SUPREME COURT OF QUEENSLAND

CITATION:	*R v JV* [2014] QCA 351
PARTIES:	**R** **v** **JV** (applicant)
FILE NO/S:	CA No 246 of 2013 SC No 221 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2014
JUDGES:	Gotterson and Morrison JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded to the manslaughter of his infant twins – where the applicant's de facto partner, and the mother of the deceased, was the co-accused – where the deceased were 18 months old at the time of death – where the applicant and co-accused failed to engage with the deceased, including feeding them – where the applicant and co-accused were sentenced to eight years' imprisonment – where the applicant submitted that he was not the primary caregiver and that there was no violence involved – whether the sentence was manifestly excessive *BW v The Queen* (2011) 218 A Crim R 10; [2011] NSWCCA 176, considered *R v Chard; ex parte Attorney-General (Qld)* [2004] QCA 372, considered *R v Cramp*, unreported, White J, SC No 611 of 2007, 30 January 2008, considered *R v Green & Haliday; ex parte Attorney-General (Qld)* [2003] QCA 259, considered *R v Hall; ex parte Attorney-General (Qld)* [2002] QCA 125, considered

R v Pesnak & Anor (2000) 112 A Crim R 410; [2000] QCA 245, considered
R v Potter; ex parte Attorney-General (Qld) (2008) 183 A Crim R 497; [2008] QCA 91, considered
R v Streatfield (1991) 53 A Crim R 320, considered
R v Webb, unreported, Henry J, SC No 20 and 26 of 2013, 27 August 2013, considered

COUNSEL: R P Devlin QC, with J L Voight, for the applicant (pro bono)
M R Byrne QC for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** On 24 July 2013 in the Supreme Court of Brisbane, the applicant, JV, pleaded guilty to alternative counts of manslaughter, having pleaded not guilty to two counts of murder. Initially neither plea of guilty was accepted by the Crown. The trial proceeded for a number of days. However, after consideration by the Crown of the outcome of ensuing legal argument, the pleas of guilty were accepted in discharge of the indictment on 5 August 2013.

[2] One count to which the applicant pleaded guilty of manslaughter, Count 3, arose out of the death of his infant son, MJZ. The other, Count 4, arose out of the death of MJZ's twin sister, MJL. Both deaths were alleged to have been caused between 8 and 17 June 2008 at Sunnybank Hills. The twins' mother and applicant's de facto partner, MKS, was a co-accused for each count.[1]

[3] On 16 September 2013, the applicant was sentenced to imprisonment for eight years on each count, the sentences to be served concurrently. A declaration that a total period of 90 days pre-sentence custody be deemed time already served was made. A parole eligibility date was fixed at 16 March 2017. On 25 September 2013, the applicant filed an application for leave to appeal against sentence.

Circumstances of the offending

[4] The twins were born on 27 December 2006. They were about 18 months old at the time of their deaths. They were the youngest of the six children to whom the applicant and Ms MKS were parents. They had been deceased for about a week when their decomposing bodies were found by their 11 year old sister in their bedroom.

[5] The twins were last seen by a doctor on 22 August 2007. Their growth measurements had been taken on 17 August 2007. At that point, their weights were within the normal range for their age. In October 2007, the family moved into a dwelling at Sunnybank Hills. The relationship between the applicant and Ms MKS was deteriorating. He was the breadwinner and she attended to domestic duties.

[6] At some period during 2008, Ms MKS was suffering from a depressive illness. There was a noticeable decline in her attention to her duties, including housekeeping and attending to the children. She was moody. The twins were rarely brought out of their bedroom. At the time of their deaths, it was found to be in an exceptionally unkempt and dirty condition.

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1 The indictment had been first presented on 8 February 2010; AB2.

[7] For the first 12 months of their lives, the applicant engaged with the twins, feeding them and playing with them. His interaction with them was limited after that and non-existent in the month immediately preceding their deaths. This, notwithstanding that he had to pass their bedroom in order to access his bedroom. From about January 2008, the applicant developed a routine in which he began drinking after work and in the evenings regularly participated in poker sessions at various hotels. From 1 January 2008 until the deaths, he visited hotels on 108 days, including weekends when poker was not played. In each of May and June 2008, he missed only one poker session.

[8] At the time of death, MJZ's weight was that expected to be found in a healthy child of about six weeks of age. MJL's weight at the time of her death was that expected to be found in a healthy child of about two months of age. The direct cause of their deaths was malnutrition rather than starvation caused by no dietary intake at all.

[9] When interviewed by the police on 16 and 17 June 2008,[2] the applicant informed them of additional factors including:

(a) he and Ms MKS had slept apart for more than six months. Although his mother, Ms MKS' mother and her foster mother had told him that she was depressed, he had not noticed it because he had not talked to her. He thought that she was just chasing attention;
(b) the last time he fed the twins solids was in January 2008. He assumed that Ms MKS was feeding them because she was at home all day;
(c) he could not remember when he last bathed the twins or when he last heard them cry;
(d) he did not know if the twins were walking;
(e) although Ms MKS' foster mother had asked him to check on the twins, he did not do so because he did not want to get into trouble for waking them up; and
(f) he did more with the older children whom he would take to the shops at the weekend, take to and from school and day care, and help with sport.

[10] The prosecution case was that in respect of each child, the applicant and Ms MKS failed to:

(a) provide sufficient food and nourishment and/or other necessaries of life to the deceased child; and/or
(b) take the precautions that were reasonable in all the circumstances to avoid danger to the deceased child's life; and/or
(c) take action that was reasonable in the circumstances to remove the deceased child from the danger that existed to the child's life,

and that pursuant to s 286(1) of the *Criminal Code* (Qld) they were held to have caused the deaths of the twins.

The applicant's personal circumstances

[11] The applicant was 28 years old at the time of the offending. He had no relevant history of offending.

[12] The applicant had commenced his relationship with Ms MKS when he was 15 years old. He completed Year 12 and then began work as a soil tester and after that, as an

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[2] Transcripts of tape recorded interviews; Exhibits MFI-S and MFI-T.

asphalt tester. By 2008 he was working as a project manager. He continued work in the soil-testing field after release on bail. He has developed a proficiency in the field and had a sound work record until sentenced. However, the pending charges had hindered his advancement in the work place in the period up to sentence.

[13] The applicant had a dysfunctional relationship with his father. He tends to exhibit anti-social and narcissistic personality traits. He has what was described by a forensic psychiatrist as "irresponsible and distorted" attitudes and beliefs regarding the paternal role model. The applicant had begun drinking alcohol as a teenager and became an alcoholic.

Ms MKS' sentence

[14] Ms MKS also pleaded guilty to manslaughter on the two counts. She was sentenced by the same sentencing judge on 15 August 2013. His Honour observed in his sentencing remarks:

> "You have now spent more than five years in custody. Ordinarily, your plea of guilty and your cooperation might be reflected in an order about when you would become eligible for parole. There is really no scope for doing that in this case, in view of the sentence I am considering imposing. It seems to me therefore that that necessarily carries with it a need to moderate the primary sentences."[3]

[15] Ms MKS was sentenced to eight years' imprisonment on each count, to be served concurrently. A declaration that the period of 1,885 days (approximately five years and two months) of pre-sentence custody be deemed time already served was made. A parole eligibility date at 15 August 2013 was fixed. Thus the applicant's sentence commenced one month later. A serious violent offender declaration which had been sought by the Crown was refused.

Applicant's sentence remarks

[16] The learned sentencing judge had regard for the applicant's pleas of guilty which, considering the convoluted history of the matter, were taken to be early pleas, and also for the absence of any relevant criminal history on the applicant's part. He noted the applicant's contribution as provider for the household, his participation in activities with the other children, his diligence as an employee and the difficulties that had been caused for him in the work place by the charges that had been pending for more than five years.

[17] His Honour referred to the applicant's involvement with alcohol, describing it as a factor of mixed significance. Whilst his frequent intoxication accounted, to some limited extent, for his failure to appreciate what was going wrong at home, it was, nevertheless, associated with a highly self-centred lifestyle. His Honour was critical of the applicant's apparent manipulation of Ms MKS and his failure to acknowledge her difficulties. He regarded them as consistent with the applicant's diagnosed personality traits. Further, the learned sentencing judge considered that the remorse shown by the applicant was partial, having been diluted by his continuing self justification and blame of Ms MKS.

[18] In dealing with a parity submission by the Crown, the learned sentencing judge noted that there were plainly some differences between the applicant's role in the

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3 AB117; Tr6 LL25-29.

deaths of the twins and that of Ms MKS. She was their primary caregiver. However, any absence of knowledge by him over the last few months of their lives that the twins were being neglected and that their health was deteriorating, was, in his Honour's words, the product of "conduct bordering on wilful blindness". He concluded:

> "… It seems to me that while there are differences between your conduct and that of Ms MKS and the circumstances of each of you, those differences are not of great significance in determining an appropriate sentence."[4]

[19] The learned sentencing judge continued his remarks by saying:

> "I also note that, on the question of parity, the sentence imposed on Ms MKS was materially affected by the time she had been in custody. It was not possible to acknowledge her plea of guilty in the more conventional way by reference to the fixing of a parole eligibility date and, accordingly, it was reflected in the head sentences imposed on her."[5]

[20] After referring to a submission by defence counsel that focused upon the difference in sentencing for manslaughter between deaths caused by malice or intent on the one hand and those that were caused by neglect or negligence on the other, his Honour observed that the extent of departure from reasonable community standards is a major factor in criminal negligence manslaughter cases and said:

> "In this case, there has been, in my view, extensive and protracted departure from what might be regarded as reasonable community standards. This is not a case of some momentary or short-term inadvertence. Moreover, although the charge against you is one of criminal negligence, I consider that your conduct contributed to the condition of Ms MKS, which in turn was a factor in her failure to care properly for the twins. That factor seems to me to be an additional reason for distinguishing many of the authorities to which I have been referred."[6]

Ground of appeal

[21] The sole ground of appeal advanced by the applicant is that his sentence is manifestly excessive.

Applicant's submissions

[22] The oral submissions by counsel for the applicant who appeared *pro bono* were very brief. Reliance was placed on written submissions and the Court's attention was drawn to two features, namely, that the applicant was not the primary carer of the twins and the absence of any violence on his part towards them.

[23] The written submissions referred to sentences in *R v Webb*[7] (three years' imprisonment with release on parole after nine months), *R v Cramp*[8] (five years' imprisonment with a recommendation for parole after 18 months), and *R v Streatfield*[9] (five years' imprisonment with a recommendation for parole after 18 months), noting their common theme of no intention to cause harm to the deceased. Reference was also made to

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4 AB73; Tr6 LL10-13.
5 *Ibid* LL15-19.
6 *Ibid* LL40-46.
7 Indictments 20 and 26 of 2013, Supreme Court of Queensland at Cairns (Henry J) 27 August 2013 (unreported).
8 Indictment 611 of 2007, Supreme Court of Queensland at Brisbane (White J) 30 January 2008 (unreported).
9 (1991) 53 A Crim R 320, Queensland Court of Criminal Appeal.

the sentence in *R v Green & Haliday*; *ex parte Attorney-General (Qld)*[10] (six years imprisonment with no parole recommendation) as an instance of consciousness of distress caused to a child over a period of several weeks without any intention to kill, and, by way of contrast, to the sentence in *R v Chard; ex parte Attorney-General (Qld)*[11] (seven years' imprisonment with no parole recommendation).

[24] It was submitted for the applicant that these sentencing decisions indicated that where an unlawful killing of a young child had been caused by negligent omission, offenders had been sentenced to five to six years' imprisonment. Based on that and the circumstance that two deaths were involved, it was submitted for the applicant that an appropriate sentence for his offending was six years' imprisonment with a recommendation for parole eligibility after serving two years.

Respondent's submissions

[25] Counsel for the respondent acknowledged that intention is relevant to sentence in criminal negligence manslaughter cases but also cited *R v Pesnak & Anor*[12] for the proposition, which the learned sentencing judge had noted, that a major consideration is the extent of departure from reasonable community standards which constituted the criminal negligence. In written submissions, the respondent characterised the applicant's degree of departure as "extreme and without precedent".

[26] It was put for the respondent that there are no truly comparable cases and that a number of factors, including the following, differentiate the offending here from that in other cases:

> "(a) The breach of the parental duty resulted in the death of two children.
>
> (b) The ages of the children were such that they were completely dependent on others to survive.
>
> (c) The breach of duty was demonstrated by omission rather than by a positive act or acts.
>
> (d) The relevant omission continued over a period of months and was most stark for about the last month of the children's lives.
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> (e) The applicant's conduct contributed to the depressive condition of his partner, which in turn, contributed to the death of the twins."[13]

[27] Reference was made to sentences in *R v Hall; ex parte Attorney-General (Qld)*[14] (a notional head sentence of eight to nine years imprisonment), *R v Potter; ex parte Attorney-General (Qld)*[15] (citing *R v Hall*: at [43]), *R v Green & Haliday; ex parte Attorney-General*, and *R v Chard; ex parte Attorney-General (Qld)* (also citing Hall: at [20] and observing that the prolonged abuse of a baby over seven and a half weeks from birth would call for a head sentence at least in the range of eight to ten years' imprisonment: at [23]). Conceding that it was a worse case, counsel for the respondent also referred to the sentencing decision of the New South Wales Court of Criminal Appeal in *BW v The Queen*[16] (16 years' imprisonment with a non-parole period of 12 years).

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10 [2003] QCA 259.
11 [2004] QCA 372.
12 [2000] QCA 245; (2000) 112 A Crim R 410 at [24].
13 Respondent's submissions paragraph 11.3.
14 [2002] QCA 125.
15 (2008) 183 A Crim R 497; [2008] QCA 91.
16 (2011) 218 A Crim R 10; [2011] NSWCCA 176.

[28] Counsel for the respondent submitted that the sentence imposed on the applicant was appropriate. In oral submissions it was said that, having regard to *BW*, the sentence was arguably a moderate one.[17] At the sentence hearing, the Crown had made a submission based on parity with Ms MKS for a sentence of seven to nine years' imprisonment with no recommendation for parole, as would have required the applicant to serve one-half of the sentence in order to become eligible for parole.[18]

Discussion

[29] I accept the respondent's submission that there are no truly comparable cases for the applicant's offending. *Cramp* and *Streatfield* are examples of single-instance infliction of fatal wounds with no intention to kill or any protracted cruelty. In *Green & Haliday*, a cruel method of restraining an 18 month old so she would sleep was imposed on the child in over several weeks. There was no intention to kill. The offender, Haliday, had a post-traumatic stress disorder and a depressive personality disorder which impaired her decision making. The offender in *Webb* was aware of, but did nothing to prevent, repeated beatings of his de facto partner's eight year old daughter over several weeks.

[30] In *Hall*, the offending involved the violent shaking of a 15 day old baby causing eventually fatal brain damage. The notional head sentence took account of the offender's criminal history but was moderated by this Court on account of his mild mental retardation as well as his plea of guilty. An increased sentence of six years' imprisonment was imposed on an Attorney-General's appeal. *Potter* was also an Attorney-General's appeal against sentence. The offender had asphyxiated her five year old daughter. The basis of the plea to manslaughter was diminished responsibility at the time of the offence. The sentence of eight years' imprisonment with eligibility for parole after three years was affirmed on appeal. In *Chard*, the offender engaged in prolonged beating of a baby which was regarded as "far more serious than the isolated instance of shaking in *Hall*".[19] The offender's sentence of six years' imprisonment on the manslaughter count was increased to seven years on an Attorney-General's appeal.

[31] These sentences do reveal a pattern in which the extent of departure from reasonable community standards is reflected in the severity of the sentence. They also indicate that a notional sentence of eight to nine years' imprisonment has tended to prevail in instances of protracted, cruel harm to an infant child which has resulted in fatality.

[32] The applicant's conduct cruelly harmed the twins at several levels. He contributed to Ms MKS' mental condition and resultant impaired fitness to care for them. But, more significantly, he abnegated any responsibility for the twins. Towards the end, he completely ignored their needs and welfare. He did so consciously, ignoring the concerns of others expressed to him about them. The departure from reasonable community standards exhibited by him was both profound and inexcusable.

[33] In these circumstances, I am satisfied that the sentence imposed on the applicant of eight years' imprisonment was an appropriate exercise of the sentencing discretion. It is in line with sentences imposed for broadly comparable offending allowing for differences for personal circumstances. It is in no degree manifestly excessive.

[34] The sentence also bears an appropriate parity relationship with that imposed on Ms MKS. I agree with the assessment of the learned sentencing judge that their respective culpabilities were of a similar order.

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17 Tr1-4 LL7-8; Tr1-7 LL12-14.
18 AB30 Tr11 LL12-18.
19 At [23].

[35] The sentence imposed will require the applicant to serve three years and nine months' imprisonment before becoming eligible for parole. Allowing for the facts that the eight years sentence imposed on Ms MKS was moderated to some extent on account of the time she had already spent in custody and that the applicant has benefited indirectly thereby, I consider that the parole eligibility date set in his case adequately accommodates all relevant factors including his pleas of guilty.

Disposition and orders

[36] The applicant has not established his sole ground of appeal. His application to appeal against sentence should be refused. I would propose the following order:

1. Application for leave to appeal against sentence refused.

[37] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the orders his Honour proposes

[38] **McMEEKIN J:** I agree.