SUPREME COURT OF QUEENSLAND

CITATION:	*R v Williams* [2015] QCA 276
PARTIES:	**R** **v** **WILLIAMS, Darren James** (respondent)
FILE NO/S:	CA No 210 of 2014 SC No 3 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Toowoomba – Unreported, 6 August 2014
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2015
JUDGES:	Philip McMurdo JA and Jackson and Bond JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of burglary and was convicted after trial on one count of attempted murder – where applicant had broken into his estranged wife's house and stabbed her while she was asleep – where applicant's two year old daughter was asleep next to the victim – where applicant in breach of a domestic violence order – where offence led to considerable emotional harm to the victim and applicant's daughter – where applicant had plead guilty to alternate charge of doing grievous bodily harm with intent – where offence was premeditated and unprovoked – where applicant sentenced to 15 years' imprisonment for attempted murder – whether sentence was manifestly excessive in all the circumstances *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2, cited *R v Ahmetaj* [2015] QCA 248, cited *R v Batchelor* [2009] QCA 150, considered *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345, cited *R v Kay* [2012] QCA 327, considered *R v Kerwin* [2005] QCA 259, considered *R v Mallie, Ex parte Attorney-General (Qld)* [2009] QCA 109, considered

R v Rochester; Ex parte Attorney-General (Qld) [2003] QCA 326, cited
R v Schaefer [2001] QCA 327, considered
R v Seijbel-Chocmingkwan [2014] QCA 119, considered
R v Tout [2012] QCA 296, cited
R v Witchard; ex parte Attorney-General (Qld) [2005] 1 Qd R 428; [2004] QCA 429, considered

COUNSEL: C W Heaton QC for the applicant
S J Farnden for the respondent

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

[1] **PHILIP McMURDO JA:** I agree with Bond J.

[2] **JACKSON J:** I agree with Bond J.

[3] **BOND J:** Late in the evening a little less than a year after he had separated from his wife of one year and only a week after he had learned she had started a new relationship, the applicant armed himself with a knife; drove to and broke into his wife's home; made his way to her bedroom where she was sleeping on her back with their two year old daughter by her side and – using both hands – plunged the knife deeply into her chest and ran off.

[4] His wife immediately woke in terrible pain, finding a knife sticking out of her chest. Her screams attracted her flatmates' attention and woke her daughter. She removed the knife from her chest and collapsed. One of the flatmates called the ambulance. She was taken to hospital and given emergency treatment for the life threatening injuries she had suffered. She survived, albeit after a complicated recovery in which that outcome was sometimes in doubt. She and her daughter still carry the emotional scars of that night.

[5] The applicant was convicted by a jury of attempted murder and the trial judge sentenced him to 15 years imprisonment for that offence. That sentence automatically involved a declaration that he was a serious violent offender, with the consequence that he must serve 80 per cent of the sentence before becoming eligible for parole.

[6] He appealed his conviction and sought leave to appeal from his sentence. Prior to the hearing of the appeal, he abandoned the appeal against conviction, so the only matter for determination became his application for leave to appeal from his sentence.

[7] The applicant does not argue that the trial judge made any specific error in the exercise of the sentencing discretion. Rather the applicant's case is that the sentence was manifestly excessive and that, accordingly, this court should set aside the sentence below and exercise the sentencing discretion afresh. In order to make good this contention, it is not enough to show that the sentence is markedly different from sentences in other cases. The difference must be such that "… the result embodied in the court's order 'is unreasonable or plainly unjust' and the appellate court infers 'that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance'."[1]

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[1] *Barbaro v The Queen* (2014) 253 CLR 58 at [26]. See also *R v Tout* [2012] QCA 296 at [8], per Fraser JA, with whom Muir and Gotterson JJA agreed, citing *Hili v The Queen* (2010) 242 CLR 520 at [58], [59]. See also *R v Ahmetaj* [2015] QCA 248 at [5], per Morrison JA, with whom Holmes CJ and Mullins J agreed.

[8] The essence of the argument by the applicant was –

(a) to concede that the wide variety of circumstances in which the offence of attempted murder is committed gives rise to a correspondingly wide range of penalties imposed[2];

(b) to refer to previous case law in this court suggesting that an "appropriate range" for the offence is generally from 10 to 17 years[3];

(c) to submit, by reference to other cases decided in this court and said to be comparable that, the 15 year sentence was manifestly excessive; and

(d) to submit that there is a "sentencing trend" evidenced in comparable cases which supports the conclusion that a sentence of 12 years would be an appropriate level of penalty in the present case.

[9] The applicant's submissions that there is an "appropriate range" of penalty derived from comparable cases having the bounds so identified and that a "sentencing trend" of the character so articulated may be discerned from such cases cannot be accepted as the law now stands, and at least as so expressed.

[10] In *R v Goodwin; Ex parte Attorney-General (Qld)* Fraser JA observed[4] (emphasis added):

> "… It is necessary to mention only *Barbaro v The Queen; Zirilli v The Queen*, in which the High Court concluded that past sentences do not mark the outer bounds of a sentencing judge's permissible discretion, and that a sentencing judge who is properly informed about the facts, relevant sentencing principles, and comparable sentences "will have all the information which is necessary to decide what sentence should be passed...". **Comparable sentences assist in understanding how those factors should be treated, but they are not determinative of the outcome and they do not set a "range" of permissible sentences. Whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences but by reference to all of the factors relevant to sentence. Because sentencing involves a case-by-case synthesis in which past sentences may be used only as guidelines and are not determinative, there can be no underlying range of available sentences for a particular case which may be narrowed or broadened over time by subsequent sentencing decisions**. Whilst the absence of comparable authorities is likely to make the already demanding task of arriving at the just sentence according to law yet more difficult, it does not leave open a wider range of permissible sentences than otherwise would be the case. The respondent's submission should therefore not be accepted."

[11] In the same case, Mullins J, with whom Philippides J agreed, observed (emphasis added):

> "[34] In view of the respondent's argument based on the lack of comparable sentences, it is necessary to consider the effect on

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2 Outline of submissions filed by the applicant on 3 November 2015 at [21].

3 *R v Reeves* [2001] QCA 91.

4 *R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345 at [5], footnotes omitted. His Honour's remarks and the remarks of Mullins J in the following paragraph were made in the course of rejecting a submission that when there were no available comparable sentences the sentencing discretion was broader than cases in which there were comparable sentences.

> both the sentencing judge and the appeal court of the absence of comparative decisions for the respondent's offending. **Comparable sentences assist in promoting consistency in the application of the principles of sentencing, as the comparable sentences provide guidance to the sentencing judge and stand 'as a yardstick against which to examine a proposed sentence'**: *Hili* at [53]-[54] and *Barbaro v The Queen* (2014) 88 ALJR 372 at [41].

[35] The plurality in *Barbaro* restated the process of sentencing at [34]:

> Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not be broken down into some set of component parts. As the plurality said in *Wong v The Queen*, '[s]o long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform'"

[12] Against that background, what were the factors which the trial judge took into account? Having regard to those factors and the yardstick provided by comparable cases, ought it be concluded that the sentence was manifestly excessive by the application of the test mentioned at [7] above?

[13] In addition to the facts to which I have already made reference at [3] and [4] above, the trial judge took into account the following:

(a) The offence was extremely serious. Citing *R v Mallie, Ex parte Attorney-General (Qld)*[5], his Honour noted that the violence of one party to a broken relationship against the other party was to be regarded as "seriously anti-social conduct warranting a condign sentence to appropriately reflect society's disapprobation and the need for general and specific deterrence".

(b) The offence was premeditated. The applicant had armed himself with the knife and driven a long distance to get to the vicinity of his wife's home. He had parked 200 metres away so as to conceal his approach to the home.

(c) The offence was carried out after perpetrating a burglary.

(d) The applicant used a dangerous weapon. He used it with considerable force. He intended that his wife would die. It was only by good luck that his goal was not obtained.

(e) His wife did nothing to provoke the attack. She was defenceless when she was attacked and, having been attacked, was left for dead. The attack and its consequences inflicted serious emotional harm on his victim, his daughter (who witnessed the immediate aftermath of the attack), and his victim's father.

(f) Having conducted the attack and run off, the applicant made a pretext call from a public telephone to his own mobile phone. The purpose was to make it appear that someone had called him to inform him his wife had been stabbed. He then attended at the hospital in continuation of that pretext where he was then arrested.

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5 [2009] QCA 109 at [32].

(g) In initial interviews with police, the applicant told lies about where he was on the night in question. Within a few days he realized that the police did not believe him and he confessed to having stabbed his wife. He advanced the false propositions to police that he had heard a "voice" which told him to stab his wife and that he had not been in control of his own actions. These indicia of a lack of remorse were reinforced by lies and prevarications advanced in an "innocence" letter written to the court attempting to implicate other persons.

(h) The offence was itself a breach of an existing domestic violence order, there having been at least one act of violence by the applicant against his wife. After the offence a further order was made prohibiting direct or indirect contact with his wife, but the applicant breached that order, by writing letters to his wife and members of her family in late 2012 and by writing to his wife in August 2013.

[14] The trial judge also acknowledged the existence of and took into account the following further considerations, namely:

(a) Any sentence of 10 years or more attracted an automatic declaration that the offender was a serious violent offender which would have the consequence for parole eligibility that I have mentioned at [5] above.

(b) There was some co-operation with the administration of justice, by entering a plea of guilty to the charge of burglary and to the alternative charge of doing grievous bodily harm with intent. The applicant also facilitated the course of the trial by way of the making of formal admissions.

(c) The applicant's criminal history was not as serious as found in some of the comparable cases.

(d) The applicant was 36 at the time of his offending, and almost 38 at the time of sentencing. His problems had deep seated origins in his observations of domestic violence towards his mother by his biological father (who left when the applicant was about four or five years old) and her next (but not current) partner.

(e) There were references from people who knew the applicant which spoke well of him and of some good work which he had done since being on remand.

(f) The applicant had a history of depression prior to the offence and for which he had been medicated, but had taken himself off the medication before offending. He also had a history of alcohol abuse. Since the offence and whilst on remand, he had attended to issues concerning domestic violence and alcohol abuse and had been trying to understand his addiction. He had sought to prepare booklets hoping to help others beset by those problems.

(g) He had taken steps to rehabilitate himself whilst on remand, giving himself insight into his offending behaviour. He had prepared statutory declarations stating an intention not to disrespect or interfere with his former wife once he was released.

(h) The relevant comparable cases which had been the subject of submission before him.

[15] Senior counsel for the applicant emphasized the following matters:

(a) The applicant had demonstrated insight into his offending.

(b) It did not appear that the applicant's attack had left any significant physical legacy on his victim.

(c) The offence – involving as it did a single knife wound to the chest whilst the victim was asleep – did not involve protracted or persistent violence.

(d) The applicant was not generally a person with an inclination to violence. He did not pose a significant continuing risk to the community.

[16] These matters may be acknowledged. But they were encompassed within the matters which the trial judge took into account. The critical question on the application is whether the conclusion that the sentence was manifestly excessive is justified when measured against the yardstick of the comparable cases.

[17] Senior counsel for the applicant relied on *R v Kerwin*[6]; *R v Rochester; Ex parte Attorney-General (Qld)*[7] and also mentioned *R v Kay*[8]. Counsel for the Respondent also referred to *Kerwin* and *Rochester* and, further, to *Mallie*; *R v Schaefer*[9]; *R v Batchelor*[10]; *R v Seijbel-Chocmingkwan*[11] and *R v Witchard*[12]. Of these:

(a) *Mallie*, *Rochester* and *Seijbel-Chocmingkwan* were all examples of cases of attempted murder in which sentences of 10 years imprisonment were imposed.

(b) *Kerwin* was the principal case relied on by the applicant. It involved a 12 year sentence.

(c) *Batchelor*, *Kay*, *Schaefer* and *Witchard* were examples of cases involving longer sentences: respectively 13 years, 14 years, 15 years and 15 years.

[18] In *Kerwin*, the offender was convicted by a jury of attempted murder of his estranged wife. Relevantly he was sentenced to 12 years imprisonment for that offence, to be served concurrently with a sentence of six years for burglary, but cumulative upon an activated suspended sentence of 135 days. That sentence was not disturbed on appeal, although one member of the Court observed that the sentence was towards the lower end of the range for so serious an offence.

[19] Factually there were a number of aspects of commonality between the offending by Kerwin and by the applicant in the present case. Kerwin was subject to a domestic violence order at the time of the offence because of previous violence towards his wife. He broke into his wife's home and, in the presence of her daughter, strangled her until police pulled him off her. As is the case in relation to the present applicant, Kerwin's victim was concerned as to the prospect of suffering further violence when the offender was released and both the victim and her daughter had been affected emotionally by the offence.

[20] Senior counsel for the applicant submitted that the offending in *Kerwin* was of a more serious nature than in the present case and revealed the sentence in the present case was manifestly too high because at the time of the offending Kerwin was on a suspended sentence for previous violence and his offending was prolonged and involved multiple blows and action designed to kill his victim. However, I do not accept that

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6 [2005] QCA 259.
7 [2003] QCA 326.
8 [2012] QCA 327.
9 [2001] QCA 327.
10 [2009] QCA 150.
11 [2014] QCA 119.
12 [2005] 1 Qd R 428.

as a significant point of distinction favouring the applicant. A countervailing consideration is that the offending in the present case involved a weapon, and the weapon was used in a manner intended to and capable of achieving the death of the victim with a single blow. The trial judge recognized that it was only by good luck that the applicant's victim survived his attack.

[21] Moreover, as counsel for the respondent noted, although there was some premeditation in Kerwin's case, it was not to the same degree. In the present case, the applicant took steps before and after the offence to avoid detection. Kerwin's offending conduct occurred whilst he was adversely affected by alcohol at the time of the offence which suggests a degree of impulsiveness (although that was not regarded by the members of the Court as a mitigating factor). On the other hand, the evidence of the development by the applicant of insight into his offending behavior which the trial judge recognized in the present case was not a factor which existed in *Kerwin*.[13]

[22] *Mallie* involved a prolonged but not premeditated murderous attack upon a woman with whom Mallie had been in a short intimate relationship and who had decided to end the relationship and return to her former partner. After a plea of guilty, Mallie was sentenced to eight years imprisonment for attempted murder with parole eligibility fixed after serving two and a half years. On an appeal by the Attorney-General, McMurdo P (with whom Chesterman JA and Mullins J agreed) concluded that the sentence was manifestly inadequate and increased the sentence to 10 years, which had the consequence that Mallie had to serve eight years before being eligible for parole.

[23] The President concluded that Mallie had attempted to carry out his murderous intention with determination and ferocity and that his offence deserved a heavy deterrent penalty. In increasing the sentence to 10 years, her Honour took into account the many mitigating features favouring Mallie, including that he had ultimately desisted in his attack and rendered assistance to his victim, was otherwise a good citizen, had many favourable references, had grave health problems which meant that he might not survive his prison sentence, had cooperated with authorities and also pleaded guilty at an early time, and was genuinely and deeply remorseful for his offending.

[24] The extent of the mitigating features in *Mallie* and the fact that it was an appeal by the Attorney-General make it an exemplar of a case in which one would expect the penalty to be significantly less than the present case. It does not assist the applicant's argument.

[25] *Mallie* is also significant because it contains a discussion of *Rochester*. The applicant in the present case submitted that the circumstances of the offending in Rochester are not such as to support the differences between the 10 year sentence in that case and the 15 year sentence in the present case. The weight of that submission is significantly reduced by the following observations made by the President in *Mallie*:

> "[36] In *Rochester*, Rochester pleaded guilty to aggravated unlawful stalking and doing grievous bodily harm with intent but not guilty to attempted murder of his wife. He was convicted after a trial and sentenced to 10 years imprisonment. The Attorney-

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13 In handwritten submissions lodged this year in support of his now-abandoned appeal against conviction, the applicant advanced the spurious proposition that the offence had not been committed by him, but had been done by an un-named "associate". I would not accept that the applicant had developed insight into his offending behaviour if he still could not accept responsibility for having done it. However, that material, not having been before the trial judge, is irrelevant to the question whether the sentence imposed by the trial judge was manifestly excessive. It would only be relevant if this court embarked upon sentencing itself.

> General appealed against the adequacy of the sentence. Rochester had separated from his wife after a 17 year volatile relationship. He visited her in the hotel where she worked. He armed himself with a fishing knife and stabbed her. She suffered a four centimetre stab wound to the abdomen which lacerated the diaphragm, liver and stomach, spilling the contents of her stomach into the chest cavity; a contusion of the left lung; two further stab wounds to the upper chest superficial to the ribcage; and a laceration to the left cheek. The most serious wound was seven and a half centimetres deep. The complainant would probably have died without medical attention. Rochester had a previous history of stalking the complainant and had previously threatened her life. He had told her mother he was going to kill his wife. This Court dismissed his appeal against conviction. This Court concluded that, given Rochester's criminal history and the circumstances of the commission of the offence, any sentence less than 10 years would be manifestly inadequate, but the sentence was within range bearing in mind the principles apposite to an Attorney-General's appeal derived from *Malvoso v The Queen* and *Dinsdale v The Queen*.
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> [37] *Rochester* was an even worse example of attempted murder than Mallie's. Although *Rochester* was a trial, Rochester pleaded guilty to the almost as serious offence of doing grievous bodily harm with intent. It demonstrates only that a sentence of 10 years imprisonment was at the very lowest end of the appropriate range in the circumstances apposite there."

[26] In *Seijbel-Chocmingkwan* Morrison JA (with whom Gotterson JA and Martin J agreed) concluded that a sentence of 10 years imprisonment was not manifestly excessive for a case in which the offender drove a car at her estranged husband hitting him and causing some minor injuries and stabbed his new partner three times in the shoulder and attempted to strangle her. She pleaded guilty to dangerous operation of a vehicle and to attempted murder. A distinguishing feature which mitigated the sentence concerned the significant mental health issues from which the offender suffered. The sentencing judge gave great weight to that and the other mitigating features of the timely plea of guilty and the offender having engaged in study and other courses to better herself whilst in custody. Morrison JA observed that it was difficult to see how the mitigating factors warranted greater weight than they were given.

[27] *Batchelor* involved an offender who was convicted on his pleas of guilty of attempted murder, burglary with actual violence while armed with a dangerous weapon and stealing. His submission that his sentence of 13 years imprisonment was manifestly excessive and should have been 11 years imprisonment was rejected. His co-offender had been a relationship which had been terminated by the woman. In order to make the woman suffer, the co-offender decided to have the woman's daughter murdered and asked Batchelor to kill the daughter. The co-offender gave Batchelor money for drugs to help him do it and drove him to the woman's home. Batchelor broke into the home, waited for the daughter to arrive and, when she did, stabbed her several times. She escaped and survived her injuries, albeit with significant residual emotional and psychological damage. Batchelor was only 20 at the time of the incident, had been influenced to commit the offence by the older co-offender, was impaired by drugs at

the time of the offence, had no relevant significant history, and co-operated with the police when first interviewed. Philip McMurdo J (with whom Holmes and Muir JJA agreed) rejected the submission that the permissible range was 10 to 12 years. His Honour observed that but for the mitigating factors rightly identified by the sentencing judge the sentence may well have been much higher.

[28] *Kay* was convicted after a jury trial of attempting unlawfully to kill his acquaintance and sentenced to 14 years imprisonment. After a confrontation earlier in the day, Kay, whilst drunk, attended at the complainant's house; they got into an argument over money and then Kay stabbed the complainant in the stomach and chest. Amongst other things, Kay sought leave to appeal against sentence on the grounds that it was manifestly excessive. The applicant in the present case rightly conceded that the factual circumstances in *Kay* were of limited comparability to the present case.

[29] *Schaefer* stabbed his mother seven or eight times in a ferocious and premediated attack. He was aged 22 at the time of his offence. There was an early guilty plea to the offence of attempted murder. On the other hand, Schaefer had previous convictions for violence against his mother and a long-standing paranoid delusional system involving his mother. The evidence revealed lack of remorse, significant motive of financial gain and that the offender posed on ongoing risk to the mother. His sentence of 15 years imprisonment was not disturbed on appeal.

[30] *Witchard* involved a sentence of 12 years imprisonment for attempted murder which was increased to 15 years imprisonment on appeal by the Attorney-General. Witchard evolved a plan which would involve her seducing her former sexual partner (but current business partner), falsely accusing him of rape and then – with the assistance of two other persons – killing him. She had intercourse with her victim. She stabbed him in the back. She accused him of rape. The other two persons stabbed him and kicked him. He was tortured over a number of hours with threats of what she would do to him. She did not carry through her intention despite having the opportunity to do so. de Jersey CJ and Mackenzie J agreed with Mullins J that the appeal against sentence should be allowed and the sentence increased. The Chief Justice (with whom Mackenzie J agreed) observed that he would regard the revised sentence of 15 years imprisonment as at the bottom of the range for Witchard's crime. Mullins J observed that the appropriate range for Witchard commenced at 15 years imprisonment.

[31] The fact that the offence of attempted murder attracts a wide variety of penalties is demonstrated by the cases to which I have referred. The sentence imposed by the trial judge was not erroneously high when measured against the yardstick of those cases. In particular, I am not prepared to regard the extent of the difference between the present sentence and the sentences imposed in *Kerwin* and in *Rochester* as justifying the inference that there must have been error in the present case.

[32] I reject the submission that the 15 year sentence was manifestly excessive. The application for leave to appeal from the sentence imposed by the trial judge should be refused.