SUPREME COURT OF QUEENSLAND

CITATION:	*R v Amato* [2013] QCA 158
PARTIES:	**R** **v** **AMATO, Rosario** (applicant)
FILE NO/S:	CA No 308 of 2012 DC No 981 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2013
JUDGES:	Holmes and Fraser JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of burglary by breaking in the night, with violence, while armed, in company, with property damage, one count of assault occasioning bodily harm while armed, in company, one count of armed robbery in company with personal violence, and one count of armed robbery in company – where the applicant was sentenced to concurrent terms of imprisonment of seven years on counts 1, 3 and 4, and five years on count 2 – where the applicant was given a parole eligibility date after having served one half of the effective sentence of seven years – where the applicant contended that the sentence was rendered manifestly excessive by reason of the fixing of parole eligibility after one half of the effective term rather than after one third – where the applicant argued that the sentencing judge gave insufficient weight to the plea of guilty and other mitigating factors – whether the sentence was manifestly excessive *Corrective Services Act* 2006 (Qld), s 182, s 184 *Penalties and Sentences Act* 1992 (Qld), s 13, s 160C, s 161B

Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v AC [2001] QCA 56, cited
R v Aaron Blenkinsop [2007] QCA 181, cited
R v Awai, Rapana and Rapana [1994] QCA 252, considered
R v Booth [2001] 1 Qd R 393; [1999] QCA 100, considered
R v Dodds [2003] QCA 540, considered
R v Hill [2012] QCA 59, cited
R v Jones [2000] QCA 84, considered
R v Kitson [2008] QCA 86, cited
R v Leu; R v Togia (2008) 186 A Crim R 240; [2008] QCA 201, cited
R v PAA [2006] QCA 56, cited
R v Rankin [2004] QCA 2, cited
R v Ruha, Ruha and Harris; Ex parte Director of Public Prosecutions (Cth) [2011] 2 Qd R 456; (2010) 198 A Crim R 430; [2010] QCA 10, cited
R v Tez [2007] QCA 227, cited
R v Torrens [2011] QCA 38, cited
R v Ungvari [2010] QCA 134, cited

COUNSEL: D R MacKenzie for the applicant
P McCarthy for the respondent

SOLICITORS: Gary Rolfe Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the order he proposes.

[2] **FRASER JA:** The applicant and a co-offender, Janissen were charged with burglary by breaking, in the night, with violence, while armed, in company, with property damage (count 1), assault occasioning bodily harm while armed, in company (count 2), armed robbery in company, with personal violence (count 3), and armed robbery in company (count 4). The offences were alleged to have occurred in a home invasion by the applicant, Janissen, and an unidentified co-offender. The applicant pleaded guilty and his plea was treated as an early plea. Janissen was convicted after having been found guilty by a jury. They were sentenced on 22 October 2012, upon the basis of an agreed schedule of facts. Reference was also made to some aspects of the evidence given at the trial.

[3] The applicant was sentenced to concurrent terms of imprisonment of seven years on counts 1, 3 and 4, and five years on count 2. A period of 120 days spent by the applicant in pre-sentence custody between 25 June and 22 October 2012 was deemed time already served under the sentence. It was ordered that the date that the applicant was eligible to be considered for parole was fixed at 21 December 2015. That date was three years and two months after the date of sentence. Taking into account the 120 days of pre-sentence custody, the applicant will be eligible for parole after he has served one-half of the effective sentence of seven years imprisonment.

[4] The applicant seeks leave to appeal against sentence on the ground that it was manifestly excessive. He made no complaint about the term of seven years

imprisonment but contended that the sentence was rendered manifestly excessive by the provision for parole eligibility being fixed at about one-half of the effective period of imprisonment rather than after one-third. He argued that the sentencing judge wrongly commenced with a notional head sentence of nine years imprisonment which was too severe, and, by reducing the term to seven years imprisonment to take into account the applicant's plea of guilty, gave insufficient weight to the plea of guilty and other mitigating factors. I will discuss these points after I have first referred to the circumstances of the offences and the applicant's personal circumstances.

Circumstances of the offences

[5] The 27 year old male complainant and 20 year old female complainant resided together in a house in a suburban street in Brisbane. At about 9.00 pm on 3 February 2012 the applicant, Janissen, and a third man confronted the male complainant at the front door of his house. Each of the applicant and Janissen was armed with a black double barrelled shotgun. The male complainant shut the front door and hid with the female complainant in a bedroom wardrobe. They heard the offenders remove a security screen door and enter the house. After the complainants had called 000, and after the wardrobe doors had been opened and the male complainant had shut it, the applicant, who was known to the male complainant as "Rosso", threatened to shoot through the door unless it was opened. The applicant entered the wardrobe, stepped over the female complainant, and struck the male complainant on his nose with the butt of the gun. Janissen, who stood outside the wardrobe, pointed his gun at the female complainant. The applicant then hit the male complainant on the head with the bottom half of a pool cue, causing him to bleed from the head and fall onto a bed.

[6] Whilst hitting the male complainant, the applicant demanded to know where $40,000 was in the house. The male complainant denied knowing about that money. The applicant continued to strike him with the pool cue in his face. When the male complainant rolled up in order to protect himself, the applicant repeatedly struck the back of his legs and the middle of his back with the pool cue. The applicant called out to Janissen, who had left the room, to "[g]rab the butcher knife. I'm going to give him a circumcision", and pushed the shotgun into the male complainant's crutch. Janissen returned to the room and pointed the shotgun at the female complainant who pleaded with the applicant and Janissen to be allowed to leave. The applicant responded that if she kept asking he would hit her. He continued to hit the male complainant whilst Janissen made numerous threats.

[7] Janissen made the female complainant go into the garage where she said that her purse was. The garage had been ransacked. Janissen threatened to bash the female complainant whilst the unidentified co-offender continued to search the garage. The female complainant could hear hitting noises coming from the bedroom and the male complainant moaning. During that time the applicant was holding a double barrelled shotgun and continuing to hit the male complainant in the head. The applicant told the male complainant that he wanted $10,000 by Monday and not to call the police because the applicant knew where the male complainant's family and friends lived. The three offenders left, taking with them several mobile telephones, a handbag, purse, house keys, a small amount of cash, and a wallet. The male complainant suffered abrasions, lacerations, undisplaced minor fractures to two facial bones, and bruising. He was taken to hospital and stitches were applied. The

applicant and Janissen were arrested two days later with some of the stolen property and with blood stains on shoes matching the male complainant's blood. They declined to be interviewed by police.

The applicant's personal circumstances

[8] The applicant was aged 29 at the time of the offence and 30 at sentence. He had a criminal history which commenced with a property offence in 2001. Between 2004 and 2010 he was convicted and dealt with in the Magistrates Courts for property and drug offences every year. In March 2011 he was dealt with in the Supreme Court for offences committed in May 2010 of producing a dangerous drug and unlawful possession of weapons. On the first of those offences he was sentenced to imprisonment for 15 months, he was given a short, concurrent term of imprisonment on the other offences, and a parole release date was fixed at 25 March 2011. (The applicant was therefore on parole when he committed the offences the subject of this application.) He was convicted of further drug related offences and dealt with in the Magistrates Court in May 2011.

Sentencing remarks

[9] At the sentence hearing the applicant's counsel told the sentencing judge that the offences occurred in the context of the applicant returning to drug use after having done quite well on parole until that point. He had been employed but lost his job and then returned to the use of methylamphetamines. The applicant had a good work history, enjoyed the support of family and friends, and had the benefit of some quite favourable references. The sentencing judge accepted that the applicant had come to realise, whilst in pre-sentence custody, that what he had done was wrong, and remarked that there was "some reason to be positive about [the applicant's] future." The sentencing judge was prepared to accept that notwithstanding that similar submissions had been made to the judge who had given the applicant the benefit of immediate parole release on 25 March 2011. The sentencing judge recorded, however, that if a major setback resulted in the applicant returning to amphetamines and the kind of behaviour in the present matter, faith in his future will have been ill founded. The sentencing judge accepted that the plea of guilty demonstrated a willingness to facilitate the course of justice and an acceptance of responsibility, but that it was less clear whether it demonstrated remorse. The sentencing judge accepted that it did save the complainants the experience of having to give evidence.

[10] The sentencing judge considered that nine years imprisonment was an appropriate head sentence before taking into account the applicant's plea of guilty. The prosecutor submitted that a declaration might be made that the applicant was convicted of serious violent offences, with the consequence that eligibility for parole would be deferred until after the applicant had served 80 per cent of the term of imprisonment. The sentencing judge rejected that proposition because the applicant had pleaded guilty and there seemed to be some prospect that the applicant had the potential to do the right thing in the future; the sentencing judge remarked, though, that, "I'm not sure where this comes from …".

[11] The sentencing judge reduced the notional nine year term to seven years to take into account the applicant's plea of guilty. Recognising that eligibility for parole was often fixed on a date which was after about a third of the term, the sentencing judge decided instead to fix parole eligibility after the applicant had served half of the term less the period of pre-sentence custody.

Consideration

[12] The question whether the sentence is manifestly excessive must be answered with reference to the whole sentence, but it is convenient first to refer separately to the notional head sentence of nine years. The applicant argued it could not be justified by *R v Booth*[1] and *R v Jones*,[2] which were referred to by the prosecutor at sentence, because they were more serious cases. He argued defence counsel's submission at sentence that the appropriate head sentence was seven years imprisonment with eligibility for parole after one-third of that term was supported by *R v A*,[3] *R v Aaron Blenkinsop*,[4] *R v Leu and Togia*,[5] and *R v Dodds*.[6]

[13] In *Booth* the offender was convicted of a series of offences which he committed in the course of two separate home invasions five days apart. I accept the applicant's submission that it was a worse case, but that was reflected in the markedly more severe sentence imposed on appeal of 10 years imprisonment, which automatically resulted in a requirement that the offender serve eight years in custody before being eligible for parole.

[14] In *Jones* the offender pleaded guilty to entering a dwelling house with intent to commit an indictable offence and armed robbery in company on the same occasion. The court refused an application for leave to appeal against the sentence for the second offence of eight years imprisonment together with a declaration that it was a serious violent offence. The offences were similar to the applicant's in that the offender was armed with a sawn-off rifle and his co-offender was also armed, albeit with a knife rather than a firearm, when they followed a married couple into their home. The offender assaulted the man with a torch and the co-offender pressed his knife against the woman's throat. Those complainants suffered serious emotional and financial consequences and the male complainant suffered substantial injuries. The applicant submitted that *Jones* was distinguishable on the ground that the offender was 55 years old when he committed his offence, but at 29 years of age the applicant could expect to be treated as a mature adult. Nevertheless I accept the applicant's submission that *Jones* was a worse case; the consequences of the offences were shown to have been very serious, the offender had a history of offences of dishonesty extending over more than 30 years, he had spent much of his life in prison, notwithstanding an apparently compelling case against him he initially pleaded not guilty, and his plea of guilty was very late. Correspondingly, the declaration that the offender committed a serious violent offence made his sentence more severe than the applicant's. The sentence in *Jones* is readily reconcilable with the sentence imposed upon the applicant, particularly having regard to Davies JA's conclusion, with which Pincus and McPherson JJA agreed, that the range in that case extended to a head sentence of 10 years imprisonment.

[15] The applicant's sentence is also not inconsistent with *R v Awai, Rapana and Rapana*.[7] The court reduced terms of imprisonment of 10 years to eight years and parole recommendations from three and a half years to two years (in the case of Awai and Danny Rapana) and to two and a half years (in the case of Chris Rapana,

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1 [2001] 1 Qd R 393.
2 [2000] QCA 84.
3 [2001] QCA 56.
4 [2007] QCA 181.
5 [2008] QCA 201.
6 [2003] QCA 540.
7 [1994] QCA 252.

who had a greater role in the offences and a more significant criminal history). Those offenders were sentenced for their participation in a series of offences (committed on one occasion) similar to those committed by the applicant. The offenders were part of a group of six people who invaded a home in the mistaken belief that it was occupied by a drug dealer. A replica gun was pointed in the face of an 18 year old man at the home, he was punched in the face, and he and two friends were marched into the house and roughly manhandled and punched. That young man, and his mother, were taken into a main bedroom where his father was woken up and struck by a gun in the head. He was the subject of further assaults to the head, a knife being pushed against his buttocks, a screw driver being held against his throat, and some substance thrown in his eyes. The occupants of the house were detained and had their wrists taped behind their backs and also their mouths taped. The offenders stole some jewellery, a small amount of cash and a credit card, enforcing their demands by holding a knife to the head of a 16 year old younger boy in the house. Violence was done to other occupants of the house. The group of offenders took a large quantity of household items of some value when they left.

[16] The applicant argued that the home invasion in that case involved "reprehensible terror and torture", so that the sentences of eight years imprisonment with parole eligibility after less that one third of that term suggested that the applicant's sentence was too severe. That argument overlooked the distinguishing circumstances that two of those offenders had no significant criminal history, all of them were young offenders, and the gun used in the offences was a replica. Furthermore, Macrossan CJ and McPherson JA made it clear that the reduction of the terms of imprisonment of 10 years imposed by the sentencing judge to eight years was required only to maintain parity with a sentence of eight years imprisonment imposed upon a co-offender by a different sentencing judge. *R v Awai, Rapana and Rapana* provides no support for the argument that the applicant's sentence is excessive.

[17] The applicant relied upon the observation by the President, with whose reasons Davies JA and Chesterman J agreed, in *R v Dodds*[8] that "[t]he schedule of offences provided by the respondent for offences of home invasion with intent to steal confirms the submission made at first instance, as adopted by the learned sentencing Judge, that the appropriate range in all the circumstances here was six to eight years' imprisonment before taking into account the plea of guilty …". That observation was expressly limited to the circumstances of that case. Those circumstances bear little resemblance to those in this case; in particular, that offender was not in company, did not use a firearm, and did not use violence of the severity or for the sustained period as did the applicant. *R v Rankin*,[9] *R v Blenkinsop*, and *R v Leu and Togia* are distinguishable for similar reasons.

[18] I would respectfully endorse the sentencing judge's succinct summary of the aggravating features of the applicant's offence which justified a notional head sentence of nine years imprisonment before taking into account the applicant's plea of guilty:

> "… this is an exceptionally serious example of a home invasion and violence; three people, two of you armed, and a terrible beating of

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8 [2003] QCA 540.
9 [2004] QCA 2.

> somebody in his bedroom while his partner lay cowering on the floor. It was protracted, it was at night, there were threats, it was brazen and it was very violent."

[19] As to the parole eligibility date, the applicant pointed out that he would have been eligible for parole at an earlier time if the sentencing judge had started with the notional head sentence of nine years and adopted the "usual fixing of an eligibility for parole [after serving] one third of the head sentence …". The applicant submitted that such an approach was appropriate because the applicant's plea of guilty was accepted as an early plea, the sentencing judge referred to the importance of such a plea in light of factors such as remorse, saving of expense, acceptance of responsibility and willingness to facilitate the course of justice, and that there were further matters in mitigation such as a good work history, family support, and the requirement to serve the balance of the earlier sentence as a result of this offending. Reference was made to cases which referred to the common practice of recognising a plea of guilty by fixing the parole eligibility date after about one third of the term of imprisonment had been served: *R v Ungvari* [2010] QCA 134 at [30]-[31]; *R v PAA* [2006] QCA 56 at [14]; *R v Tez* [2007] QCA 227 at p 8. The respondent submitted that it was wrong to adopt an arithmetical approach to the fixing of the parole eligibility date and that regard must be had to the particular circumstances of each case: *R v Torrens* [2011] QCA 38 at [25]-[26] (referring with approval to *R v Robertson* [2008] QCA 164).

[20] The applicant's argument is not persuasive. If the sentencing judge made a declaration under s 161B of the *Penalties and Sentences Act* 1992 that the applicant was convicted of a serious violent offence, the earliest parole eligibility date would have been after 80 per cent of the term of imprisonment for the serious violent offence (*Corrective Services Act* 2006, s 182). Absent such a declaration, the applicant would be eligible for parole after he has served half the period of imprisonment, unless the sentencing judge fixed a different parole eligibility date (*Corrective Services Act* 2006, s 184). Provisions analogous to s 184 in earlier legislation seem to have been influential in the common sentencing practice of taking into account pleas of guilty and some other personal matters by providing for a pre-release period of the order of one third of the term of imprisonment (see, for example, *R v PAA* [2006] QCA 56 at [14]), but the sentencing judge's adoption of the different approach of taking the plea into account by reducing the term of imprisonment does not of itself reveal any error in the exercise of the sentencing discretion. Section 13 of the *Penalties and Sentences Act* 1992 requires sentencing courts to take guilty pleas into account but it does not prescribe the manner in which the pleas must be taken into account. Notwithstanding the common sentencing practice I have mentioned, the discretion conferred by s 160C of the same Act to fix the parole eligibility date is relevantly unfettered: see *R v Kitson* [2008] QCA 86 at [16]. That being so, and since the significance for the just sentence of a plea of guilty varies according to the particular circumstances of each case, there can be no rule of thumb or arithmetical approach: cf *R v Ruha* (2010) 198 A Crim R 430 at [47] (approved in *Hili v The Queen* (2010) 242 CLR 520 at [42]).

[21] In this case, the plea had a utilitarian value in saving the community the expense of a trial, it saved the complainant the experience of having to give evidence, and it was also regarded as evidence of acceptance of responsibility by the applicant. The sentencing judge was therefore right to treat the plea as justifying significant mitigation of the sentence. On the other hand, the Crown case was evidently strong

and the sentencing judge thought it doubtful that the plea demonstrated real remorse. That view was open to the sentencing judge. In considering how and to what extent the plea should be taken into account in mitigating the severity of the sentence, the sentencing judge was also entitled to take into account all other aspects of the applicant's personal circumstances as well as the circumstances of the offence. One circumstance which the sentencing judge could regard as important in this exercise was the fact that the applicant committed the offences whilst on parole.

[22] When all of these circumstances are taken into account, the applicant's contention that the sentence is manifestly excessive must be rejected. Such a contention is not established merely by demonstrating that the sentence is markedly different from sentences imposed in similar cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence is "unreasonable or plainly unjust": *Hili v The Queen* (2010) 242 CLR 520 at [58], [59]. I think it clear that the sentence imposed upon the applicant did not involve any such error.

[23] I would add that, in assessing the applicant's argument that the treatment of his plea rendered the sentence manifestly excessive, it is arguably relevant that the plea formed one of the grounds of the sentencing judge's rejection of the prosecutor's submission in favour of a declaration that the applicant was convicted of serious violent offences. The sentencing judge's conclusion that this was "an exceptionally serious example of a home invasion and violence" reveals that this is not a case, like *R v Hill* [2012] QCA 59 (see at [36]), where such a submission could readily be rejected on the different ground that the particular offence was not "beyond the norm" for offences of like nature. The applicant's argument overlooked the benefit which the applicant's plea afforded him in avoiding a requirement to serve 80 per cent of the term of imprisonment. On the other hand, it might be contended that the making of the declaration could have resulted in a sentence which differed in other respects. In view of my conclusion that the sentence was in any event not manifestly excessive it is unnecessary to decide whether this point should be taken into account in support of the sentence.

Proposed order

[24] I would refuse the application.

[25] **MULLINS J:** I agree with Fraser JA.