceased, who was intoxicated, was struck at least three times with the rock after he had been pursued into the grounds of his residence. While it is not appropriate to give undue emphasis to *Sebo*, it is relevant to note that a range of nine to 12 years was identified in that case and that a sentence of 10 years imprisonment was imposed on an offender with no criminal history.

[23] The applicant's sentence has not been shown to be manifestly excessive and I would order that the application for leave to appeal be refused.

[24] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with his Honour's reasons and the order that he proposes.

[25] **PHILIPPIDES J:** I agree with the reasons for judgment of Muir JA and with the proposed order.

---

[20] *R v Schubring; ex parte Attorney-General (Qld)* [2005] 1 Qd R 515; *R v Sanderson* [2003] QCA 338; *R v DeSalvo* (2002) 127 A Crim R 229; *R v Murray* [2012] QCA 68; *R v Ogborne* [2006] QCA 236.