SUPREME COURT OF QUEENSLAND

CITATION:	*R v MacGowan* [2015] QCA 185
PARTIES:	**R** **v** **MACGOWAN, Brandon Peter** (appellant/applicant)
FILE NO/S:	CA No 246 of 2014 SC No 26 of 14
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Cairns – Unreported, 29 August 2014
DELIVERED ON:	6 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2015
JUDGES:	Holmes CJ and Gotterson JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Dismiss the appeal against conviction.** **2. Grant the application for leave to appeal against sentence.** **3. Vary the sentence imposed at first instance by deleting the requirement that the appellant serve a minimum of 30 years before his release and substituting a requirement that he serve a minimum of 24 years unless released sooner on exceptional circumstances parole under the *Corrective Services Act* 2006.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant was convicted of two counts of murder – where the bodies of the deceased were disposed of in a remote location – where the trial judge gave a direction on post-offence conduct, saying the jury might infer intent from the manner of the disposal of the bodies – where defence counsel agreed to the content of the direction and did not seek a redirection – where the appellant argues that the trial judge should have given a full consciousness of guilt direction – whether the trial judge erred – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE –

SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted of two counts of murder and sentenced to life imprisonment with a non-parole period of 30 years – where the sentencing judge considered that the need for denunciation, punishment and community protection warranted a non-release order substantially beyond the statutory minimum of 20 years – where the sentencing judge deemed the killings, which were execution style and intended to solve financial problems, to be more serious than some of the comparable sentences for double murder – whether the sentences were manifestly excessive

Criminal Code (Qld), s 305

Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, applied
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, considered
R v Brennan [2013] QCA 316, considered
R v Hayes [2008] QCA 371, considered
R v Loader (2004) 89 SASR 204; (2004) 147 A Crim R 312; [2004] SASC 234, applied
R v Maygar; Ex parte Attorney-General (Qld); R v WT; Ex parte Attorney-General (Qld) [2007] QCA 310, considered
R v Sica [2014] 2 Qd R 168; [2013] QCA 247, considered
R v Smithers [2013] QCA 90, considered
R v Stewart & Garcia [2014] QCA 244, considered
Stasinowsky v Western Australia (2009) 40 WAR 11; [2009] WASCA 20, cited

COUNSEL: A Edwards for the appellant/applicant
M Cowen QC for the respondent

SOLICITORS: Locantro Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The appellant was convicted of the murders of a husband and wife, Scott Maitland and Cindy Masonwells, in Cairns on 5 July 2012. He appeals the convictions on the ground of error in, or miscarriage of justice resulting from, the trial judge's direction to the jury in relation to post-offence conduct. He seeks leave to appeal against his sentences of life imprisonment on the ground that they were rendered manifestly excessive by the imposition of a 30 year minimum period before his release on parole could be considered.

The evidence

[2] Mr Maitland and Ms Masonwells had travelled to Cairns from their home in Mt Isa on the evening of 5 July 2012. They were not seen alive again after that date. On 17 July 2012, police found their bodies in scrub down an embankment on the side of the road to Copperlode Dam, about half an hour's drive from Cairns. Some of their belongings were scattered nearby. Mr Maitland had been killed by a gunshot to the

back of his head, the bullet entering just below the base of the skull and travelling upwards through the brain. A fragment of the bullet was retrieved from within the skull. He was likely to have been rendered unconscious immediately, and to have died within four minutes. Ms Masonwells was killed by a stab wound to her upper back, between the shoulder blades; it extended at least five to six centimetres and had severed her spinal column, requiring moderate to severe force to achieve that effect. She might have sustained other stab wounds, but because of the state of decomposition of her body, the pathologist who conducted the autopsy could not be certain. However, the top she was wearing had four cuts in it.

[3] The appellant was a mechanic who operated a motor repair workshop. Originally, he conducted his business from premises in a group of industrial sheds in Fearnley Street in Cairns, and later moved to a workshop in Hannam Street. He had known Mr Maitland and Ms Masonwells for some years, and had been asked to restore Ms Masonwells' panel van. The couple travelled to Cairns on 17 April 2012 for a wedding at which the panel van was to be used to transport the bride. However, the appellant claimed that it had been stolen that very day, when he had left it on a trailer outside a mechanic's workshop to get a roadworthy certificate. (The proprietor of the workshop said in evidence that he had received a call from the appellant saying that the van had been left for a roadworthy inspection; but no vehicle was outside.) The following day, the appellant reported it to the police as stolen. He provided the police with a photograph which was supposed to be of the vehicle; in fact, it had been taken from a website and was a picture of a panel van restored by a man in Victoria.

[4] On 23 April 2012, the appellant went with Ms Masonwells and Mr Maitland to a solicitor, where a deed was drawn up pursuant to which he agreed to acquire and restore a replacement panel van if Ms Masonwells' vehicle were not recovered. If he failed to do so, Ms Masonwells and Mr Maitland were to be entitled to recover the amount of $30,000 from him. The appellant paid the couple's airfares back to Mt Isa. Meanwhile, he made reports to police of supposed sightings of the van. On 15 May 2012, the appellant advised the police that as a result of receiving an anonymous phone call, he had located the panel van and had arranged for it to be taken to a local panel beater's workshop. The proprietor of that workshop gave evidence: he said that the appellant had delivered the van to him in late 2011 or early 2012 for repainting, for which he was to be paid $16,000. Because he had not received the money, he had done little work on the vehicle, and it had remained, rusting, at his workshop ever since. (On 14 July 2012, police found the panel van at the workshop).

[5] On 5 July 2012, Ms Masonwells and Mr Maitland flew from Mt Isa to Cairns, their tickets booked and paid for by the appellant. The appellant was recorded by a CCTV camera leaving the airport with them just after 9.00 pm in a white Econovan which, in fact, belonged to another of his clients, who had left it with him for repair. CCTV footage recorded the van driving through Cairns streets between 9.23 pm and 9.27 pm.

[6] Two men who were drinking that night in a shed in the same Fearnley Street complex in which the appellant had previously had his workshop saw a white van go past and pull up nearby. One of them saw the passenger side door open and someone fall from it before a man got out of the driver's side, walked around and told the person on the ground, who sounded as if they were female, to shut up. The other witness said that he saw a man pull a girl out of the car by her arm. She was screaming as he pulled her onto the ground, and the witness heard her say "Fuck off". The two drinkers asked who was there and what was going on, and the male replied that he was "Brando".

One of them recognised him as the appellant, whom he knew from when the latter had his business at the Fearnley Street sheds. The appellant physically turned the two onlookers around and pushed them inside the shed in which they had been drinking. Saying that he would come back and talk to them, he pulled the roller door down.

[7] The two men heard some more screaming or yelling. About 10 or 20 minutes later one of them heard the van driving away. They went to where the van had been, and noticed two Jim Beam cans (which the appellant was given to drinking) on the ground. The cement was wet around a nearby fire hydrant, as if someone had been hosing it. The fire hose reel and drainpipe on the hydrant were damaged. The following day, one of them saw some spatters on the wall near the fire hydrant which looked like blood. (The hydrant and hose were examined on 14 July, when bloodstains were found on the fire hose reel and the fire hose itself. Swabs from the hose and reel were later found to contain DNA consistent with that of the appellant and of Ms Masonwells.) A couple of days later, the man who knew the appellant saw him again; he said that he had given someone a "touch up" that night.

[8] At 10.06 pm, CCTV cameras recorded the Econovan travelling through Cairns streets once more. The appellant's mobile telephone was last detected within the range of the Cairns telecommunication tower at 10.23 pm that night. At 11.09 pm, the Econovan was filmed performing a U-turn at the entrance gate to the Copperlode Dam, at the top of the road off which the bodies were found. The appellant's mobile phone signal was next picked up by a Cairns tower at 12.52 am. At 12.58 am, CCTV footage showed the appellant arriving at the Colonial Club in Cairns. He had telephoned a friend, Mr Curtis, who lived there and asked if he could stay the night with him. Mr Curtis described some bloodstains on the appellant's jacket and jeans. He had a cut hand which was bleeding copiously. Curtis bandaged the hand, and, at the appellant's request, took his clothes and put them in a bin. He lent him another set of clothing to wear. The appellant said that he had got into a fight with someone from whom he would not be hearing again. That witness noticed blood on the appellant's ear and bruising on his knuckles, and the appellant reported that he had sore ribs.

[9] The following morning, the appellant pointed out a white Econovan, which he wanted to move from the street to the car park at the back of the Colonial Club. Mr Curtis saw some blood on the front passenger door of the van which he tried to wipe off, assuming that it was the result of the appellant's reported fight. The appellant moved the van into the Club car park and asked Mr Curtis to keep it for a couple of days. Curtis drove the appellant to his workshop, where the latter returned the borrowed clothes and gave him the keys for the van. He asked Mr Curtis to clean the blood off the van door, which he did. Some days later, before Curtis was due to return the van, he opened its sliding door and noticed that there was blood on the step on the passenger side. He delivered it back to the appellant's workshop, where he left its keys on a hook. While driving it, he noticed that the gear knob had fallen off and was stuck under the clutch; it was sticky to the touch.

[10] On 10 July, the appellant telephoned a car detailer whom he knew, asking him if he could hose the blood out of the back of a van because he had carried an injured dog in it. In the event, the appellant did not bring the vehicle to the detailer. On the same day, the appellant told a friend of Mr Maitland and Ms Masonwells (whose engagement party the two were expected to attend) that he had picked the couple up from the airport. On his account, Mr Maitland had put the number plates from another of his own vehicles, a utility, on the (unregistered) panel van, and he and Ms Masonwells

intended to drive straight back to Mt Isa. The friend reported the couple as missing to the police. A police officer contacted the appellant who, over a couple of telephone calls, disclosed that he had collected them from the airport, and that they had replaced the number plates on the panel van with other number plates.

[11] The appellant had other conversations to similar effect with police officers, culminating in a statement made on 12 July 2012. In it, he claimed that he had started work on the panel van in mid-February 2011, and had largely completed the job by January 2012. He had been paid $14,000 for his restoration. In the early hours of 18 April, he had dropped the van off outside the workshop where the roadworthy inspection was to be done. When the workshop owner told him later that day that the van was not outside his premises, he had reported the vehicle to police as stolen. About three weeks later, Mr Maitland told him that he had some information as to where the panel van could be found. The appellant went to the identified location and found it there intact but for some scratches. He returned it to his Hannam Street workshop, where it stayed until 5 July, when the couple arrived in Cairns, having arranged to collect the vehicle then. He collected them from the airport in a Ford sedan and took them to his shed. Mr Maitland took some number plates from his swag and put them on the vehicle. The appellant gave the vehicle's registration papers and an SD card with photographs of its restoration to Ms Masonwells. She and Mr Maitland drove away in the panel van. He went upstairs and watched television until about 11.30 pm, when he contacted Mr Curtis. The latter picked him up and took him back to the Colonial Club where he stayed the night.

[12] The appellant went with police to his workshop and showed them the silver Ford sedan in which he claimed to have picked the couple up from the airport. The police officer taking his statement noticed that the appellant had scratches on his back and upper arm. The following day, he was arrested and was medically examined. The examining doctor recorded a variety of scratches and lacerations to his hands and limbs, as well as a contusion to his right shoulder blade and gravel rash on his right inner knee, all of which were five to 10 days old. The appellant's work premises were searched and the keys to the Econovan were found. Its owner said that he had telephoned the appellant on 6 July and asked about progress with its repairs. The appellant told him there had been an accident in which the vehicle had been damaged, but he would get it fixed. Subsequently, the owner went to the workshop and asked whether the vehicle was ready. The appellant gave him a silver Ford sedan to use overnight.

[13] The Econovan was found in a bank car park. A forensic officer who examined it found blood stains from projected blood on the interior passenger front door and on the rear passenger side exterior, underneath the van on the passenger side, and on the ceiling. There were contact bloodstains on the front driver side door and pooled blood in the driver side footwell. There were areas of bloodstains in the cargo section of the van, and on the vinyl on the back of the front seats. DNA consistent with Mr Maitland's DNA profile was found in the passenger side footwell, while swabs taken from blood in a number of areas inside and outside the vehicle matched Ms Masonwells' profile. There was scuffing on the front of the vehicle which was consistent with the damage to the fire hydrant at Fearnley Street. Headrests on the passenger and driver side and a safety barrier designed to separate the passenger and cargo areas of the vehicle had been removed. The front centre seat-back had an area of damage where it had been cut by something sharp.

[14] There was also damage to the ceiling of the van which indicated that a projectile had been fired from its rear over the top of the passenger side seat. In the rear of the van, a spent .22 calibre cartridge whose markings were consistent with those on the remnants of the projectile located in Mr Maitland's skull was found. A live .22 calibre round also consistent with the spent cartridge was found in a bag belonging to the appellant at his workshop. Various witnesses spoke of having seen the appellant with a very small silver handgun at different times; one said that he had seen the appellant with it in his office in June 2012 and was told that it took a ".22 shell". Another witness said that the appellant told him he had retrieved the panel van from the people who stole it by threatening them with a .22 calibre pistol.

[15] The appellant gave evidence; he said that much of what he had said to the police in his statement was untrue. He had lied in order to cover up for Mr Maitland. Ms Masonwells and Mr Maitland had paid him $14,000 for the restoration on the vehicle, but all he had done was soda-blast it. He took the vehicle to the panel beating workshop at which it was ultimately found. When the proprietor asked for payment, he told Mr Maitland to sort it out with him, and assumed he had done so. In April 2012, during the couple's trip to Cairns, Mr Maitland informed him that the bodywork on the panel van had been carried out and that he had taken it to another workshop where it was to get a roadworthy certificate. When the appellant contacted the proprietor of that workshop, the latter informed him that the van was not there. Concerned, the appellant informed Mr Maitland, who told him that the van was not stolen but he wanted the appellant to report it as if it were. It was Mr Maitland who found the website photograph which he provided to the police, and it was at Mr Maitland's direction that on 15 May 2012 he reported that the panel van had been found. He had paid for the couple's flights because Mr Maitland had asked him to use money that had been paid to him.

[16] The appellant said that he had collected the couple from the airport in the Econovan and taken them to Hannam Street. They were arguing; Ms Masonwells had apparently not been told what was happening with the panel van. The appellant refused to do any further work on it. He had lent the couple the Econovan to use for the night. They left in it and he did not see them again. He was not at the Fearnley Street sheds at all that night, and would not have used the fire hydrant hose since 2011. After the couple departed, he stayed in the Hannam Street workshop working on a vehicle, leaving at about midnight in a white HiAce van to drive to the Colonial Club. Mr Curtis lent him some shorts because his trousers were dirty, and gave him a Band-Aid to put on a cut on his hand which he had sustained working on a car. Because the appellant had no licence and did not like to drive in the day time, Curtis drove him back to his workshop and retained the keys to the HiAce, which the appellant said he would retrieve a couple of days later. He did not know how the Econovan's keys came to be on the hook in his workshop, notwithstanding the couple's allegedly having left in it. His inquiry to the car detailer was about a car which had a dog smell in it. He did not own a firearm; what the witnesses had seen was a cigarette lighter which resembled a gun. He did not know where the .22 calibre bullet in his bag came from; he could have picked it up anywhere. His injuries were all from working on vehicles.

The trial judge's directions about post-offence conduct

[17] The trial judge discussed with trial counsel the direction to be given about the disposal of the couple's bodies at a remote location. Initially, his Honour proposed a "consciousness of guilt–type direction" in relation to that conduct, based on the suggestion that the disposal of the bodies was to conceal an unlawful killing. Defence counsel said he

would have no difficulty with such a direction. Subsequently, however, the judge said that he had reconsidered the matter. In his view, the nature of the injuries and the way the bodies were disposed of were relevant to inferring the intent of the perpetrator, whoever it was, rather than constituting conduct properly characterised as exhibiting a consciousness of guilt. Both counsel agreed with that proposition.

[18] Directing the jury generally about drawing inferences concerning intention, the trial judge said this:

> "Intention may be inferred or deduced from the circumstances in which the death eventuated and from the conduct of a defendant before, at the time of or after the defendant did the specific act which caused death. And, of course, whatever a person has said about his intention may be looked at for the purpose of deciding what that intention was at the relevant time."

[19] His Honour pointed to the pathologist's evidence as to the nature of the wounds and its relevance in determining intent, observing:

> "You might think whoever shot Mr Maitland in the back of the head and stabbed Ms Masonwells in the back did so deliberately with the intention of killing them or, at the very least, inflicting grievous bodily harm."

[20] The trial judge then turned to the manner of disposal of the bodies and its significance:

> "You might think that the person who then disposed of the bodies did so in a way that also bespeaks the killings having been intentional. You might think that whoever had shot Mr Maitland in the back of the head and stabbed Ms Masonwells in the back disposed of their bodies in Lake Morris Road to distance him or herself from involvement in the killing and conceal the fact the killing was unlawful.
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> You might think this was achieved by hiding the body in a remote location and delaying the discovery of their death - if, indeed, it was ever to be discovered - and thus any investigation into it. The chosen location, you might think, exposed the bodies to the elements and the prospect of decomposition of the bodies would increase the likelihood that the true nature of their injuries and mechanism of their death would not be able to be identified. It also increased the likelihood that any forensic evidence linking the defendant to the killing would not be able to be identified. I say "the defendant", I repeat that and rephrase it. You might think it also increased the likelihood that any forensic evidence linking the killer, who it was, to the killing would not be able to be identified. You might think that resulted in evidence of the killer's involvement in the killing and the cause of the death being concealed.
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> …
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> Members of the jury, Mr Trevino for Mr MacGowan did not [submit] otherwise, but you would appreciate the defence position is simple. Mr MacGowan did not kill them, he is not to know what the killer's intention was. So that's not a matter for the defence to be conceding one way or the other.
>
> Were you to have a view of the case that one looks at the nature of the killing in combination with the disposal of the bodies then it bespeaks

> an obvious intention to kill or do grievous bodily harm then you might have little difficulty in concluding that this is not a case of manslaughter by reason of a failure to prove intention. Realistically, you might think, the issue is whether the prosecution can prove the accused is the killer, not whether the killer intended to kill or do grievous bodily harm. However, these are matters for you, and that is why I have explained that what I've just said is a matter of comment by me, which you do not have to follow, and, more importantly, why I have explained, as a matter of law, the lesser alternative verdict of manslaughter which is open to you were you to conclude, for example, that the accused unlawfully killed them but did not have the requisite intention to kill or do grievous bodily harm. Or, at least, more accurately, where you hold a reasonable doubt on the subject. It is for you, not me, to decide whether the element of intention has been proved beyond a reasonable doubt."

[21] Defence counsel did not seek any redirection; not surprisingly, in light of his earlier agreement to the content of the direction.

The appellant's submissions

[22] The appellant submitted that although the trial judge had characterised the direction as purely concerned with the perpetrator's intent, it was in truth a direction that the jury could have regard to the post-offence conduct as exhibiting a consciousness of guilt. That being so, it was incumbent on the trial judge to give an *Edwards*-style[1] direction, identifying the fact that there might have been reasons for disposing of the bodies short of a consciousness of guilt of murder: for example, panic or a consciousness of guilt of killing amounting only to manslaughter. Defence counsel had originally agreed with the proposal that a consciousness of guilt direction had to be given, although he subsequently agreed with the amended direction. It was arguable that it was an error of law to give the latter direction, and even if there were no such error, a miscarriage of justice had occurred. The case on murder had been left on two bases: the nature and position of the injuries suffered by the deceased and the perpetrator's conduct in disposing of the bodies. Although the trial judge had made it clear he was making comments, not giving directions, those comments must have been reflected in the jury's consideration of intent, and the verdict.

[23] There was evidence to contradict the Crown's contention at trial that the killings were effectively executions. There was a reasonable possibility that the killings had occurred in the heat of the moment in the background of an argument and struggle. Both deceased were of relatively strong build, and there were signs of a struggle in the form of the appellant's injuries and the shot fired into the ceiling of the van. The appellant had made some attempt at a cover up, but it was ineffectual and inconsistent with premeditation, given that he left the keys to the van on the hook in his workshop, he was connected to the vehicle, and he had left it parked in a nearby car park with evidence of the killings in it. Similarly, his leaving property belonging to his victims near their bodies, linking him to the crime, was inconsistent with any degree of organisation.

The respondent's submissions

[24] The respondent submitted in the first instance that the trial judge's direction had not indicated that the post-offence conduct constituted evidence of consciousness of guilt.

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1 *Edwards v The Queen* (1993) 178 CLR 193.

To give an *Edwards* direction would have elevated the evidence to an importance which the Crown had not sought to attribute to it. The real issue on the trial was the identity of the killer; intent was not in any real sense in dispute. It could not have been, in circumstances in which Mr Maitland was killed by a gunshot to the back of the head and Ms Masonwells by a stab wound to her back. Since there was no live issue, a direction was unnecessary; even if it were, strictly speaking, required, its absence occasioned no miscarriage of justice.

Conclusions on the appeal against conviction

[25] In my view, the appellant's submission that his Honour's comments in fact entailed consciousness of guilt reasoning is correct. The evidence of the dumping of the bodies could only be relevant to intent by demonstrating an apprehension on the part of the killer that, were they to be found, it would be evident from their wounds they had been killed with the requisite intent; justifying a conclusion that the explanation for the attempt at concealment was that the truth would implicate him in the offence of murder. It cannot be said that intention was not an issue in this case: it was specifically left to the jury for their consideration.

[26] The trial judge's comments were accurate. The evidence could be used in the way he suggested and there was no error in his making them, but if the conduct were to be relied on in that way, the jury should have been instructed that they could take it into account only if they were satisfied that it was engaged in because of a realisation of guilt;[2] that there could be other reasons for it; and that if they accepted that there were, the evidence should not be used as probative of guilt.[3] His Honour should, in giving such a direction, have adverted to the alternative possibility that the conduct was consistent with panic following unlawful killings, short of murder. (Notwithstanding the appellant's submission, there was no warrant for raising separate possibilities of panic and consciousness of guilt of manslaughter. There was no scenario - for example of self-defence - in which the killer could have been disposing of the bodies for a reason other than his or her culpability for the deaths.)

[27] However, defence counsel expressed himself satisfied with the proposed direction and did not seek any different direction. It cannot be said that there was some wrong decision of law; the trial judge did not misdirect the jury, but what he said was incomplete. The appellant can rely on the failure to give a full *Edwards* direction only if he establishes that it is reasonably possible that it affected the verdict so as to produce a miscarriage of justice.[4] In assessing that question, the attitude of defence counsel at trial may assist in determining whether there is any such real risk.[5] In this case, trial counsel did not seek any further or different direction, nor indeed, to have accident or the "struggle" theory left to the jury.

[28] There was good reason for that. There were aspects of the case that spoke strongly of pre-planning of the killings: the fact that the appellant took Ms Masonwells and Mr Maitland from the airport to an industrial area which might ordinarily have been expected to be deserted late at night and the fact that the evidence indicated that the appellant owned the gun which killed Mr Maitland,[6] and thus must have brought it

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2 The relevant state of satisfaction need not be beyond reasonable doubt when the evidence is merely one of a number of circumstances relied on: *Edwards v The Queen* (1993) 178 CLR 193 at 210.

3 *Edwards* at 211.

4 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13, 15.

5 *R v Loader* (2004) 147 A Crim R 312 at 325.

6 In the form of the .22 round found in his bag which matched the spent cartridge in the van, which in turn was consistent with the bullet which entered Mr Maitland's skull.

with him when he collected the couple from the airport. The removal of the vehicle's headrests and the barrier separating the front seats from the rear of the vehicle also was suggestive of a planned assault from behind.

[29] More importantly, the notion of two deaths occasioned during a struggle is utterly implausible. Mr Maitland was shot from behind through the base of the skull, although the range is unknown. If the shot were fired at close quarters in the posited struggle, it is impossible to conceive how the appellant could accidentally have positioned the gun at that lethal spot behind Mr Maitland's head and pulled the trigger. If the shot were fired from further away, the possibility of its resulting from a struggle becomes even less credible. From the unchallenged evidence of the two men who saw the van at Fearnley Street, Ms Masonwells was completely under the physical control of the appellant. He acted deliberately and authoritatively to remove those two witnesses from the scene before he dealt further with her. It seems probable from their description that he had already disabled her. It is beyond belief that she could have sustained a stab wound to her back severing her spinal column through some unintended or inadvertent event. Had the jury in this case been correctly directed on the question of post-offence conduct and rejected it entirely as probative of intent, they must inevitably have been satisfied on the other evidence that these were intentional killings.

[30] I am satisfied that the failure to give a more complete direction could not have affected the verdict and that no miscarriage of justice has occurred. The appeal against conviction should be dismissed.

Matters raised at the sentence hearing

[31] Victim impact statements from close relatives of Mr Maitland and Ms Masonwells were tendered at the sentence hearing. Mr Maitland had a daughter from an earlier marriage who spent holidays with him and was close to both him and to Ms Masonwells, her stepmother. She, his former wife and his parents and Ms Masonwells' parents all spoke of their intense grief at the loss of the couple.

[32] The appellant was 41 years old when he committed the murders and 43 when he was sentenced. He was married with one child, but was separated from his wife at the time of his arrest. He had no prior criminal history, although he did have a very extensive traffic history which included a number of offences of disqualified driving. On one occasion he had been sentenced to three months imprisonment after breaching a suspended sentence, and on three other occasions had been imprisoned for six month periods, the most recent being in May 2009; on that last occasion he was given early parole release after six weeks.

[33] Section 305 of the *Criminal Code* at the relevant time mandated life imprisonment for murder and, where the defendant had been convicted of more than one count of murder, an order that the defendant not be released on parole before serving a minimum of 20 years imprisonment. Defence counsel, asked by the trial judge to make submissions as to what the non-parole period should be in this case, pointed to the facts that the appellant had no criminal history; that he was under significant pressure at the time the offences were committed; and that a number of admissions had been made for the purposes of the trial which had the effect of shortening it.

The trial judge's findings and remarks on sentencing

[34] In sentencing, the trial judge noted that at the relevant time the appellant's financial position was precarious, he had separated from his wife and he was at a low point of

his life; circumstances which led to a blurring of his judgment. His use of his victims' money for his own purposes rather than for the intended work had placed him under mounting pressure, as did the agreement he had entered to repay the couple should the vehicle not be recovered. He had responded by arriving at an intention to kill them and pretend that they had driven away in the panel van. The fact that he had left a trail of incriminating evidence was not the product of a spur of the moment killing but of the appellant's "unintelligent disorganised thinking" and "misplaced confidence in [his] capacity to lie and attempt to deceive others".

[35] It was likely, his Honour found, that Mr Maitland had been shot first; Ms Masonwells had probably been stabbed as she lay defenceless on the ground at Fearnley Street. The appellant had attempted to hose away the blood at Fearnley Street and opted to dispose of the bodies on an incline, not expecting that they would be found. Thereafter he had told a series of lies and had attempted to the end to avoid responsibility, exhibiting no remorse. These were execution-style killings to eliminate financial problems, and were more wicked than a killing in the heat of passion. They were followed by the attempt to deprive the deceased and their families of the dignity of a proper funeral. The need to denounce such conduct, community protection and the culpability involved in the killings warranted a non-release order substantially beyond the statutory minimum. The order was made that the appellant not be released until he had served a minimum of 30 years unless released sooner under exceptional circumstances.

Sentencing in comparable cases

[36] The prosecutor put before his Honour a series of cases in which the application of non-parole periods beyond the mandatory non-release period of 20 years was considered: *R v Maygar; Ex parte Attorney-General (Qld)*;[7] *R v Hayes*;[8] *R v Sica*,[9] and a decision of the Court of Appeal of Western Australia, *Stasinowsky v Western Australia*.[10] (The last sets out some considerations relevant to determining the length of a non-parole period; but given that there was a different statutory regime for sentencing in that case, it is of limited relevance.) In discussions during sentencing submissions, his Honour referred also to *R v Brennan*,[11] a decision of the Court of Appeal refusing leave to appeal a sentence he had imposed in respect of a double murder; because it concerned offending in the context of a "high emotional domestic drama", he considered it entailed a less serious level of offending than the present case. In this court, the appellant relied, in addition, on *R v Smithers*[12] *and R v Stewart and Garcia*.[13]

[37] *Maygar* was an Attorney-General's appeal on inadequacy grounds against the sentences imposed on two respondents, one of whom, Maygar, was 18 years old, while the other was a juvenile. Maygar had been sentenced to life imprisonment with a minimum of 20 years before parole. He had pleaded guilty on the second day of his trial to two counts of murder, one of manslaughter and four counts of rape, all committed in a sustained episode of violence inflicted on people occupying or visiting a Toowoomba flat. It began with the appellant and a juvenile (not the co-respondent) battering and stomping a male visitor to death; that killing, for reasons which are unclear, was charged as

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7 [2007] QCA 310.
8 [2008] QCA 371.
9 [2013] QCA 247.
10 [2009] WASCA 20.
11 [2013] QCA 316.
12 [2013] QCA 90.
13 [2014] QCA 244.

manslaughter. Five other people who were on the premises were told that they were hostages. One of them, a 17 year old, was killed by repeated blows to his head with a metal bar, struck by Maygar and by his juvenile co-respondent in the appeal; Maygar had threatened the latter with death to make him participate.

[38] Maygar next committed a number of rapes on a young woman who was at the flat with her baby. He then set about killing the male occupant, who had been a witness to the events, by adopting a variety of gruesome means: attempting to cut his Achilles tendon with a knife, twisting his neck in order to break it, hitting him in the throat with metal bars, striking his head with the bars, placing a bar across his throat and standing on it, breaking his jaw as a bar was forced into his mouth and out the side of the side of his face, stomping on his head, hitting him with a hammer, attempting to gouge his eye out and cutting at his throat with a broken knife. Some of those acts were committed with the assistance of his juvenile co-offenders.

[39] At the same time as he was sentenced for the manslaughter, murders and rapes Maygar was sentenced to concurrent sentences for offences of arson, burglary, armed robbery, assault occasioning bodily harm in company, dishonesty, violence and possession of a dangerous drug. The sentencing judge identified as the only mitigating factors his youth, which carried some prospect of rehabilitation, and the fact that he had eventually pleaded guilty. In setting the non-parole period His Honour had regard to considerations of parity; one of the co-offenders, having been sentenced as a child, was eligible for parole after 15 years.

[40] In this court, Keane JA, delivering the leading judgment, made some points of general application in considering whether the sentence imposed on Maygar was manifestly inadequate by reason of the non-parole period:

> "The first consideration in a case such as this is the need to impose a sentence which protects the community. In this regard, a non-parole period of 20 years would usually provide adequate protection for the public. At the expiration of the non-parole period of a life sentence, Maygar will only be released if the authorities consider that it is then safe to release him on parole. As was said in the High Court in *Bugmy v The Queen*, "a minimum term of eighteen years and six months is of such length as to take the prospects of re-offending in this case beyond even speculation". On this approach, it is better for judges not to try to guess about these matters too far into the future. If, at the end of 20 years actual imprisonment, Maygar is thought still to represent an unacceptable risk to the community, he will not be released. To impose a sentence of actual imprisonment in excess of 20 years is, therefore, not warranted as a rational response to the need to ensure the protection of the community.
>
> There are, however, other considerations which apply in this case, in addition to the claims of community protection. In this case, the need for condign punishment is as strong as it could ever be bearing in mind considerations of denunciation of Maygar's conduct and the vindication of the victims of his conduct. The horrific nature of these offences, and the unspeakable suffering endured by the victims and their families, makes this aspect of the sentencing function of special importance in this case.

> Happily, cases in which it is necessary to consider whether the minimum term of actual imprisonment fixed by s 305(2) of the *Criminal Code* should be increased to impose adequate punishment on the offender are rare."[14]
>
> (Citations omitted)

[41] In the result, the court concluded that the sentencing judge had erred in regarding parity considerations as significant, and consequently exercised the sentencing discretion afresh. Having regard to the savagery of what was done, there was no real prospect of Maygar's rehabilitation. It was an act of cruelty to force the juvenile to participate. The last of the murders was the execution of a witness to the earlier crimes which, in itself, would have warranted the imposition of a non-parole period substantially in excess of the minimum. The plea of guilty had little utilitarian value, having been made on the second day of a trial in which there was a strong Crown case. It was observed that a period of 30 years non-parole was appropriate punishment for offences in the category of the "worst imaginable examples of murder";[15] as these were. The non-parole period for each of the two murders was increased to 30 years.

[42] In *Hayes*, the appellant was convicted after a trial of one count of arson and three counts of murder. Having been released from gaol, he was angered to find that his girlfriend had formed a new relationship, and set her house on fire in an "act of vengeance and jealousy",[16] killing her, their infant son, and her new lover. That appellant was 38 years old and had a criminal history which included drug offences and four convictions for assault occasioning bodily harm. He was sentenced to life imprisonment with an order that he not be released until he had served 24 and a half years in prison. The basis of sentencing was not clear as between felony murder and intentional killing. This court held that whichever was the basis, the sentence imposed was not manifestly excessive. The appellant had exhibited no remorse for the consequences of his actions, describing his child's death as "God's work". It was open to the sentencing judge to conclude that vindication of the victims and denunciation of the crime called for an extension of the non-release period beyond the statutory minimum of 20 years.

[43] The appellant in *Sica* murdered his 24 year old girlfriend and her younger brother and sister, aged, respectively, 18 and 12. The sentencing judge found that he had strangled the elder sister, probably in a fit of jealous rage, and then struck each of her siblings in the head with a garden fork a number of times before placing them into a spa bath. The boy was unconscious, not dead, when placed in the spa bath, and drowned. The appellant then cleaned the house to remove evidence and pretended a couple of days later to have discovered the bodies. It was accepted that the killing of the elder sister may not have been premeditated, but the murders of the younger brother and sister were. The effect on the family of the three murdered children was, his Honour observed, horrific. The appellant was 33 at the time of the offences and 42 when sentenced. He had a criminal history which included a number of counts of arson, involving the destruction of police stations, for which he had served nine years imprisonment. At the time he committed the murders, he was on parole for offences involving the throwing of Molotov cocktails into premises. He was sentenced to life imprisonment with a minimum period of 35 years to be served before he could be released on parole, other than exceptional circumstances parole. This court held that the appellant's

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14 At [63]-[65].
15 At [65].
16 At [103].

criminal history, his lack of remorse, his doubtful prospects of rehabilitation, considerations of deterrence and protection of the community, warranted the sentence imposed.

[44] In *R v Brennan*, the case to which the sentencing judge in the present case referred, the appellant was convicted of the murders of his estranged wife and his 14 year old stepdaughter. He had made a number of threats of sexual and other violence against his wife and on the day of the murders pleaded guilty to two charges of using a carriage service to make threats against her. Having then been made the subject of a domestic violence protection order that he not contact her or her children, he was heard to say outside the court that he was going to kill her. He bought high velocity bullets and went to her house holding a gun and a baseball bat. He shot the woman and her daughter; the girl's twin brother managed to flee. The appellant went to trial, claiming that his estranged wife had taken the gun and accidentally killed her daughter before committing suicide. He was sentenced to life imprisonment with an order that he not be released before serving a minimum of 22 years. This court held that the sentence reflected a proper exercise of discretion in light of the shooting of the defenceless 14 year old girl, who had done nothing to attract the appellant's anger, and the killing of his wife in defiance of the order designed for her protection.

[45] In *Smithers*, the applicant, having pleaded guilty to two counts of murder and one of grievous bodily harm, was sentenced to life imprisonment with a non-parole period of 25 years. He sought an extension of time within which to seek leave to appeal against sentence. He had murdered a couple who owned the rural property on which he lived, killing the woman first. He beat her about the face and chest, broke her nose and inflicted multiple stab wounds to her neck and chest. When her de facto husband returned, his hands were tied behind his back and a rope placed around his neck before he was stabbed 50 to 60 times and assaulted around the head and face with a fire poker. He remained conscious for those assaults, and was finally strangled. The grievous bodily harm was the causing of serious brain injury to a young woman in what was described as a "senseless attack". This court considered that the "multiple acts of sustained and brutal violence on separate occasions" involved in the killings warranted the imposition of a release eligibility period in excess of 20 years; they were not counterbalanced by the applicant's early guilty pleas, which were made in the face of an overwhelming Crown case. The application for an extension of time was refused.

[46] The last of the cases relied on, *R v Stewart and Garcia*, concerned the murder of a married couple, in that case by two offenders. The couple ran a security business for which the two appellants had previously worked. The husband was found dead in a toilet cubicle on business premises which he had been patrolling. His hands were tied behind his back and the word "dog" was written in his blood on the toilet door. There had been previous ill-feeling between the two appellants and the dead man and they had made threats to kill him. It is not clear from the judgment precisely what the mechanism of his killing was, although there is a reference to an incision around and behind his left ear and cuts to his clothing, so one infers that he was stabbed to death. The appellants then went to his home where they struck his wife with a claw hammer and stabbed her, causing numerous injuries and fatal blood loss, before ransacking the house. They were convicted after a trial and each was sentenced to life imprisonment, with an order that he not be released before serving a minimum of 25 years. This court refused leave to appeal against sentence, considering that the malice in the husband's killing, the prolonged, premeditated and shocking violence used in the wife's murder and the gap in time between the two killings justified an increase in the minimum custodial period to 25 years.

The submissions on the application for leave to appeal against sentence

[47] Counsel for the appellant submitted that notwithstanding the breadth of the sentencing discretion, the features of the present case did not warrant elevation of the non-parole period by 10 years above the statutory minimum. Counsel for the respondent submitted that it was open to his Honour to conclude that an execution style killing to solve financial problems was innately more wicked than a killing committed without forethought in the heat of passion. That feature distinguished the case, and justified a conclusion that the degree of culpability was such as to warrant the length of the non-parole period.

Conclusions on the application for leave to appeal against sentence

[48] In my view, the appellant's contention that the setting of the minimum period of imprisonment at 30 years rendered the sentence manifestly excessive must be accepted. Unlike many convicted murderers, the appellant did not have a criminal history indicative of a stronger need for community protection. For the reasons explained by Keane JA in *Maygar*, one can assume that a non-parole period of 20 years with the need then to satisfy parole authorities of his suitability for release would adequately meet that requirement.

[49] The sentencing judge here correctly contrasted the case with that of *Brennan*, in that there was an emotional component in that case. However, against that feature he might properly have balanced the fact that *Brennan* involved some level of premeditation, the killing of a child and the breach of the domestic violence order intended to protect the appellant's estranged wife and her family. One must not lose sight of the fact that this case had neither of the last two features; and also, of course, that there was here no element of torture or sexual violence. The killings fall far short of what one might describe as the "worst imaginable examples of murder". A period of non-eligibility for parole of 30 years is not warranted.

[50] What does warrant extension of the non-parole period beyond the minimum is the need for adequate punishment. That punishment must reflect the apparent absence of remorse; the premeditated nature of the murders, purely for reasons of self-interest; and the suffering caused to the victims' families both by the nature of the victims' killings and the heartlessness of the treatment of their bodies. The sentence imposed at first instance should be varied by reducing the minimum period which the appellant must serve to 24 years.

Orders

[51] I would:

1. Dismiss the appeal against conviction.

2. Grant the application for leave to appeal against sentence.

3. Vary the sentence imposed at first instance by deleting the requirement that the appellant serve a minimum of 30 years before his release and substituting a requirement that he serve a minimum of 24 years unless released sooner on exceptional circumstances parole under the *Corrective Services Act* 2006.

[52] **GOTTERSON JA:** I agree with the orders proposed by the Chief Justice and with the reasons given by her Honour.

[53] **MULLINS J:** I agree with the Chief Justice.