SUPREME COURT OF QUEENSLAND

CITATION:	*R v NQ* [2013] QCA 402
PARTIES:	**R** **v** **NQ** (applicant)
FILE NO/S:	CA No 58 of 2013 SC No 626 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2013
JUDGES:	Margaret McMurdo P, Morrison JA and Mullins 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 against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty in December 2012 to manslaughter (count 1), and in May 2009 to improperly interfering with a corpse (count 2) – where the applicant was sentenced to nine years and nine months imprisonment on count 1 and that conviction was declared to be a conviction for a serious violent offence – where the applicant was sentenced to two years concurrent imprisonment on count 2 – where the applicant contends that the learned sentencing judge erred by not stating that account was taken of the plea of guilty, as required by s 13(3) of the *Penalties and Sentences Act* 1992 (Qld) – where the primary judge directly referred to the applicant's pleas of guilty but did not use the precise terms of s 13(3) – whether the primary judge complied with s 13(3) of the *Penalties and Sentences Act* CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the statement of facts tendered by consent at sentence referred to statements made by the

applicant in his police interview on 30 October 2009, which had previously been ruled inadmissible – where the applicant entered free and informed pleas of guilty prior to sentence – where, at sentence, the applicant was represented by counsel instructed by solicitors – where the statement of facts was tendered by consent and the applicant's counsel confirmed that it was not disputed and was the truth – whether the learned sentencing judge erred in receiving or acting on the statement of facts insofar as it referred to the applicant's statements to police on 30 October 2009

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where a co-offender of the applicant was sentenced to nine years imprisonment for the offence of manslaughter and one year concurrent imprisonment for the offence of interfering with a corpse – where, but for the co-offender's cooperation, she would have been sentenced to 12 years imprisonment – where the sentencing court exercised its discretion under s 161B(3) not to make a serious violent offence declaration in relation to the co-offender's conviction for manslaughter – where the applicant carried out an extended violent attack upon the deceased with a baseball bat, while the co-offender led the deceased to that attack – where the co-offender cooperated with authorities earlier, more extensively and more productively than the applicant – whether the learned sentencing judge erred in the application of the parity principle

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant was sentenced to more than 10 years imprisonment for a serious violent offence – whether the learned sentencing judge erred in his approach to the declaration that the applicant had been convicted of a serious violent offence, pursuant to s 161B(1) of the *Penalties and Sentences Act*

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the attack leading to the death was premeditated and carried into effect by a group – where the applicant repeatedly bashed the deceased with a baseball bat – where a co-offender used a ligature to choke the deceased – where fabric sprayed with ether was also used to overcome resistance from the victim – where the applicant was 29 years old – where the applicant had a criminal history that included offences of violence – where the applicant pleaded guilty – where the applicant cooperated with police pursuant to s 13A of the *Penalties and Sentences Act* – where the sentencing judge determined that the appropriate sentence before taking

into account the s 13A cooperation, and bearing in mind the guilty plea, was 14 years imprisonment – where the sentencing judge allowed a discount of two years for the s 13A cooperation – whether the sentence imposed is manifestly excessive

Criminal Code 1899 (Qld), s 8
Criminal Law Amendment Act 1894 (Qld), s 10
Penalties and Sentences Act 1992 (Qld), s 13, s 13A, s 15, Pt 9A, s 161B(1), s 161B(3)

Pascoe v Little (1978) 24 ACTR 21, cited
R v Baker; *R v Bates* [2002] QCA 174, considered
R v Corry [2006] QCA 203, considered
R v Dwyer [2008] QCA 117, cited
R v Ianculescu [2000] 2 Qd R 521; [1999] QCA 439, cited
R v Jervis [1993] 1 Qd R 643, considered
R v Laracy [2007] 180 A Crim R 19; [2007] VSC 19, cited
R v Liddle [2006] QCA 45, cited
R v Mallon [1997] QCA 58, cited
R v Mardlin [2004] WASC 73, cited
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited
R v NP; Ex parte Attorney-General (Qld) [2013] 1 Qd R 368; [2012] QCA 116, considered
R v N, unreported, Supreme Court of Queensland, Indictment No 505 of 2011, 28 November 2011, considered
R v Plotzki [1972] Qd R 379, cited
R v Smith [1959] 2 QB 35; [1959] 43 Cr App Rep 121, considered
R v Warner (1988) 48 SASR 79, considered
R v WAW [2013] QCA 22, considered
R v Webber (2000) 114 A Crim R 381; [2000] QCA 316, cited
R v Welham & Martin [2012] QCA 103, considered

COUNSEL: P J Callaghan SC, with F Lubett, for the applicant
P J McCarthy for the respondent

SOLICITORS: Boe Williams Anderson for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant pleaded guilty on 19 December 2012 to manslaughter (count 1) and to improperly interfering with the deceased's corpse (count 2). Both offences occurred on 25 May 2009. He was sentenced to nine years and nine months imprisonment on count 1 and his conviction on that offence was declared to be a conviction of a serious violent offence. He was sentenced to two years concurrent imprisonment on count 2. Pre-sentence custody of 194 days was declared to be time already served under the sentence. He has applied for leave to appeal against his sentence contending:

> "1. The learned sentencing judge erred by not stating that account was taken of the plea of guilty as required by s.13 *Penalties and Sentences Act 1992* (Qld).

2. The learned sentencing judge erred by allowing regard to be had to the applicant's interview of 30 October 2009 notwithstanding its exclusion pursuant to s.10 *Criminal Law Amendment Act 1894* (Qld).

3. The learned sentencing judge erred in the application of the parity principle.

4. The learned sentencing judge erred in his approach to the declaration that the applicant had been convicted of a serious violent offence.

5. The sentence imposed is manifestly excessive."

[2] The Court is grateful for the assistance of Mr P J Callaghan SC and Ms Lubett instructed by Boe Williams Anderson who appeared pro bono for the applicant.

[3] The circumstances of the applicant's offending and the relevant background to this application are comprehensively set out in Morrison JA's reasons so that my reasons can be more economically expressed than otherwise.

Section 13 *Penalties and Sentences Act*

[4] The applicant submits in his first ground of appeal that the judge failed to comply with s 13(3) *Penalties and Sentences Act* and that this failure is an indication tending to confirm the errors alleged in grounds 3, 4 and 5.

[5] In considering that contention, the first question is whether the judge failed to comply with s 13 which relevantly provides:

"**13 Guilty plea to be taken into account**

(1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court—

(a) must take the guilty plea into account; and

(b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.

(2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender—

(a) pleaded guilty; or

(b) informed the relevant law enforcement agency of his or her intention to plead guilty.

(3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.

(4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court—

(a) that fact; and

(b) its reasons for not reducing the sentence.

> (5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made."

[6] In his sentencing remarks, the judge twice directly referred to the applicant's pleas of guilty.[1] Before listing other mitigating features, his Honour also stated: "Your counsel has rightly emphasised your pleas of guilty".[2] His Honour further noted: "Your pleas reflect co-operation in the administration of justice. You offered to plead guilty to manslaughter on the 14th of November 2012."[3]

[7] The only rational inference from the text and context of those statements is that the judge stated in open court that he was taking into account the applicant's guilty plea in determining the sentence which he then imposed. Although his Honour did not rehearse the precise terms of s 13(3), he complied with the subsection. It follows that this ground of appeal is without substance.

The reference in the statement of facts tendered at sentence to the applicant's statements in a police interview which was earlier excluded as evidence under s 10 *Criminal Law Amendment Act* 1894 (Qld).

[8] The statement of facts tendered by consent at sentence (ex 2) on 28 February 2013 referred to statements made by the applicant in his police interview on 30 October 2009. In late 2011, that interview was ruled involuntary as it was preceded by an inducement: see *R v N*[4] and *R v NP; ex parte A-G (Qld)*.[5] The applicant contends that the sentencing court should not have received or acted on ex 2 insofar as it referred to the applicant's statements to police on 30 October 2009; to do so was contrary to s 10 *Criminal Law Amendment Act*.

[9] That section provides:

> "**10 Confessions**
>
> No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown."

[10] It is accepted that prior to the applicant's sentence in late 2012 he entered a free and informed plea of guilty to both counts. He was represented by counsel who was instructed by solicitors. During the sentencing proceedings, ex 2 was tendered by consent. The sentencing judge specifically asked defence counsel if the facts were agreed and counsel responded: "They're not disputed."[6] Shortly afterwards, the judge again enquired whether the sentence could proceed on the basis that the account in ex 2 was the truth and defence counsel responded "Yes".[7] In agreeing to the tendering of ex 2, the applicant was admitting the truth of its contents, including

---

1 AB 47 and 49.
2 AB 50.
3 AB 51.
4 Unreported, Supreme Court of Queensland, Dick AJ, Indictment No 505 of 2011, 28 November 2011.
5 [2012] QCA 116.
6 T1-7.54 (AB 17).
7 T1-8.14 (AB 18).

the statements it contained as to the 30 October 2009 interview. Receipt of ex 2 into evidence at sentence was permissible under s 15 *Penalties and Sentences Act*. Its tender was not a tender into evidence of the confession excluded in 2011 under s 10 *Criminal Law Amendment Act*. It was a fresh set of admissions. It is clear that, in making them, the applicant was not acting under any inducement. He had made a free and informed decision to conduct the sentencing proceedings by admitting the matters in ex 2. Section 10 had no application. This conclusion is consistent with the approach taken in *R v Smith*[8] cited with approval in *R v Plotzki*.[9]

[11] This ground of appeal is without substance.

Does the sentence offend the parity principle, was it manifestly excessive or was there error in making the declaration of a conviction of a serious violent offence?

[12] Grounds 3, 4 and 5 are inter-linked and are conveniently dealt with together. The applicant contends that the judge did not give proper weight to the parity principle, erred in declaring that the applicant had been convicted of a serious violent offence and that the sentence was manifestly excessive.

[13] The female co-offender was ultimately sentenced to nine years imprisonment for the offence of manslaughter and one year concurrent imprisonment for the offence of interfering with a corpse.[10] But for her s 13A cooperation, she would have been sentenced to 12 years imprisonment. There were important distinctions to be made between the present applicant and the female co-offender. He carried out an extended violent attack upon the deceased with a baseball bat. Of even more significance, the female co-offender's cooperation with the authorities was much earlier, much more extensive and much more productive than his. These considerations provided very sound reasons for sentencing the female co-offender to a noticeably lesser sentence.

[14] The sentencing judge determined that the appropriate sentence for the applicant before taking into account his s 13A cooperation and bearing in mind his plea of guilty was 14 years imprisonment. For the following reasons, I consider that conclusion was open although it was at the top end of the appropriate range. This was a serious instance of manslaughter, although perhaps not in the most serious category. The attack leading to the death was premeditated and carried into effect by a group. The applicant repeatedly bashed the victim with a baseball bat. The male co-offender used a ligature to choke the deceased. Fabric sprayed with an ether-type substance was also used to overcome resistance from the victim. The applicant was a relatively mature man aged 29 years. He had some previous recorded brushes with the law, including for violence. The sentence of 14 years imprisonment was consistent with Keane JA's observations in *R v Corry*[11] that sentences of 15 to 18 years imprisonment are within range for the most serious cases of manslaughter, even with a guilty plea. It is also consistent with the sentences of 17 and a half years imprisonment imposed in *Corry* and the 18 years imprisonment imposed in *R v Bates and Baker*,[12] which were all even more serious examples of manslaughter than the present case. It is also supported by *R v Jervis*[13] where a 24 year old woman with no criminal history

---

8 [1959] 43 Cr App Rep 121.
9 [1972] Qd R 379, 385.
10 *R v W*, unreported, Supreme Court of Queensland, Daubney J, Indictment No 456 of 2012, 10 September 2012.
11 [2006] QCA 203, [25].
12 [2002] QCA 174.
13 [1993] 1 Qd R 643, 656-657.

and of prior good character was sentenced to 12 years imprisonment after being convicted of manslaughter at a murder trial. As Jervis had spent 16 months in pre-sentence custody which could not be declared as part of the sentence and as she was sentenced before the introduction of Pt 9A *Penalties and Sentences Act*, her sentence was effectively one of 14 years and eight months imprisonment.

[15] The sentencing judge then allowed a discount of two years imprisonment as credit for the applicant's s 13A cooperation. This was entirely appropriate moderation in light of the nature of the cooperation here. This brought his sentence to 12 years imprisonment, a sentence which must be the subject of a declaration of a conviction of a serious violent offence under s 161B(1) *Penalties and Sentences Act*. By contrast, once the female co-offender's s 13A cooperation was considered, her sentence was properly reduced to nine years imprisonment. The sentencing court exercised its discretion not to make a declaration of a conviction of a serious violent offence under s 161B(3).

[16] The sentencing judge next properly took into account the applicant's 22 months of pre-sentence custody which could not be declared part of the sentence. His Honour rightly treated this as a 27 month period of pre-sentence custody as, had it in fact been part of the notional 12 year sentence, the applicant would have been eligible to apply for parole after serving 80 per cent of it. This reduced the applicant's effective 12 year sentence to nine years and nine months so that the judge was required to exercise his discretion under s 161B(3)(b) and determine whether to declare the manslaughter conviction to be a conviction of a serious violent offence. Understandably, his Honour considered that he should make that declaration as the effective sentence imposed on the applicant was one of 12 years imprisonment where, under s 161B(1), a declaration of a conviction of a serious violent offence was mandatory. Defence counsel at sentence understandably conceded that this was the proper approach.[14] The judge did not err in exercising his discretion under s 161B(3) to declare the manslaughter conviction to be of a conviction of a serious violent offence.

[17] The applicant has not demonstrated that the sentence was manifestly excessive, that it offended the parity principle or that the sentencing judge erred in making a declaration of a conviction of a serious violent offence.

[18] For these reasons I would refuse the application for leave to appeal against sentence. It follows that it is not necessary to have regard to the affidavit material filed by the applicant which would become relevant only if this Court were to grant the application, allow the appeal and re-sentence him.

[19] **MORRISON JA:** This is an application for leave to appeal against sentence. The applicant pleaded guilty on 19 December 2012 to the offences of manslaughter and interfering with a corpse. On 28 February 2013 he was sentenced to concurrent terms of nine years and nine months in respect of the manslaughter offence, with that sentence attracting a serious violent offence declaration, and two years in respect of the offence of interfering with a corpse.

Circumstances of the offences

[20] The circumstances in which the offences occurred are conveniently summarised in the applicant's written submissions, particularly paragraphs 3-13. The respondent

---

[14] T1-30 – T1-31.

accepts those paragraphs as accurate. It is therefore convenient to set them out as follows:

> "3. The offences were committed at the behest of [the male co-accused] who was upset because the deceased, … , was in a sexual relationship with [the male co-accused's] former girlfriend. [The male co-accused], the applicant and [the female co-accused] were all drug users.
>
> 4. [The male co-accused] was known to have uttered threats to find and kill the deceased. A month before the killing, at the former girlfriend's house, he hit the deceased in the head with a steel pole, causing injury. The deceased then lodged a complaint with the police. The deceased was seriously fearful for his own safety, terrified that [the male co-accused] would come after him.
>
> 5. Sometime before 25 May 2009, [the male co-accused] told [the female co-accused] that he wanted to 'do in' the deceased because he had 'stolen (his) woman', and asked whether she and the applicant would help. He offered drugs and money.
>
> 6. On 25 May 2009, the applicant and [the female co-accused] had been using morphine. They also consumed alcohol.
>
> 7. [The male co-accused] went to [the female co-accused's] house and told her that he and the applicant had ascertained that the deceased was in town (Maryborough). [The male co-accused] urged [the female co-accused] to find out where he actually was.
>
> 8. Earlier that day [the male co-accused] had purchased a spray containing ether. He showed it to the applicant and [the female co-accused]. [The male co-accused] said that he would spray the deceased's face and beat him to death. [The male co-accused] had asked for power leads, presumably to restrain the deceased, and strips of material. He put a doona on the washing line outside [the female co-accused's] house in order to block any view from the neighbour's house.
>
> 9. [The female co-accused] then arranged to meet the deceased at the Centrelink office. Whilst there, he told her that he was in fear for his life, because of [the male co-accused]. The deceased then drove [the female co-accused] and her son back to her house, where the applicant and [the male co-accused] were waiting.
>
> 10. When the deceased walked into the lounge room at the house, the applicant came out of the bedroom and hit him on the head with a baseball bat. The deceased pushed the applicant away. The applicant called for help from [the

male co-accused], who came out of the bathroom and put something around the deceased's neck, choking him. The applicant continued to deliver blows to the deceased's head with the baseball bat. A pillowslip impregnated with the spray was placed over the deceased's face and he passed out. He was tied up. [The male co-accused] then sprayed the spray directly into the deceased's face.

11. [The male co-accused] and the applicant then drank some rum. [The male co-accused] checked the pulse of the deceased and reported that he was dead. [The male co-accused] retrieved his own vehicle. The deceased was wrapped in a doona and placed in the boot of the deceased's own car. They waited until it was dark. [The male co-accused] took the deceased's mobile telephone, and had [the female co-accused] answer a call from [the male co-accused's] former girlfriend, in which [the female co-accused] told her that the deceased had moved on and wanted nothing to do with her anymore.

12. When it was dark, [the male co-accused] and the applicant drove the deceased's vehicle, and [the female co-accused] drove [the male co-accused's] car, to a road off a highway. [The male co-accused] asked [the female co-accused] to cut off the deceased's penis because he was a rapist or paedophile. [The female co-accused] did so; claiming later she was 'off her face pretty bad on morphine'.

13. They all returned to [the female co-accused's] house. The applicant drove [the male co-accused's] vehicle away, and [the male co-accused] drove the deceased's vehicle (containing the body). The applicant and [the male co-accused] disposed of the body together. The body has never been recovered."[15]

Events subsequent to the offences

[21] The applicant was first interviewed by police on 26 August 2009, at which time he denied any knowledge as to the fate of the deceased. He was interviewed subsequently on 30 October 2009 and made a number of confessions about his involvement in the offences. That interview was subsequently ruled to be inadmissible, having been induced by police statements prior to the interview.[16]

[22] The female co-accused was also interviewed in August 2009 and revealed some, but not all of the details of the offences.[17] At a second interview, on 6 October 2009, she made comprehensive admissions as to the events of 29 May 2009. Finally, on 6 September 2012 she provided a formal statement implicating both the male co-accused and the applicant.

---

15 Internal references to the appeal record book omitted.

16 *R v N*, unreported, Dick AJ, SC No 505 of 2011, 28 November 2011. The Attorney-General referred certain questions to this Court from that decision, under s 668A of the *Criminal Code* 1899 (Qld): *R v NP; ex parte A-G (Qld)* [2012] QCA 116. The questions and answers are immaterial to the present appeal.

17 *R v WAW* [2013] QCA 22, at [6].

[23] On 14 November 2012, the applicant, whilst still charged with murder, indicated a willingness to plead guilty to manslaughter. He was arraigned on the murder charge on 19 December 2012, to which he entered a plea of not guilty, but acknowledged that he was guilty of manslaughter. The basis of the plea of guilty to manslaughter was that he, the female co-accused and the male co-accused had a common plan to prosecute an unlawful purpose, which was to assault the deceased in a serious way, and an unlawful killing was a probable consequence of the execution of that plan.[18]

[24] On 22 January 2013, the applicant indicated that he wished to show police the location of the body. On 6 February 2013, he directed police to an area near Beerburrum. Notwithstanding an extensive search by police and SES volunteers, no sign of the deceased's body was ever found.

[25] On 11 February 2013, the applicant provided a statement and offered to give evidence against the male co-accused, who was at that stage awaiting trial for murder.

Proceedings against the female co-accused

[26] The female co-accused entered pleas of guilty to manslaughter and interfering with a corpse. She was sentenced to nine years imprisonment for the manslaughter, and one year (to be served concurrently), for the offence of interference with a corpse. That sentence was affirmed on appeal.[19]

The sentencing process

[27] The learned sentencing judge also presided on the application for leave to appeal against sentence in the female co-accused's matter.[20] The decision in that case as handed down on 22 February 2013, and the sentence hearing in the applicant's case occurred six days later on 28 February 2013.

[28] It is plain from the sentencing transcript that his Honour was well aware of the link between the two cases, and that it was still fresh in his mind.[21]

[29] The interview made on 30 October 2009 was referred to, and the primary judge was informed that it had been ruled to be involuntary because of an inducement. That led to an exchange between the primary judge and counsel for each side in relation to a statement of facts that had been tendered. The exchange led to confirmation by counsel for the applicant[22] that he could proceed upon the basis that the statements were the truth.[23] The statement of facts became exhibit 2.

[30] The learned sentencing judge was referred to a statement given by the applicant on 11 February 2013, and an offer to give evidence against the male co-accused. The inconsistencies between that statement and the interview given on 30 October 2009 were highlighted.[24] Having referred to those inconsistencies, his Honour was informed that the prosecutor had formed the view that the applicant was not a reliable witness and would not be called to give evidence in the trial against the male co-accused,

---

18 See s 8 of the *Criminal Code*.
19 *R v WAW* [2013] QCA 22.
20 *R v WAW* [2013] QCA 22.
21 AB 12-13.
22 Counsel on that occasion was different from the counsel who appeared on this application.
23 AB 17-18.
24 AB 20.

then due to start on 5 March 2013. The prosecutor also identified the difficulties presented by the inconsistencies between the recent statement and the earlier statement in 2009. They included: that it only served to undermine the evidence of the female co-accused (who had agreed to give evidence against the male co-accused); it opened up a potential defence of self-defence not raised at any other time; and the provision of the statement could be seen as being driven out of self-interest only, and for the purpose of getting the sentence reduced.

[31] The learned sentencing judge also referred to this Court's decision in relation to the female co-accused, where the 12 year indicative sentence was not regarded as manifestly excessive.[25] His Honour noted that the 12 year indicative sentence in that case was "after allowance for the plea".[26]

[32] The prosecutor also addressed the primary judge on the issues of how much time in terms of pre-sentence custody should be taken into account. A total of 194 days (about six and a half months) could be declared as time served, but the 660 days (about one year and nine months) period between 3 March 2010 and 23 December 2011 could not be declared – rather it could only be taken into account. Thus, a total of approximately 27 months represented time in custody to be taken into account.

[33] The prosecutor also addressed on the basis that the sentence would attract a serious violent offence declaration, resulting in the necessity for the applicant to serve 80 per cent of his sentence.

[34] Counsel who appeared for the applicant on the sentencing expressly conceded that a serious violent offence declaration was appropriate because if the sentence got below 10 years it would only have done so after taking into account time served.[27]

[35] As to the interview in October 2009, which had been ruled inadmissible on a trial, counsel for the applicant expressly conceded that it was "admissible material" for the sentencing judge on the question of sentence.[28] The applicant's counsel went further, however, saying that the October 2009 statement "… can be taken into account as some co-operation on the charge that is now proceeding with (sic) in that he made admissions at an early time".[29]

[36] There was an exchange between counsel for the applicant and the primary judge on the question of parity, and the fact that the applicant was the one who had actually committed the physical violence, unlike the female co-accused. Counsel accepted that it was open to impose a higher sentence than that imposed on the female co-accused because of that fact.[30] On that topic the primary judge then referred to the fact that the male co-accused would "have to get a much higher term than will be imposed on your client", because "… he won't get the benefit, of course, of the guilty plea".[31]

[37] On the question of how much benefit the applicant should receive because of co-operation, counsel for the applicant accepted that in order to warrant a reduction

---

25 *R v WAW* [2013] QCA 22 at [36].
26 AB 23.
27 AB 27-28.
28 AB 30.
29 AB 30, T 1-20 ll 37-40.
30 AB 34.
31 AB 34, T 1-24 ll 27-29.

the assistance offered had to be of worth.[32] Counsel went on to have this exchange with the primary judge:

> "[COUNSEL]: I don't seek and don't suggest that he should get anywhere near the benefit that [the female co-accused] received.
>
> [PRIMARY JUDGE]: You don't – say that again?
>
> [COUNSEL]: I don't suggest in my submissions that he should receive anything like the benefit that [the female co-accused] received.
>
> [PRIMARY JUDGE]: Well, you knock off a couple of years.
>
> [COUNSEL]: Yes, but maintain the serious violent offence declaration."[33]

[38] On the question of the appropriate sentence, counsel for the applicant said: "… what I ultimately contend for is a sentence that would see him serving – putting aside presentence custody – some 7.2 to eight years' imprisonment …".[34] That was putting aside the 27 months pre-sentence custody. There then followed this exchange:

> "[PRIMARY JUDGE]: Mmm. You say an indicative sentence of 10 to 12 years would be reduced to nine to 10 years?
>
> [COUNSEL]: Yes. Even that nine to 10 would see him serving a minimum period of some 7.2 to eight years' imprisonment.
>
> …
>
> [COUNSEL]: Which is significantly different from the minimum 4.5 years that [the female co-accused] is liable to serve. And, in my submission, that distinction in the amount of time required to be served is almost double makes adequate allowance for their differing roles and their differing levels of cooperation both generally and pursuant to section 13A. He will serve nearly twice as long in gaol."[35]

Ground 1 – Error in referring to the October record of interview

[39] The first contention by the applicant is that the learned primary judge fell into error by having regard to what was said by the applicant in the record of interview of 30 October 2009, which had been ruled inadmissible by Dick AJ. The submission was made in reliance on s 10 of the *Criminal Law Amendment Act* 1894 (Qld) which provides:

> "**10 Confessions**
>
> No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat

---

32 AB 40. That concession was appropriate: *R v Ianculescu* [2000] 2 Qd R 521 at 522-523; *R v Webber* (2000) 114 A Crim Rep 381 at 382.

33 AB 40.

34 AB 41.

35 AB 41.

> or promise by some person in authority, and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown."

[40] The applicant's contention was that the statement of facts (exhibit 2) contained three paragraphs at the end[36] which referred to things said in the interview of 30 October 2009. Thus, it was said, that part of the agreed statement of facts amounted to the tendering in evidence of a confession contrary to s 10 of the *Criminal Law Amendment Act* 1894.

[41] There can be little doubt that the record of interview made on 30 October 2009 could not have been tendered into evidence. Acting Justice Dick held that the record of interview fell within s 10 of the Act and was inadmissible at the trial. I accept that if that record of interview had been tendered at the sentencing proceeding, that also would have been caught by s 10 of the Act.

[42] However, that is not what occurred. Exhibit 2 was tendered on the basis that it was an agreed statement of true facts.[37] Evidently much of it was taken from evidence provided by the female co-accused, but nothing turns on that. Self-evidently the document was produced at a much later time than the record of interview on 30 October 2009. Its preparation was expressly on the basis of the plea of guilty to the offence of manslaughter, which was entered on 19 December 2012. Thus, the statement of facts post-dates the impugned record of interview by some three years.

[43] Insofar as the statement of facts refers to things said in the interview on 30 October 2009, it does not consist of the entirety of the record of interview, nor is it recorded verbatim. In that sense, the part of exhibit 2 which refers to the 30 October 2009 record of interview consists of an edited synopsis of some parts of that record of interview.

[44] More significantly that part of exhibit 2 was tendered for forensic advantage by both the prosecutor and counsel for the applicant. In the prosecutor's case, it was to demonstrate that the inconsistencies between that material and the accepted facts meant that the applicant was an unreliable witness who would not be called in the trial against the male co-accused. Therefore, the benefit that the applicant sought under s 13A of the *Penalties and Sentences Act* 1992 (Qld) should be, at least, discounted because the assistance was of no value.

[45] From the point of view of counsel for the applicant, the forensic advantage was that it could be taken into account as showing co-operation on the manslaughter charge, and that he made an admission of guilt at an early time.[38]

[46] Further, it is quite clear that counsel for the applicant was well aware that the record of interview had been ruled inadmissible by Dick AJ. Notwithstanding that reference was made to that interview in exhibit 2, counsel for the applicant expressly accepted that it was admissible material before the sentencing judge.[39]

[47] The applicant's contention was that the confession (recorded in the 30 October record of interview) was received in evidence as part of the agreed statement of

---

36 AB 58-59.
37 AB 17-18.
38 AB 30, T 1-20 l 38.
39 AB 30.

facts, exhibit 2. As it was put in oral submissions: the agreed statement of facts "can't contain the [excluded] confession"[40], the confession was "part of the agreed statement of facts"[41], and "the [prohibited] confession was received" as part of exhibit 2.[42] However, for the reasons that follow, in my opinion exhibit 2 was admissible, even though it incorporated references to the record of interview.

[48] When the interview was held on 30 October 2009, the threat or inducement which led to it being held inadmissible was that the applicant might be charged with murder, but if he co-operated he would possibly be charged with manslaughter. Since the agreed statement of facts (exhibit 2) expressly proceeds upon the basis of an already accepted plea to manslaughter, whatever the inducement was in respect of the record of interview in October 2009 was no longer operative. Put simply, the plea to manslaughter had been accepted by the time the agreed statement of facts (exhibit 2) was tendered before the sentencing judge.

[49] Where a statement has been induced by a threat or promise and thereby has been rendered inadmissible, and a second statement is made, if the threat or promise under which the first statement was made still persists when the second statement is made, then the second statement is also inadmissible. However, if the circumstances existing at the time of the second statement are such that, taken with the time period between the two statements, it can be said that the original threat or inducement has been dissipated, then the second statement can be admissible as a voluntary statement. So much appears in *R v Smith*.[43] There the court[44] considered a situation where one admission was made at 10.00 pm one night under a threat or inducement, and a second statement was made the next morning before a different investigator and after the usual caution was given. The issue was whether the second statement was still under the influence of the threat or inducement of the first. The court stated:[45]

> "The court thinks that the principle to be deduced from the cases is really this: that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time-limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.
>
> …
>
> This court, however, is of the clear opinion that the second statement was admissible. No doubt, the opening reference to what it was said he had said to the regimental sergeant-major put the appellant in a difficulty. No doubt it was introduced by Sergeant Ellis in the hope that thereby he might get a continued confession; but it is quite clear that the effect of any original inducement or threat under which the first statement was made had been dissipated. Quite apart from the fact that the caution was given and given twice, some nine hours had

---

40 Appeal transcript 1-13, line 21.
41 Appeal transcript 1-13, line 46.
42 Appeal transcript 1-14, line 24.
43 *R v Smith* [1959] 2 QB 35; (1959) 43 Cr App Rep 121.
44 Parker LCJ, Streatfield and Hinchcliffe JJ.
45 *R v Smith* [1959] 2 QB 35 at 41; (1959) 43 Cr App Rep 121 at 128-129.

> elapsed and the whole circumstances had changed. The parade had ended. The rest of the company had gone to bed. The effect of the threat or the inducement was spent. On those grounds this court has come to the conclusion that the oral and written statements made to Sergeant Ellis were clearly admissible."

[50] *R v Smith* has been followed on this point in other courts in Australia,[46] and the line of reasoning was accepted in Queensland in *R v Plotzki*,[47] though in that case a different result was reached on the facts.

[51] *R v Smith* was adopted by O'Loughlin J in *R v Warner*.[48] In that case W gave evidence on the voir dire that he had furnished personal details and signed a false record of interview invented by the interviewing police officers, only because they had threatened to charge his wife as a co-accused, to oppose bail and to have his children taken by welfare if he did not admit involvement. Some two months later W was spoken to by a police officer, primarily in order to ascertain the identity of an accomplice. By that time the wife and child had since moved to another state. Justice O'Loughlin held that the situation was covered by *R v Smith* on the basis that the two month period, and the fact that the wife and child had moved to another state, meant that the threat had "dissipated" or been "spent".

[52] In my opinion, the agreed statement of facts falls into the same category as a subsequent voluntary statement. That is so, even if it incorporates references to a previous statement that would, itself, be inadmissible. I consider it to be the same as if an admission had been repeated, on the second occasion under no inducement.

[53] The agreed statement of facts (exhibit 2) was not a confession which had been induced by any threat or inducement. That threat or inducement was made some three years prior to the tendering of exhibit 2, and the threat or inducement which had affected the record of interview had expired.

[54] In my respectful opinion the applicant's submission also confronts difficulties created by the forensic use made of exhibit 2 by the applicant's own counsel. Given the acceptance of the plea of manslaughter, the time that had passed since the original record of interview in October 2009, and the fact that this court should accept that counsel was acting on instructions when exhibit 2 was prepared and used before the sentencing judge. A deliberate decision was made to make forensic use of parts of the record of interview, to gain advantage for the applicant.

[55] For the reasons above, this ground has no merit.

Ground 2 – Error by not stating that account was taken of the guilty plea

[56] The basis of this contention is s 13(3) of the *Penalties and Sentences Act* 1992. Section 13 relates to the imposition of a sentence on an offender who has pleaded guilty. Subsection (3) provides: "When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed."

---

46 *Pascoe v Little* (1978) 24 ACTR 21 at p 23; *R v Mardlin* [2004] WASC 73 at [49]; and *R v Laracy* [2007] VSC 19 at [109].

47 *R v Plotzki* [1972] Qd R 379 at 384-385.

48 *R v Warner* (1988) 48 SASR 79 at 89.

[57] The applicant contends that at no stage did the learned sentencing judge state that the guilty plea was being taken into account in determining the sentence.

[58] It is true to say that the learned primary judge did not use words which fit precisely within s 13(3). However, in my opinion s 13(3) does not require that those precise words be used. All that is required is that the court "state in open court" that it took account of the guilty plea. In my opinion the words by which such a statement might be made, could take a variety of forms. There is no point in exploring the various examples that might be given, but rather attention should be focussed on what the sentencing judge actually says in each case. That is appropriate because, where s 13(3) is not followed, this Court will examine the sentence more closely, since it will not clearly appear that the plea has, in fact, been taken into account.[49]

[59] The opening words of the sentencing judge's remarks commence: "You have pleaded guilty to two offences…".[50] Then, after reciting the essential facts his Honour turned to the question of pre-sentence custody to be taken into account, and the serious violent offence declaration. He then continued: "Your counsel has **rightly** emphasised your pleas of guilty …".[51] Finally, his Honour said: "Your pleas reflect co-operation in the administration of justice."[52]

[60] In my opinion those three references plainly state that the court was taking into account the guilty plea. The whole sentence proceeds upon the basis that it is on a plea of guilty. It is difficult to understand the reference to the pleas of guilty having been "rightly emphasised" as meaning anything other than that those pleas were being taken into account. Why else would they be "rightly" emphasised? Finally, to state that the guilty pleas "reflect co-operation in the administration of justice" is to plainly refer to the benefit an offender gets from a guilty plea.

[61] Those comments can also be seen in the light of the many references, made in the course of submissions on the sentencing, to the plea of guilty being of significance. Thus, when referring to the male co-accused, the primary judge said that he would have to get "a much higher term than will be imposed on your client" because "he won't get the benefit, of course, of the guilty plea."[53]

[62] In my respectful opinion there is nothing of substance in this ground.

Grounds 3 and 4 – Error in the application of the parity principle and declaration of a serious violent offence

[63] These grounds were argued together on the basis that the declaration as to a serious violent offence created the lack of parity between the sentence imposed on the applicant, and that imposed on the female co-accused. It will be recalled that the female co-accused was sentenced to nine years imprisonment for manslaughter, and one year to be served (concurrently) for interference with a corpse. No serious violent offence declaration was made. On the other hand, the applicant was sentenced to nine years and nine months for manslaughter, that sentence attracting a serious violent offence declaration, and two years for interfering with a corpse; to be served concurrently.

---

49 *R v Mallon* [1997] QCA 58; *R v Liddle* [2006] QCA 45 at [18].
50 AB 47.
51 AB 50 (emphasis added).
52 AB 51.
53 AB 34.

[64] The applicant argued that the facts showed the female co-accused's culpability was not so dissimilar from that of the applicant. I do not agree. Each of them was involved in the planning of the attack on the deceased, though with different roles. The female co-accused was to lure the deceased to the male co-accused's house, where the applicant and the male co-accused proposed to attack him. The applicant and the male co-accused spoke on the day about "hurting [the deceased] very badly". Once the deceased had been lured to the house, it was the applicant who attacked him first, hitting him in the head with a baseball bat, and then continuing to hit him once the male co-accused had commenced to choke the deceased. The applicant continued to hit the deceased with a baseball bat until his head was "busted open". Thereafter the applicant participated in disposing of the deceased's body, being actively involved at all stages.

[65] By contrast, whilst the female co-accused lured the deceased to the house, she took no part in the physical attack upon him. True it is that she was there during that attack, and apparently did nothing to prevent it, but that is hardly surprising given the ferocity of the attack by both the applicant and the male co-accused and the weapons used. Thereafter she drove the male co-accused's vehicle when they took the body away from the house. She also participated in the act of cutting off the deceased's penis. Once the three of them had returned to her house, she did not participate thereafter in the disposal of the body.

[66] The female co-accused revealed some but not all of the details of the offence in August 2009. However, by 6 October 2009 she had made a comprehensive admission as to the events which had occurred. It was by her confession that sufficient evidence was obtained, to not only implicate the applicant and the male co-accused, but to proceed against them with some confidence.

[67] The foregoing is sufficient to demonstrate that the applicant's involvement in the events were quite distinct from those of the female co-accused, such that it could not seriously be argued that the different sentences reflected a lack of parity.

[68] In terms of whether a serious violent offence declaration should have been made, the applicant did not contend that there was no discretion to do so even where the sentence was below 10 years. Instead, it was contended that both the prosecutor and counsel for the applicant had simply fallen in line with a comment by the sentencing judge that: "… the philosophy would have to require the addition of a serious violent offence declaration, wouldn't it?"[54] That comment was made in the context that the sentence would be taken below 10 years.

[69] I am not convinced by this attack on the sentencing process. Counsel for the applicant agreed with the proposition that where the sentence was taken below the 10 year mark because of the amount of pre-sentence custody to be taken into account, a serious violent offence declaration could still be made.[55] It was by reference to that that counsel said:

> "Just on that last point, I think I concede as much in my written submissions, were the sentence to go below the 10 years, it would have only got there after taking various matters into account."[56]

---

54 AB 27.
55 AB 27-28.
56 AB 28.

[70] The submissions referred to were those given in closed court, and are dealt with in the confidential reasons.

[71] The submissions made proceeded upon the basis that even if a sentence of nine years were imposed as a result of the ultimate assessment, taking all matters in to account, nonetheless a serious violent offence declaration would be appropriate. In my opinion, this Court should not ignore the fact that the applicant's case was conducted on the basis of such a concession. Further, in my view that concession was properly made, given the extremely violent nature of the applicant's participation in the attack.

[72] Once the clear distinction between the applicant's violent participation in the physical attack leading to the death of their victim, and the female co-accused's lack of participation in that physical attack, is kept in mind, I do not consider that the difference in the sentences would give rise to a justifiable sense of grievance.[57]

[73] I do not consider that this ground could succeed.

Ground 5 – Sentence manifestly excessive?

[74] Part of the applicant's contention was that one could not tell from the sentencing reasons what the start point for the sentence was. This submission focussed on the amount that the sentencing judge must have allowed for the plea of guilty. The contention referred to part of the sentencing remarks and part of the reasons in *R v WAW*.[58] As to the sentencing reasons the learned primary judge said:

> "For the offence of manslaughter you will be imprisoned for nine years and nine months. I declare that you have been convicted of a serious violent offence. I calculate that term by subtracting from 12 years the period of 27 months in respect of time served but non-declarable."[59]

[75] The passage in *R v WAW* is as follows:

> "In his sentencing remarks, the Judge said that he had 'moderated significantly' the head sentence, to allow for the plea of guilty. He must therefore have worked from a starting point some years in advance of 12 years. It would have been helpful had the Judge disclosed, in his sentencing remarks, what that starting point was, so that the applicant, in particular, was fully apprised of the process. Nevertheless he sufficient stated the 'reasons for the sentence' (s 10 *Penalties and Sentences Act*), so that the absence of that further detail did not give rise to an error of law."[60]

[76] The sentencing reasons reveal the way in which the learned sentencing judge took the various matters into account. It is convenient to commence at the base sentence, as it were, to follow the process.

[77] The final sentence was nine years and nine months for the manslaughter. His Honour calculated that term by subtracting the period of 27 months for pre-

---

57 *R v Nagy* [2004] 1 Qd R 63 at 75 [49].
58 *R v WAW* [2013] QCA 22.
59 AB 51.
60 *R v WAW* [2013] QCA 22 at [26].

sentence custody from 12 years.[61] Plainly 12 years is the figure selected by the sentencing judge after allowance for whatever s 13A discount was applicable.

[78] Reference to the submissions before the learned sentencing judge revealed the way in which he approached some of the figures. He referred to the decision in *R v WAW* where the Court of Appeal said that a 12 year indicative sentence upon the female co-accused was not manifestly excessive. His Honour observed that was after allowance for the plea of guilty and that the starting point before one got to the plea of guilty "must have been ranging well beyond 12 years".[62]

[79] The prosecutor contended for a sentence higher than that for the female co-accused. That was based upon the applicant's involvement in the actual violence of the physical attack.[63] It is evident from the exchanges during the sentencing debate that his Honour was adopting figures applicable on the basis of a plea of guilty, and not before the plea of guilty was taken into account.[64]

[80] In *R v WAW*[65] the failure of the sentencing judge to disclose the start point was mentioned. However, the learned sentencing judge in this case, who presided in *R v WAW*, had the following to say in the attempt to work out what the likely starting point was in that case:

> "If the indicative 12 year term is sustainable, then the reduction to nine years was plainly supportable, bearing in mind that 80 percent of 12 years would have to be served, whereas parole eligibility would arise after one-half of the nine year term had been served. The 12 year term has been determined from a starting point of 14 or 15 years, before allowing for the plea of guilty and the earlier cooperation (which bears on both the reduction leading to the indicative term, and the further s 13A discount, which was in this case, as I have said, generous). For reasons emerging from the previous discussions I am not satisfied such a starting point would be manifestly excessive."[66]

[81] In the proceedings against the female co-accused the sentencing judge indicated that but for the reduction allowed under s 13A of the *Penalties and Sentences Act* 1992, for her co-operation, he would have sentenced her to 12 years imprisonment.

[82] The female co-accused's sentence proceeded on the basis of a plea of guilty to manslaughter and interfering with a corpse. Therefore the sentencing judge in that case must be understood to have decided upon 12 years, but for the s 13A co-operation, as reflecting 12 years on the basis of a plea of guilty. In other words, the start point was obviously something greater than 12 years, but reduced to 12 on account of the plea of guilty.

Comments during the sentencing hearing

[83] The prosecutor told the learned sentencing judge that, in the case of the female co-accused, the sentencing judge in that case gave a discount for co-operation under

---

61 AB 51.
62 AB 23.
63 AB 22.
64 AB 22, 23 and 34.
65 *R v WAW* [2013] QCA 22 at [22].
66 *R v WAW* (supra) at [36].

s 13A of the *Penalties and Sentences Act* 1992, indicating that the sentence but for that undertaking would have been 12 years. Therefore, the prosecutor argued that because of the applicant's greater participation in the actual physical attack[67] and disposing of the body in such a way that it has not since been located, he should receive a greater sentence (but for co-operation). This was principally based upon the fact that the applicant was involved in the actual violence, using a baseball bat to inflict multiple blows upon the deceased, whereas the female co-accused's role was simply to lure the deceased to the house. Whilst she had participated to that extent in causing the death, the applicant had actually been involved in the violence which led to the death.

Submissions by the applicant – serious violent offence declaration

[84] The written submissions put forward by the applicant before the sentencing judge expressly conceded that if a sentence of nine years were imposed then a serious violent offence declaration would be appropriate. Thus:

> "14. Ultimately it is submitted that the appropriate sentence, taking all matters into account, is 9 – 10 years imprisonment. Given that such a sentence will have been arrived at after taking into account all matters in litigation, including his general co-operation, plea of guilty and co-operation pursuant to s 13A it is conceded that even if a sentence of 9 years were imposed a serious violent offence declaration would be appropriate.
>
> …
>
> 18. In the present case it is submitted that an indicative sentence of between 10 – 12 years could be imposed in respect of the manslaughter charge. To reflect [the applicant's] co-operation a final sentence of 9 – 10 years imprisonment with a serious violent offence declaration was appropriate."

[85] In my opinion this Court should not ignore the fact that the applicant's case was conducted on the basis that even if the ultimate sentence fell below 10 years, nonetheless a serious violent offence declaration was still appropriate.

Starting point of the sentence

[86] The learned primary judge revealed that but for the s 13A undertaking he would have imposed a sentence of 14 years imprisonment, less 27 months, resulting in 11 years and nine months. In revealing what the starting point was his Honour referred back to *R v WAW*, where the female co-accused had an indicative sentence of 12 years, then reduced to nine years because of the s 13A contribution. He went on:

> "Your starting point should be higher because in addition to your other involvement, which was comparable with [the female co-accused's], you, unlike her, participated directly in the assault upon the deceased using the baseball bat. That is why I have worked in your case from a starting point of 14 years not 12 years."

---

67 Hitting the deceased's head with a baseball bat.

[87] Those comments must be understood in light of what is plain from the sentencing reasons otherwise, and the exchanges during the sentencing hearing, namely that where his Honour referred to the female co-accused's indicative sentence of 12 years, and his own starting point of 14 years rather than 12 for the applicant, in each case that was a period of years based upon a plea of guilty. In other words, it is plain that when his Honour said the starting point was 14 years for the applicant, he was referring to the period having already applied a discount for the plea of guilty. That means that his Honour's start point was something well in excess of 14 years. Given the comments at [36] in *R v WAW*, it is likely, in my opinion, that the start point before the plea of guilty was taken into account was more like 15 to 17 years.

[88] In my view, the learned presiding judge cannot be demonstrated to have been in error in the sentencing process. The evident start point was likely to be something between 15 and 17 years. From that his Honour has discounted for the plea of guilty and co-operation generally (such as it was) to arrive at 14 years.

[89] His Honour's reasons reveal that the discount for s 13A co-operation was two years. His Honour made that reduction, not for the value of the undertaking to give evidence, which was worthless, but because of the exposure by reason of the applicant's s 13A co-operation, to threats within the prison environment and the necessity to serve his period of imprisonment in protective custody. His Honour had already expressed the view in *R v WAW*, that the three year discount in the female co-accused's case for s 13A co-operation was "generous".[68]

[90] That process resulted in his Honour's determination of 12 years, from which the 27 months for time served was deducted.[69] In my respectful opinion it cannot be demonstrated that the learned sentencing judge is guilty of error in that process.

[91] In light of the court's comments in *R v WAW*[70], it is plain that there is no confined range or "typical" range for manslaughter. Such a view was expressly rejected in *R v WAW*[71] and a higher start point was clearly indicated as being within range.[72] The danger in a process of close comparison with so called comparable cases, was identified by Muir JA in *R v WAW*:[73]

> "A process such as this is likely to result in error if insufficient consideration is given to the assessment of the gravity of the offending by reference to the circumstances of the offender and of the offending conduct. In *R v Dwyer*,[74] Keane JA made the following relevant observations:
>
> > "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."

---

68 *R v WAW* [2013] QCA 22 at [23]-[24]; Muir JA concurring.
69 AB 51.
70 *R v WAW* [2013] QCA 22 at [32]-[35].
71 *R v WAW* (supra) at [32].
72 *R v WAW* (supra) at [36].
73 *R v WAW* (supra) at [47].
74 [2008] QCA 117 at [37].

[92] In my respectful opinion it is plain, given the substantial difference between the applicant and the female co-accused in terms of participation in the inflicting of physical violence, and the disposal of the body, that his Honour should have imposed a greater sentence on the applicant than was imposed on the female co-accused. His Honour had the considerable benefit of having considered the precise circumstances of offence in *R v WAW*, and having delivered judgment in that case only six days prior to the sentencing of the applicant. If there is any benefit in having a "comparable" case, *R v WAW* was it.

[93] In *R v WAW* the court was pressed with comparable decisions and considered some of them. That, of course, was in the context of the female co-accused's involvement, which was distinguishable from that of the applicant. Two which attracted attention were *R v Jervis*[75] and *R v Welham & Martin*.[76] In each case the offender was in the position of the female co-accused; either luring an innocent victim to a place where she knew that he would be violently attacked (causing his death),[77] or not being the primary attacker, but interfering with a corpse.[78] What is of interest is that the sentence in *R v Jervis* was 14 years and eight months (following conviction on a trial), and that in *Welham & Martin* was 11 years imprisonment. In each case the Court of Appeal upheld the terms.

[94] On this application, the respondent urged decisions in *R v Corry*,[79] *R v Bates; R v Baker*[80] and *R v Jervis*[81] as supporting a notional starting point upon conviction after trial in excess of 14 years imprisonment.

[95] Reference was also made to the comments of Keane JA in *R v Corry*,[82] namely "… in the most serious cases of manslaughter, the appropriate sentencing range, even where the offender has pleaded guilty, is 15 to 18 years imprisonment".

[96] In *R v Corry* the offence involved a home invasion in which the victim was attacked with a meat cleaver and a carving knife, and 14 significant wounds were inflicted. The nature of the wounds, and their locations around the body of the deceased, indicated a savage attack with repeated blows causing the eventual death of the victim. The evidence suggested a motive which was to avenge a perceived insult to a person who had been Corry's girlfriend for a few days, and who had previously been in a relationship with the deceased. After a trial the sentence imposed was 17 and a half years with 980 days being declared as time served. The court held that to be well within range.

[97] In *R v Bates & Baker* the two offenders were much younger than the applicant in this case, being 20 and nearly 17 at the time of the offence. The circumstances also involved a home invasion as a consequence of a perceived slight directed at Baker. She invoked the assistance of her former de facto husband, Bates. Bates and Baker gained entry to the house and Bates administered a "vicious battering" to which there was no resistance. During the onslaught Baker urged Bates on. After a short break the attack was continued by Bates, and a little later Baker joined in, stomping

---

75 *R v Jervis* [1993] 1 Qd R 643.
76 *R v Welham & Martin* [2012] QCA 103.
77 *R v Jervis* (supra).
78 As in *R v Welham & Martin* (supra).
79 *R v Corry* [2006] QCA 203.
80 *R v Bates; R v Baker* [2002] QCA 174 ("*R v Bates & Barker*").
81 *R v Jervis* [1993] 1 Qd R 643.
82 *R v Corry* [2006] QCA 203 at [25].

upon and kicking the deceased's head. As a result the deceased died of head injuries. The sentence at first instance for Bates was life imprisonment, reduced on appeal to 18 years.

[98] When one considers *R v Corry*, *R v Bates & Baker*, and *R v WAW*, there is a deal of support for a start point in sentencing, for an offence such as the applicant's, at 15 to 18 years. The learned primary judge in this case presided in *R v Bates & Baker*. He differed from the majority in relation to how the sentence for Bates should be treated. Having described the case as being one which fell "within the worst category of manslaughter", his Honour was of the view that the court could not appropriately sentence Bates to imprisonment below the level of 18 years. During the submissions on sentencing, the prosecutor referred the primary judge to the reasons of Muir JA in *R v WAW*,[83] where reference is made to *R v Corry* and *R v Bates & Baker*. Thus, the primary judge was given a range of comparable cases that extended between 15 to 18 years.

[99] I am not satisfied that the term imposed on the applicant was manifestly excessive. By comparison with the situation of the female co-accused, the applicant was deeply involved not only in the planning of the attack, but in the institution of it and the application of physical violence where the probable consequence was the unlawful killing of the victim. As well the applicant was centrally involved in the disposal of the body in such a way that it has not been discovered. His co-operation was relatively insignificant. He stated as late as 19 December 2012 that he could provide no information as to the recovery of the body. Then, on 22 January 2013 he indicated that he wished to show police the location of the body. He attempted to do so and directed police to an area at Beerburrum, but notwithstanding an extensive search of a significant area, nothing whatsoever was found. Since then his attempt to provide s 13A co-operation has proved of no worth. There are such significant differences between the statement provided under that process, and the agreed facts, that no reliability could be placed upon it.

[100] In my respectful opinion this ground could not succeed.

Disposition

[101] For the reasons given above I would refuse the application for leave to appeal.

[102] **MULLINS J:** For the reasons given by the President, I also agree that the application for leave to appeal against the sentence must be refused.

---

83 *R v WAW* [2013] QCA 22 at [46].