SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lincoln; R v Kister; R v Renwick* [2017] QCA 37
PARTIES:	**In CA No 159 of 2016:** **R** **v** **LINCOLN, Zane Tray** (applicant) **In CA No 166 of 2016:** **R** **v** **KISTER, Luke Shayne** (applicant) **In CA No 172 of 2016:** **R** **v** **RENWICK, Stephen Dale** (applicant)
FILE NO/S:	CA No 159 of 2016 CA No 166 of 2016 CA No 172 of 2016 SC No 41 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	Supreme Court at Mackay – Date of Sentence (Lincoln): 31 May 2016; Date of Sentence (Kister and Renwick): 3 June 2016
DELIVERED ON:	17 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2016
JUDGES:	Margaret McMurdo P and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made in CA No 159 of 2016 and CA No 172 of 2016, Margaret McMurdo P dissenting in CA No 166 of 2016
ORDER:	**In CA No 159 of 2016:** **The application for leave to appeal against sentence is refused.** **In CA No 166 of 2016:** **The application for leave to appeal against sentence is refused.** **In CA No 172 of 2016:** **The application for leave to appeal against sentence is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant Lincoln pleaded guilty to one count of manslaughter and one count of possessing a dangerous drug methylamphetamine exceeding 2 grams – where the applicant was sentenced to nine years imprisonment for manslaughter and two years cumulative imprisonment for the drug offence with parole eligibility set after five years – where the applicant is a New Zealand citizen residing in Australia – where the applicant contends that the sentence was manifestly excessive because the primary judge failed to take into account the hardship that will flow from the cancellation of his visa and his consequent removal and exclusion from Australia upon being released on parole – where the applicant had lived in Australia for more than 20 years and was married with five children – whether the judge erred in not taking account of the applicant's possible removal and exclusion from Australia by the immigration authorities upon his release on parole – whether the sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant Renwick pleaded guilty to one count of accessory after the fact to manslaughter – where the applicant was sentenced to five years imprisonment with parole eligibility after 20 months – where the applicant contends that the sentence was manifestly excessive because the primary judge failed to take into account his attempts to assist authorities in finding the deceased's remains and the risks associated with those attempts as well as the delay between the offence and sentence as relevant to his rehabilitation – where the applicant's attempts to locate the deceased's remains were unsuccessful – where the offending contributed to the delay in prosecuting the matter – whether the primary judge erred in giving little weight to the assistance provided by the applicant and the alleged associated risk – whether the sentence imposed was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant Kister pleaded guilty to one count of accessory after the fact to manslaughter – where the applicant was sentenced to five years imprisonment with parole eligibility after 12 months – where the applicant contends that the sentence was manifestly excessive as he was considerably less culpable than his co-offender – where the co-offender Renwick

pleaded guilty to one count of accessory after the fact to manslaughter and was sentenced to five years imprisonment with parole eligibility after 20 months – where the applicant was aged 21 at the time of the offence and played a lesser role in the offending – where the co-offender was aged 36 at the time of the offence and was involved in the offending from an earlier stage – whether the applicant's earlier parole eligibility sufficiently reflected the difference in age, involvement and prospects of rehabilitation – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant Lincoln pleaded guilty to one count of manslaughter and one count of possessing a dangerous drug methylamphetamine exceeding 2 grams – where the applicant was sentenced to nine years imprisonment for manslaughter and two years cumulative imprisonment for the drug offence with parole eligibility set after five years or 45 per cent of his sentence – where the applicant contends that the sentence was manifestly excessive and that the disparity between his non-parole period and that of his co-offender amounted to an error – where his co-offender pleaded guilty to one count of manslaughter and was sentenced to eight years imprisonment with parole eligibility set at one third – where the applicant's culpability was far greater than any of his co-offenders – where the applicant planned the abduction of the deceased – where the applicant was motivated by a drug debt owed to him by the deceased and a bounty offered by an outlaw motorcycle gang – whether the head sentence and parole eligibility date combined when compared to the sentences imposed on his co-offenders can give rise to a justifiable sense of grievance

Criminal Code (Qld), s 8
Migration Act 1958 (Cth), s 501(3A), s 501CA
Penalties and Sentences Act 1992 (Qld), s 13A

R v Ambrose, unreported, Applegarth J, SC No 445 of 2012, 26 April 2013, considered
R v Brown, unreported, Byrne SJA, SC No 338 of 2016, 8 July 2016, considered
R v HBI [2013] QCA 369, considered
R v Hicks & Taylor [2011] QCA 207, considered
R v KAK [2013] QCA 310, cited
R v Kay, unreported, Byrne SJA, SC No 668 of 2015 and SC No 338 of 2016, 21 April 2016, considered
R v MAO; Ex-parte Attorney-General (Qld) (2006) 163 A Crim R 63; [2006] QCA 99, distinguished
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, considered

R v Pham [2005] NSWCCA 94, cited
R v Schelvis; *R v Hildebrand* [2016] QCA 294, followed
R v UE [2016] QCA 58, followed
R v Welham & Martin [2012] QCA 103, considered
R v Winston [1994] QCA 137, cited
Schneider v The Queen [2016] VSCA 76, cited

COUNSEL: M J McCarthy for the applicant, Lincoln
M J Copley QC, with C Grant, for the applicant, Kister
A J Edwards for the applicant, Renwick
M Cowen QC for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant, Lincoln
Anderson Telford Lawyers for the applicant, Kister
Morton Lawyers for the applicant, Renwick
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** On 31 May 2016, the applicant Zane Tray Lincoln, together with Benjamin Francis Graeme Oakley, pleaded guilty to the manslaughter of Timothy John Pullen on 16 April 2012. Lincoln also pleaded guilty to possessing a dangerous drug methylamphetamine exceeding 2 grams on 19 July 2013. Four days later, the applicants Luke Shayne Kister and Stephen Dale Renwick, pleaded guilty to accessory after the fact to the manslaughter of Mr Pullen on or about 17 April 2012. Lincoln was sentenced to nine years imprisonment for manslaughter and two years cumulative imprisonment for the drug offence, with parole eligibility set after five years. Oakley was sentenced to eight years imprisonment with parole eligibility set at one third. Kister was sentenced to five years imprisonment with parole eligibility after 12 months. Renwick was also sentenced to five years imprisonment but with parole eligibility after 20 months. He was convicted but not further punished for a breach of bail.

[2] Lincoln has applied for leave to appeal against his sentence contending that it was manifestly excessive. He argues that, first, the disparity between his non-parole period and that of his co-offenders amounted to an error; and, second, the primary judge failed to take into account the hardship that will inevitably flow from the cancellation of his visa and his consequent removal and exclusion from Australia upon being released on parole. Kister has also applied for leave to appeal against his sentence contending that it was manifestly excessive. Renwick, too, has applied for leave to appeal against his sentence, contending that it was manifestly excessive and that the primary judge erred in failing to take into account his attempts to assist authorities in finding the deceased's remains and the risks associated with those attempts, as well as the delay between the offence and sentence as relevant to his rehabilitation.

[3] I will summarise what occurred at the two hearings before dealing with each application.

Lincoln's hearing

The circumstances of Lincoln and Oakley's offending

[4] The following facts of Lincoln's manslaughter offence were placed before the primary judge[1] who sentenced all three applicants as well as Oakley. Police received information on 27 June 2012 that the deceased had been killed at a unit in North Mackay 6 – 10 weeks prior, possibly over a drug debt, and that Kiera McKay and Nicholas Voorwinden lived at the unit and were present at the time of the killing. The body has never been found but is believed to be buried somewhere in the Collinsville region. The following day, police established a crime scene at the then unoccupied unit which had most recently been leased by Voorwinden. A forensic examination found the presence of blood and bleach in the downstairs area. The deceased's DNA was matched to blood found in the lounge, kitchen, front door and front entry.

[5] Prior to April 2012, Lincoln had been in a sexual relationship with McKay. In her presence he had enquired about the whereabouts of the deceased who owed him money for drugs. In April, McKay commenced a relationship with Voorwinden and shortly afterwards moved into his unit. The deceased also moved into the unit, where he slept on the sofa downstairs. About two days before the killing McKay told Lincoln that the deceased was staying in their unit. Lincoln said he needed time to "gather some boys from as far as Brisbane".[2] On 15 April 2012, at Lincoln's request, McKay and Voorwinden met Lincoln in an area in North Mackay known as the Goose Ponds. Lincoln told them that the deceased owed him $7,000 and that there was a $30,000 bounty on the deceased's head. Voorwinden joked that for $30,000 he would roll the deceased up in a carpet himself. Lincoln arranged with McKay and Voorwinden for the back door to be unlocked and to make sure the deceased did not leave the unit.

[6] Later that night, Lincoln, Oakley, Nathan Rowland and some others were drinking at Rowland's house. Sometime between 11.00 pm and midnight, Lincoln told Oakley that people to whom the deceased owed money were coming to Rowland's house to learn where the deceased was. At about 4.00 am Lincoln, Rowland and Oakley travelled to the unit. Others including Renwick arrived outside the unit in two cars, one of which was a blue Nissan Navara owned by Kister. Shortly before 5.00 am Lincoln texted McKay and Voorwinden to ensure the back door was unlocked. As McKay did so, she saw that the deceased was uninjured and awake on the sofa and that there was no blood in the room. Lincoln, Oakley and two other unknown[3] men entered the unit through the unlocked rear door. The deceased was known to carry knives for self-protection. McKay then went upstairs; she heard a commotion but did not see any violence. When the noise ended, Lincoln called out "sorry about the mess guys".[4]

[7] Over about five minutes, the deceased was forcibly taken from the unit, placed into the rear of Kister's car and driven off. Police subsequently found blood in Kister's vehicle. Lincoln and Oakley travelled in a different car to Rowland's residence.

[8] Voorwinden observed blood throughout the loungeroom, on the couch where the deceased slept, on the floor in front of the couch, and on the walls and ceiling. He described it as:

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1 Exhibit 5, AB 136 – 140.
2 Above, AB 137.
3 Oakley's Schedule of Facts (Exhibit 12) states that Renwick entered the unit: Supplementary Appeal Book (SAB) 25 – 28.
4 Exhibit 5, AB 138.

> "… a fair bit of blood ... a pool and there was drips all the way out the door ... there was little splatters on the roof of the unit and there was drips all the way out the front door and on the front doorway … and on the doorway with, like smudged hand marks ... there was some on the – on the seats and drips on the – on the pavers".[5]

[9] McKay and Voorwinden cleaned the blood and disposed of the couch. Lincoln subsequently quizzed her to ensure she had cleaned the unit. He was annoyed that when she had burnt the cushions she did not make sure they were totally destroyed. He told her to leave Queensland and that he was "going to get his boys to torch the unit".[6] Lincoln promised him a share of money and that "the bikies would pay for a new sofa".[7] Voorwinden left for Sydney.

[10] On 19 July 2013, Lincoln participated in an interview with police in which he admitted having known the deceased for about five years. He initially denied knowing Renwick until shown telephone records indicating a large number of phone calls between them at the time of the offending. He then told police he had been drinking with Renwick on the night of the deceased's abduction. He was initially charged with murder.

[11] Oakley's Schedule of Facts[8] was broadly similar but noted that he flew to Mackay from Brisbane to take up work arranged by Lincoln with an asbestos removal company. He was a friend of Lincoln's brother and had arranged to stay with Lincoln and Rowland. That night, whilst drinking with Lincoln at Rowland's house Oakley agreed to go with them and show other unknown men the whereabouts of a person who owed money. These unknown men were going to take the debtor to work off the debt. When Oakley was interviewed by police on 13 September 2012 he said he did not know the deceased and had never been at the unit in company with Lincoln. He denied meeting Voorwinden, McKay, Renwick or Kister. On 3 March 2015 he was charged with murder. He was committed for trial after a four day committal in July 2015.

[12] Lincoln and Oakley's committal was heard over four days in July 2015. They were committed for trial on 24 July 2015 and an indictment was presented on 9 December 2015 charging them with murder. Oakley offered to plead guilty to manslaughter on 11 May 2016, on the basis that he agreed to participate in the abduction. Lincoln first offered to plead guilty to manslaughter on 26 May 2016, on the basis that he organised the abduction of the deceased. Both were liable under s 8 *Criminal Code* (Qld) as each knew that it was highly likely that some violence would be used to achieve the abduction, although not that it would amount to grievous bodily harm or death; nevertheless, an unlawful killing was a probable consequence of the force used to enable the abduction.

[13] Voorwinden and McKay were also charged with manslaughter. They pleaded guilty shortly before their committals, after giving statements under s 13A *Penalties and Sentences Act* 1992 (Qld). McKay identified Lincoln as being one of the men at the unit at the time of the abduction. Voorwinden was sentenced to five years imprisonment suspended after 15 months and McKay was sentenced to five years imprisonment

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5 Above.
6 Above.
7 Above, AB 139.
8 Exhibit 12, SAB 25 – 28.

suspended after nine months.[9] But for their extensive co-operation they would have received seven years imprisonment with parole eligibility after two years and four months.[10]

[14] The circumstances surrounding Lincoln's drug offence were as follows.[11] When police arrived at his home to arrest him for the deceased's murder, he was sitting alone in a vehicle in the driveway. They found a package on the front passenger seat. He said it was drugs, but claimed not to know what kind. When asked who owned the drugs he said he did not want to answer any more questions. He declined to participate in an interview and was remanded in custody. The package was later found to contain 126.923 grams of a substance containing 42.265 grams of methylamphetamine (33.3 per cent purity).

The submissions at sentence

[15] The prosecutor stated that Lincoln was born in New Zealand and was 34 at the time of the offending and 37 at sentence. He had a minor criminal history.[12] His Queensland history included a conviction and $200 fine in 2008 for contravening a *Police Powers and Responsibilities Act* order in 2007. The following year he was sentenced to six months concurrent imprisonment for breaching a suspended sentence imposed in 2008 for disqualified driving. He had a five-page traffic history with numerous entries for speeding and disqualified driving as well as other matters.[13] His New South Wales criminal history included possession of cannabis, stealing and driving offences in the Children's Court; and in 1998 community service orders for break enter and steal and break enter with intent and a $1,000 fine for influencing a witness.

[16] Oakley was 24 at the time of the offence and 28 at sentence. His criminal history[14] was more extensive, traversing three pages and commencing in 2002 for minor street offences. In 2007 he was placed on probation for unlawful use of a motor vehicle and drug offences. In 2008 he was placed on a bond without conviction for unlawful supply of weapons. In 2009 he was sentenced to a six month intensive correction order for assault occasioning bodily harm. In 2011 he was sentenced to an effective term of four years imprisonment with parole after sixteen months for a large number of property offences. In 2013, after the commission of this offence, he was sentenced to six months imprisonment, suspended for 12 months for possessing drugs and receiving tainted property on 30 December 2012. He had been released from prison only five weeks before committing this manslaughter.

[17] The prosecutor read aloud victim impact statements from the deceased's parents and sisters. These poignantly and eloquently set out how much the deceased was loved and missed and the dreadful impact of his death on their lives.[15] Their huge loss has affected their physical and emotional health and caused resulting financial detriment. One sister spoke of the pain they endure every day as they wonder where his body is; they regret the inability to "give him the farewell that he deserves"[16] so

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9 Sentencing Remarks, 2 March 2015, AB 168 – 170.
10 Sentencing Proceedings in Camera, 2 March 2015, AB 143.
11 Exhibit 6, AB 141.
12 Exhibits 1 and 3, AB 124, 130 – 134.
13 Exhibit 2, AB 125 – 129.
14 Exhibit 8, SAB 6 – 8.
15 Exhibits 13 – 17, AB 171 – 179.
16 Exhibit 17, AB 179.

that they can properly begin the grieving process after respectfully laying him to rest. Another sister spoke of how unbearable it was living with the unknown of what happened to the deceased and the callous way in which his body was disposed of.

[18] Lincoln, the prosecutor emphasised, was responsible for planning the deceased's abduction whilst Oakley went along with it "as part of the muscle".[17] The prosecution could not say that either man used actual violence on the deceased. It was not known how many other than Lincoln and Oakley entered the unit or who they were. He submitted that Lincoln should be sentenced to between two and a half and four years imprisonment for the drug offence, relying on *R v Carter*[18] and *R v Hesketh; ex-parte A-G (Qld)*,[19] to be served cumulatively upon the sentence for manslaughter. He submitted that a sentence between eight to 10 years imprisonment was appropriate for manslaughter for both Lincoln and Oakley, relying on *R v McDougall and Collas*,[20] *R v Hicks & Taylor*[21] and *R v Welham & Martin*.[22] He accepted that Lincoln's cumulative sentence should be ameliorated for questions of totality.[23]

[19] Senior counsel for Lincoln submitted that the appropriate sentence for manslaughter was between eight and nine years, perhaps closer to nine, with a cumulative term of about 18 months for the drug offence. Parole eligibility should be after about four years. Lincoln, counsel explained, came to Australia from New Zealand when he was 16 and lived in Port Macquarie with his family. He married at 18 and had five children, now aged between 11 and 17. He never became an Australian citizen so that, his counsel submitted, he faces almost certain deportation upon becoming eligible for parole if the current Migration regime is then in force. He left school at 15 as he was dyslexic. He worked in an abattoir for three years until he suffered a wrist injury. He then owned and operated a pizza business for four years. Next he set up a tip truck business, principally in the removal of asbestos, which employed seven people. He began using amphetamines whilst running that business, and worked there at the time of his arrest. At least some of the drugs found in his possession were for his own use. His criminal history, counsel submitted, was relatively minor.[24]

[20] Counsel contended that there was no evidence that Lincoln was armed or knew that anybody else would be armed when the deceased was killed. Counsel emphasised that Lincoln did not intend that the deceased would suffer serious harm. There was no evidence that he personally inflicted any violence on the deceased, although he was responsible for placing the deceased, still alive and moving, into Kister's vehicle. He was not involved in the disposal of the body and was unable to assist in locating it. There was nothing that took this case out of "the norm for a section 8 manslaughter".[25] There was a substantial utilitarian benefit from the guilty plea as a trial would have taken two weeks or longer.

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17 Transcript of Proceedings, 31 May 2016, AB 25.
18 [2008] QCA 226.
19 [2004] QCA 116.
20 [2007] 2 Qd R 87; [2006] QCA 365.
21 [2011] QCA 207.
22 [2012] QCA 103.
23 Transcript of Proceedings, 31 May 2016, AB 35 – 40.
24 Above, AB 41 – 43.
25 Above, AB 43.

[21] Counsel sought to distinguish Lincoln's case from those relied on by the prosecution and emphasised that the notional sentence for Voorwinden and McKay before taking into account their s 13A co-operation was seven years imprisonment. As for the drug offence, he submitted *Hesketh* and *Carter* supported a sentence of about two and a half years imprisonment but as this was to be cumulative it should be reduced to about 18 months. Counsel emphasised that Lincoln had spent a little over two years and 10 months in pre-sentence custody and submitted he should serve about another 12 months before becoming eligible for parole. Counsel emphasised that Lincoln had the support of his wife and family, an important factor in terms of rehabilitation.[26]

[22] The likelihood, counsel submitted, was that, once paroled, he would be taken into immigration detention and deported to New Zealand, in circumstances where he had lived in Australia since he was 16 and he had a wife and five children here. This would be a significant disruption to his and his family's life. At the time he offended, the deportation powers under the character test in the *Migration Act* were not as well-known as they now are.[27]

[23] Later in the hearing, counsel asked the court to disregard his submissions about deportation, because of *R v MAO; Ex-parte Attorney-General*[28] which accepted a New South Wales Court of Criminal Appeal decision, *R v Pham*,[29] which noted:

> "The fact that the Respondent would be or might be deported … was accordingly an immaterial factor in structuring a sentence in this case and error would be demonstrated if it could be established that it became a factor in determining any aspect of the sentence …"[30]

[24] Oakley's counsel emphasised that Oakley had travelled to Mackay where his father lived, with the support of his parole officer, to take up a new position and make a fresh start. He informed the prosecution that he would plead guilty to manslaughter in discharge of the indictment about two weeks before sentence. His counsel submitted that he should receive a sentence of about seven and a half years imprisonment with parole eligibility after two and a half years. He was much younger than Lincoln. He was a qualified chef and began to use ice when working long hours. He had been on remand since 11 March 2015 during which he had completed a Certificate III in Cleaning. His prospects of rehabilitation were excellent. There had been significant delay between the offence and sentence. He should be given full credit for his early plea of guilty and had expressed remorse. Oakley's counsel, too, distinguished the cases relied on by the prosecution as comparable. Oakley's case, he submitted, was low level and transient offending. Oakley knew Lincoln's younger brother and Lincoln had put some money in Oakley's prison account so that he felt a sense of loyalty to Lincoln which influenced him to assist in the offence.[31]

The judge's reasons for sentencing Lincoln and Oakley

[25] The judge set out the known facts of the offending and the basis of the guilty pleas, noting that Lincoln was the principal organiser of the abduction whilst Oakley had

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26 Above, AB 46 – 49.
27 Above, AB 48.
28 (2006) 163 A Crim R 63; [2006] QCA 99, [19].
29 [2005] NSWCCA 94.
30 Above, [14].
31 Transcript of Proceedings, 31 May 2016, AB 50 – 56; Exhibit 18, SAB 29 – 35.

a lesser role having learned of the plan only some hours beforehand. The crime was one which appalled the community. Lincoln's motivation was the money to be paid by the Odin's outlaw motorcycle gang. His Honour also noted the antecedents of each offender, observing that Oakley's criminal history was much more extensive. The guilty pleas whilst very late must be accepted as timely as they were entered soon after the Crown indicated it would accept them. Community benefits flowed from these pleas as the trial was to take between two and three weeks.[32]

[26] His Honour noted the notional sentence of seven years which would have been imposed on McKay and Voorwinden but for their co-operation and that they had deliberately removed themselves from the violence and were not downstairs at the time of the attack and abduction. Their admissions constituted the sole evidence against them and they had been of good character beforehand. They were, however, involved in the planning and the clean-up whereas Oakley was not.[33]

[27] The sentences for Lincoln's offences, his Honour considered, should be cumulative, with moderation so that the total sentence was not crushing. There was no evidence that Lincoln personally inflicted violence upon the deceased. His involvement ended whilst the deceased was alive and there was no evidence that he was involved in the disposal of the body. As his involvement did not include extraordinary violence or callousness, a serious violent offence declaration was not appropriate.[34]

[28] Oakley, his Honour noted, pleaded guilty some weeks before Lincoln and his culpability was less. His involvement arose from his friendship and loyalty to the older Lincoln and through being in the wrong place at the wrong time. There was no evidence he was to profit from his involvement; that either offender was aware of anyone entering the unit armed or whether anyone did so; or that Oakley was involved in or knew what happened to the deceased after he was taken from the unit. At the time Oakley was arrested he was working as a labourer with the local council and was in a long-term relationship. His good behaviour continued in prison. There had been a long delay between his arrest and sentence during which he had made efforts towards rehabilitation. But against that, his Honour observed, Oakley had involved himself in this offending only weeks after his release on parole.[35]

[29] Lincoln's drug offence involved a commercial purpose. The judge considered that a sentence in the range of three years imprisonment would ordinarily be appropriate with parole release after one third.[36] The cases to which counsel had referred and which his Honour discussed demonstrated that a sentence for manslaughter in the range of eight to 11 years imprisonment was appropriate. His Honour referred to the victim impact statements before sentencing Lincoln to an effective term of 11 years imprisonment for both offences with parole eligibility after five years, and Oakley to eight years imprisonment with parole eligibility after one third of that sentence.[37]

Renwick and Kister's hearing

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32 Sentencing Remarks, 31 May 2016, AB 63 – 66.
33 Above, AB 67 – 68.
34 Above, AB 66.
35 Above, AB 66 – 67.
36 Above, AB 68.
37 Above, AB 68 – 70.

The circumstances of Renwick and Kister's offending

[30] Renwick and Kister pleaded guilty to accessory after the fact to manslaughter on the following basis.[38] At the time of the offending Renwick worked as manager and Kister as security guard in the Code nightclub. Kister was also residing with Renwick and his partner. On 15 April 2012 Lincoln, who knew Renwick, formulated a plan to abduct the deceased, motivated by the money the deceased owed him and the bounty on the deceased. At about 5.00 am on 16 April 2012, Lincoln, Oakley and unknown others entered the unit and forcibly abducted the deceased who Lincoln placed in Kister's car. It was not known whether Renwick or Kister was driving Kister's car or whether they were near the unit.

[31] In the early hours of 16 April 2012, Renwick's partner was awoken by the sound of her car pulling up outside. She did not know how many other vehicles were there. She saw Renwick and Kister outside talking quietly with a group of men of similar size to Renwick. No-one came inside. Renwick and Kister left while the rest of the men stayed outside. She texted Renwick, annoyed that he had left strange men at her house. He replied "I'm with Lawf,[39] those guys are me mates so you'll be right".[40] At some point the men left.

[32] Sometime later Renwick and Kister returned. At about 2.00 pm Renwick's phone was used to hire an excavator on a trailer from Kennards in Kister's name. Kister signed for two days hire but returned it the same day unused. Renwick told his partner they were using it to clear Kister's block of land that day but their plans changed and all three went to a sale at Wow Sight and Sound, Kister in his car and Renwick and his partner in her car. It is unknown where the deceased's body was at this time, although there had been an alarm activation shortly after 6.00 am at the nightclub where there was a cold room.

[33] Later that night, Renwick told his partner that he and Kister had "important stuff to do"[41] and they left in Kister's vehicle. At some point during the evening or early hours Renwick's partner sent a message asking where he was. He replied: "stop texting me, I don't want to leave a trail."[42] When she woke in the morning he was still not home. She tried to phone him but he did not answer. He returned her call at about 6.57 am and said that he had broken down and was waiting on the side of the road.

[34] A woman saw a car matching the description of Kister's 27 kilometres northwest of Collinsville with a flat tyre on 17 April 2012. A person matching Renwick's description and another man waved down her vehicle. They asked for a wheel brace or socket set but she told them she did not own one and offered to call the local garage. The first man said he had already phoned for assistance. After dropping her children at school she saw a local garage employee's vehicle with Kister's car driving behind.

[35] The employee took a phone call from Renwick for assistance at about 6.45 am. He located two men and a vehicle without registration plates outside Glenden towards

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38 Exhibit 4, AB 184 – 187.
39 This is a reference to a Mr Lawford, who owned the Code nightclub.
40 Exhibit 4, AB 184.
41 Above, AB 185.
42 Above.

Collinsville. One man said the plates had been stolen. The employee noted the car registration was "LukeyK". He changed the tyre and the two men drove off.

[36] At about 10.00 am Kister and Renwick were pulled over by a police officer on the Peak Downs Highway about one and a half hours east of Glenden for failing to display registration plates. The front windscreen was also broken. The driver identified himself as Renwick and the passenger as Kister. Kister said that he worked at a nightclub in town and earlier in the year someone had thrown a bin through the window and the plates were seized for investigation. At about 9.00 am Renwick called his partner and told her that he and Kister were at the carwash cleaning Kister's vehicle. She drove past a nearby carwash and saw them there. After she returned home from shopping she saw they were both asleep. She did not discuss the incident with them until months later when Renwick told her "he had taken his bows and arrows hunting".[43]

[37] Police later seized Kister's vehicle for forensic examination. They found dark red stains on the underside of the rear seat covers and in and on the foam. These stains; a manufactured tube/hole which traversed the foam seat; the metal components of the rear seat; visible dark stains under the rear seat carpet; areas on the back of the front passenger seat; a spot on the floor in the rear of the vehicle; and areas on the carpet under the front driver's seat; all tested positive for the presumptive presence of blood. Traces of the deceased's blood were found on the passenger side back seat and on foam collected from the rear seat.

[38] On 12 October 2012, a female friend of Kister asked him if he killed the deceased. He laughed and said: "no of course not, but that doesn't mean I didn't bury him". He added: "well they found his blood in my car and they have it". She asked how he buried the body. He replied: "with some sort of earthmoving equipment".[44] At committal she claimed she could not recall the conversation despite having given a statement to police. Despite her evidence, the prosecution did not allege that earth-moving equipment was used to dispose of the body.

[39] On 12 July 2012 Kister gave two statements to police which included the following. Renwick was his boss at the nightclub. He did not know either Lincoln or the deceased. His registration plates had been stolen during the first half of 2012 and lots of people, whose names he could not recall, used his car. He washed his vehicle regularly but had never vacuumed or detailed it inside. On 24 July 2013 he was charged with accessory after the fact to murder and released on bail.

[40] Police conducted a field interview with Renwick on 6 August 2012 which included the following. He knew Kister but denied knowing Lincoln. He had driven Kister's vehicle a number of times but not out west. He was unaware of taking any overnight trips with Kister nor any trips to Collinsville. He had grown up in Collinsville but had not visited for about two and a half years. He denied any knowledge of blood in Kister's vehicle. Renwick was charged with accessory after the fact to murder and released on bail on 23 July 2013. On 4 March 2015 following identification evidence provided by McKay, he was charged with murder and remanded in custody until granted bail on 17 March 2015.

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43 Above, AB 186.

44 Above.

[41] On 31 May 2016 Renwick and Kister pleaded guilty to accessory after the fact to manslaughter. They were bailed to travel with police on 1 June 2016 to try and locate the deceased's remains. Renwick took police 240 kilometres west of Mackay along the Glenden to Collinsville Development Road. He indicated an area 30 metres off the dirt road but nothing was found. Kister, travelling independently of Renwick, was unable to recall or recognise the area. He claimed he was asleep while Renwick drove somewhere Kister had never been before. A local farmer said there had been no fire or flood in the area since June 2012.

The submissions at sentence

[42] The prosecutor stated that Kister was 21 at the time of the offence and 25 at sentence. He had a minor criminal history for street and drug offences for which he was fined without conviction.[45] Renwick was 36 at the time of the offence and 40 at sentence. He had a minor criminal history for which he had been fined without conviction. In September 2012 after the offence he was placed on a good behaviour bond and four months drug diversion for possessing dangerous drugs and on 25 December 2014 he was convicted and fined $1,200 for contravening a direction or requirement on 5 January 2013.[46]

[43] The prosecution case was that they both used Kister's vehicle to take the deceased's body and dispose of it. As the body remained unrecovered the case against the killers was weakened. The prosecutor pointed out that it was known the deceased was bundled into Kister's motor vehicle in the early morning of 16 April and that he drove his car to Wow Sight and Sound later that day. It was possible the body was stored in the nightclub cold room at that time. The deceased was about six foot tall and weighed over 100 kilos.

[44] The prosecutor again read out the family's victim impact statements.[47] Accessory after the fact to manslaughter, he submitted, was a most serious offence; general deterrence was important to ensure the community understands that people who kill should be completely deprived of support and assistance and the crime not covered up.[48] The assistance rendered by Renwick and Kister in disposing of the body was of a very high order. The prosecutor referred to *R v HBI*[49] and to a schedule of single judge decisions. He submitted that, whilst it was impossible to derive a range for this type of offending, this was a serious example. They had possession of the body for many hours, successfully disposed of it, and then gave false statements to police about their involvement. Both had gone on to commit offences since, which suggested their rehabilitative prospects were not promising.[50] He emphasised the terrible effect of their offending on the deceased's family. He acknowledged that they had pleaded guilty; they had recently spent a day attempting to locate the body, albeit many years after the offence; and there was a utilitarian benefit in their guilty pleas.

[45] Renwick's counsel emphasised his client's genuine attempts to assist police in locating the body. He understood he had caused great grief to the deceased's family. He submitted there was a real possibility that there had been fire and flooding in the area

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45 Exhibit 3, AB 183.
46 Exhibit 1, AB 181.
47 Exhibits 5 – 9, AB 188 – 198.
48 Transcript of Proceedings, 3 June 2016, AB 74 – 75, 78.
49 [2013] QCA 369.
50 Transcript of Proceedings, 3 June 2016, AB 94.

where the body was left. Counsel submitted that Renwick's recent co-operation with the police in attempting to find the body had been well-publicised and as a result he had been warned that he was at risk in prison. He may well have to serve his sentence in a far more restrictive custodial regime than otherwise.[51] Counsel submitted that Renwick's involvement was only on 16 April 2012.[52] He had suffered a great deal of shaming in his local community. Whilst on bail he lost a number of jobs when employers learnt of the charge against him. Once released from prison he planned to start afresh in another community.[53]

[46] Counsel handed up an affidavit from his client[54] in which Renwick deposed to the following. In April 2012 he was using methylamphetamine regularly but not when he was responsible for his young daughter. His drug-taking affected his decision-making in regards to this offence. He hoped when released from prison to find employment in the mining or hospitality industry. His conviction for this offence meant he would be unable to return to work as a venue manager as he could not hold a liquor or gaming licence.

[47] Counsel emphasised that Renwick's breach of bail arose through a genuine misunderstanding. He emphasised the delay between Renwick being charged and his sentence, and his timely plea of guilty. Those convicted of the deceased's killing, he submitted, had received effective head sentences of between seven and nine years imprisonment. Renwick was to be sentenced for accessory after the fact to manslaughter, not accessory after the fact to murder with which many of the comparable cases relied on by the prosecutor were concerned. He submitted a sentence of three years imprisonment suspended after six months was appropriate, with an operational period of up to five years.[55]

[48] Kister's counsel emphasised that his client was not involved in the incident at the unit. Kister was only 21 at the time of the offence. He was now in a stable relationship and he and his partner were expecting their first child in January 2017. He came from a close, supportive and functional family. He had completed a carpentry apprenticeship and had been employed in the building industry. He was a hard worker with a strong work ethic and had obtained employment whilst on bail. He bought a block of land on which to build his own house but had since sold it to pay for legal representation and other debts. To pay off his land he began working for the Code nightclub where he was exposed to drugs and became an occasional user. His vehicle was seized during this investigation in 2012 and had been dismantled for forensic testing so that it was now valueless. He had to continue to pay it off until 2015. He was extraordinarily remorseful for his offending, thought about it every day and had difficulty sleeping at night. The stress had affected his health and he had developed food intolerances. He expressed his regret for the effect the offence had on both the deceased's family and his own. He had severed all ties with those involved and moved to Townsville where he eventually planned to commence his own business and design his own home.[56]

[49] Counsel explained that Kister routinely parked his vehicle at the nightclub and left the keys in a room outside the office. It was used without his knowledge in the

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51 Above, AB 98, 100 – 101.
52 This submission is incorrect as Renwick assisted Kister in cleaning his car on 17 April 2012.
53 Transcript of Proceedings, 3 June 2016, AB 101.
54 Exhibit 10, AB 199 – 202.
55 Transcript of Proceedings, 3 June 2016, AB 102 – 107.
56 Exhibit 12, AB 206 – 212.

abduction of the deceased. He did not know Lincoln, Oakley, McKay, Voorwinden or the deceased. When he was told of the killing the following morning, he was concerned that he was already implicated and that his vehicle, which he needed to earn his income, would be seized. For those reasons he went along with Renwick in collecting the excavator and later in disposing of the body and washing the vehicle. Renwick drove Kister's vehicle to the area where the body was left. Kister was unfamiliar with the area.[57]

[50] His criminal history, counsel submitted, was minor. The breach of bail arose through a misunderstanding. He was found in possession of a small quantity of methylamphetamine when his car was seized by police. He pleaded guilty as he could not disprove possession under s 129(c) *Drugs Misuse Act* 1986 (Qld). He had never been a significant drug user and no longer used drugs. The other entries in his criminal history occurred when he was 18 years old and were inconsequential. It was almost three years since he had been charged with the present offence and his positive post-offence conduct demonstrated his rehabilitation.[58] In support of that contention, counsel tendered eleven references from Kister's current employer, community members, his parents and his partner which referred to his positive character traits and rehabilitation, and stated that his involvement in this offence was out of character.[59] Counsel emphasised Kister's guilty plea and submitted that he had done his best to co-operate in the administration of justice. He contended that a sentence of three years imprisonment with parole release after six to nine months was appropriate, or a similarly structured suspended sentence with a longer operational period.[60]

The judge's reasons for sentencing Renwick and Kister

[51] The judge stated that he had recently sentenced Lincoln and Oakley on the basis that their last dealings with the deceased were when he was bundled into Kister's car and taken from the unit and that what then happened to the deceased was unknown. Renwick or Kister or both may well know something about this but they were to be sentenced on the basis of their involvement in taking the deceased's body in Kister's car some three hours out of Mackay and dumping it in the bush. They treated the deceased with a complete lack of respect and dignity and his body has never been recovered.[61]

[52] His Honour referred to the victim impact statements and the devastating effect of the deceased's death on his family, something which Kister and Renwick must have anticipated when they committed this offence. Although they had only recently pleaded guilty, the pleas were timely as the prosecution only agreed to accept the pleas that week. They did, however, lie to police about their involvement.[62]

[53] His Honour adverted to the possibility that the body had been stored in the cold room of the nightclub overnight. He accepted that, as Kister was not familiar with the area, Renwick drove the vehicle to where the body was dumped. They unsuccessfully attempted to assist police in locating the body, motivated by selfish reasons and perhaps by a very belated wish to assuage the grief of the family. His

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57 Above, AB 210.
58 Above.
59 Exhibit 13, AB 213 – 227.
60 Above, AB 211; Transcript of Proceedings, 3 June 2016, AB 111.
61 Sentencing Remarks, 3 June 2016, AB 116.
62 Above.

Honour considered that there was no objective evidence of the genuineness or otherwise of the attempt and did not think that it could figure significantly in the sentencing process. Through their actions potentially valuable evidence was lost. Had the body been available to police, forensic evidence may have assisted in identifying the killers and bringing them to justice.[63]

[54] His Honour noted their antecedents and that each had a relatively good record and employment history. He particularly noted the excellent references for Kister and that his connection with this offending was through Renwick who managed the nightclub where Kister worked. His Honour noted their expressions of regret.[64]

[55] As to delay, the judge noted that it was caused through the prosecution endeavouring to gather evidence to ascertain what happened to the deceased, and that they were not assisted by the offenders. The judge considered that any shaming of Renwick was deserved and was unpersuaded it could have much effect on sentence. As to any risk of retaliation from other prisoners following his co-operation with police, this involved a misunderstanding of what Renwick had done. His Honour struggled to see how a misunderstanding by criminals in jail of what had transpired could possibly impact on the sentencing process.[65]

[56] His Honour noted that the mitigating features for each offender must be considered against the serious crime they involved themselves in. Their sentence must reflect society's condemnation of their conduct and deter others from engaging in similar conduct. *R v HBI*[66] and the single judge decision of *R v Ambrose*[67] demonstrated the importance of isolating those who commit homicide from support and assistance so that such crimes are not covered up. The severe penalties afforded to accessories after the fact to homicide provide a general deterrence against homicide and assist in protecting the community.[68]

[57] His Honour noted the maximum penalty was 14 years imprisonment; the submissions of counsel as to the sentences which should be imposed; the timely pleas; the many years of delay; the belated attempt to find the body; Kister's youth; and that both were generally of good character with solid work histories and strong family support. Nevertheless a significant sentence had to be imposed, although his Honour accepted Kister should receive a lesser sentence because of his youth and more limited involvement. The judge sentenced both Kister and Renwick to five years imprisonment. Kister received parole eligibility after 12 months and Renwick after 20 months.[69]

Lincoln's application for leave to appeal against sentence

Lincoln's contentions

[58] Counsel for Lincoln in this application submits that the primary judge erred in failing to give proper effect to the parity principle by setting Lincoln's parole eligibility date after five years or 45 per cent of his sentence, when compared to

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63 Above, AB 116 – 117.
64 Above, AB 118.
65 Above, AB 118 – 119.
66 [2013] QCA 369.
67 (Unreported, Supreme Court of Queensland, Applegarth J, 26 April 2013).
68 Sentencing Remarks, 3 June 2016, AB 119 – 120.
69 Above, AB 120 – 121.

Oakley's parole eligibility after one third; the notional parole eligibility for McKay and Voorwinden after one third; Kister's parole eligibility date after one fifth; and Renwick's parole eligibility date after one third. His Honour did not consider that Lincoln's was an appropriate case for a serious violent offence declaration yet gave no reason for not setting parole eligibility at the one third mark. He submits that Lincoln has a justifiable sense of grievance warranting this Court's intervention.

[59] Counsel also submits that Lincoln's sentence does not account for his almost certain removal and exclusion from Australia upon his release on parole. Lincoln's conviction and sentence presently require the Minister for Immigration and Border Protection under s 501(3A) *Migration Act* 1958 (Cth) to cancel his visa on character grounds before he is released on parole, unless Lincoln successfully applies to the Minister to have the cancellation revoked under s 501CA. But, Lincoln's counsel submits, to treat that possibility as a relevant consideration would be to invite speculation. He cites *R v UE*[70] as authority for the proposition that removal under the *Migration Act* is a hardship to a person being sentenced and is a relevant sentencing consideration. In this respect he emphasises that the sentencing court was told that he had been in Australia from the age of 16, had a wife who continues to support him and five children.

[60] He submits that in light of these matters, the application for leave to appeal against sentence should be granted, the appeal allowed and parole eligibility set at one third of the head sentence, that is after about 3.7 years.

Conclusion in Lincoln's application

[61] Lincoln's counsel in this application does not contend that the combined head sentence for both offences was manifestly excessive. That concession is rightly made in light of the comparable cases placed before the sentencing judge and the request of Lincoln's experienced senior counsel at sentence for an effective penalty on both counts of 10 and a half years imprisonment with parole eligibility after four years. The submission now made, that parole eligibility should be granted after one third of the sentence, was not made below. In essence it is contended that because Lincoln's co-offenders effectively received parole eligibility after one third or earlier, he has a justifiable sense of grievance in not also obtaining parole eligibility after one third of his sentence. A timely plea of guilty, co-operation with the authorities and other mitigating features frequently result in a parole eligibility date at the one third mark. But failure to set parole eligibility at this time is not necessarily an error.[71] In determining this contention the question is whether the head sentence and the parole eligibility date combined, when compared to the sentences imposed on his co-offenders, can give rise to a justifiable sense of grievance.

[62] Lincoln's culpability was far greater than any of his co-offenders. Renwick and Kister pleaded guilty to a much less serious offence so questions of parity with Lincoln do not arise.

[63] Oakley was in his early twenties at the time of the killing whereas Lincoln was a mature man. Lincoln, not Oakley, planned the abduction of the deceased, motivated by the deceased's $7,000 drug debt and a $30,000 bounty offered by an outlaw motorcycle gang. Oakley, McKay and Voorwinden played much less significant roles. Lincoln, like Oakley, was present when dreadful violence was done to the deceased, demonstrated by the amount and pattern of blood found in the unit. Whilst there is

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70 [2016] QCA 58, [9] – [16].

71 *R v Rooney*; *R v Gehringer* [2016] QCA 48, [16].

no suggestion that Lincoln perpetrated any of this violence, he, unlike Oakley, assisted in forcibly taking the deceased from the unit and putting him into Kister's car, the last reported sighting of the deceased. Oakley, the sentencing judge found, became involved only out of a misguided sense of loyalty to Lincoln,[72] after coming to Mackay the day before the offence to work in Lincoln's asbestos removal business. Oakley was not to receive any benefit from the abduction.

[64] Unlike Oakley, McKay and Voorwinden, Lincoln was also being sentenced for commercial possession of a significant quantity of methylamphetamine, which would ordinarily attract a sentence in the range of three years imprisonment. McKay and Voorwinden were not present when the violence was done to the deceased in the unit and had no prior criminal convictions.

[65] Lincoln's more culpable offending warranted a much heavier penalty then his co-offenders. A sentence of 10 years imprisonment with an automatic serious violent offence declaration would have been within range for his role in the manslaughter. The judge, however, determined that a nine year sentence was appropriate, inferentially discounting the head sentence to reflect the guilty plea. The two year cumulative sentence for the drug offence is not said to be inappropriate. Having already given some credit for mitigating features in setting the head sentence, in light of the gravity of Lincoln's role in the offending the judge was not obliged to set parole eligibility after one third. Indeed, such a course was not supported by the comparable sentences. In *Welham & Martin*[73] both offenders were subject to a serious violent offence declaration with parole eligibility after 80 per cent. In *Taylor & Hicks*,[74] Taylor had parole eligibility after 50 per cent whilst Hicks was subject to a serious violent offence declaration. And in *McDougall and Collas*,[75] McDougall was subject to a serious violent offence declaration and, whilst Collas' serious violent offence declaration was removed on appeal, his parole eligibility was set at 50 per cent.

[66] Given Lincoln's grossly anti-social and significant involvement in the killing and the much lesser participation of his co-offenders, the disparity between Lincoln's sentence and those imposed on Oakley, McKay and Voorwinden cannot give rise to a justifiable sense of grievance on Lincoln's part. His later parole eligibility appropriately reflects the serious nature of his combined offending. Lincoln's first contention is without merit.

[67] The applicant's second contention is that the judge erred in not taking account of Lincoln's almost certain removal and exclusion from Australia by the immigration authorities upon his release on parole. I note that *MAO* on which Lincoln's counsel at sentence relied in abandoning this submission concerned an earlier version of the *Migration Act* so that the decision is no longer apposite. The way in which Queensland courts should deal with this issue and the various approaches taken in other jurisdictions were recently discussed by Fraser JA (Morrison JA and Peter Lyons J agreeing) in *R v Schelvis*; *R v Hildebrand*,[76] a decision handed down shortly before the hearing of these applications.

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72 Sentencing Remarks, 31 May 2016, AB 67.
73 [2012] QCA 103.
74 [2011] QCA 207.
75 [2007] 2 Qd R 87; [2006] QCA 365.
76 [2016] QCA 294, [70] – [83].

[68] It was common ground that Lincoln, like Schelvis, as a person sentenced to a term of imprisonment exceeding 12 months, would have his visa cancelled under s 501(3A) *Migration Act*[77] prior to being paroled. As discussed in *Schelvis*, under the present regime the Minister is obliged, as soon as practicable after making a decision to cancel a visa, to give the person a written notice setting out the original decision and particulars and inviting the person to make representations to the Minister about revocation of the original decision.[78] The Minister may revoke the original decision if the person makes representations and if satisfied that the person passes the character test as defined by s 501, or that there is another reason why the original decision should be revoked. Decisions of a delegate of the Minister not to revoke a decision to cancel a visa may be reviewed by the Administrative Appeals Tribunal.[79] If the visa cancellation is not revoked, the person will be liable to removal from Australia as a non-citizen. The intent of the legislation is that a person who fails the character test and is released from criminal custody would remain in immigration detention whilst revocation was pursued.[80]

[69] Schelvis, like Lincoln, argued that it was merely speculative whether the Minister would revoke the decision to cancel her visa upon her application under s 501CA(4) so that the possibility of such revocation should be disregarded.[81] As in *Schelvis*, it can be assumed that if Lincoln considered his removal from Australia was a disadvantage warranting a lesser penalty, then he would apply for the revocation of the cancellation of his visa.[82] As the Court in *Schelvis* explained:

> "The fact that Schelvis will not be eligible to be released on parole for very many years and the history of frequent amendments to the *Migration Act* make it unsafe to proceed on the footing that the current provisions will remain in force when any decision may be made about her visa. If the relevant provisions remain in force, then, as I have indicated, ... the focus should be upon the prospect of Schelvis being removed from Australia as a result of the rejection of an application by her for revocation pursuant to s 501CA(4) of the Ministerial decision to cancel her visa required by s 501(3A). If the decision about revocation is made by a delegate of the Minister, it will be reviewable on its merits under [s 500(1)(ba)]. There is apparently no provision for merits review if the decision is made by the Minister. It is purely speculative whether the decision will be made by the Minister or by a delegate. Furthermore, s 501CA(4) does not specify any criteria for the exercise of the discretion by whoever makes the decision. Further, it is impracticable now to assess many apparently significant factors (including the health and rehabilitation status of Schelvis at the time of the decision) which might be considered by the Minister or delegate. The prospect that

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77 See the definition of 'substantial criminal record' under s 501(7).

78 *Migration Act* s 501CA(3).

79 *Migration Act* s 500(1)(ba).

80 *Schelvis* [2016] QCA 294, [74] citing the Explanatory Memorandum for the Bill for the Act which introduced s 501(3A), the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

81 [2016] QCA 294, [75].

82 Above, [77].

> the decision under s 501CA(4), whether it be made by a Minister or a delegate, will be unfavourable to Schelvis is entirely speculative."[83]

[70] As a result, this Court in *Schelvis* found that the sentencing judge was right not to take into account by way of mitigation of sentence any hardship which Schelvis might suffer as a result of the prospect that she might be deported after completing the custodial component of her sentence.[84] The same is true for Lincoln. The sentencing judge was right not to speculate about whether Lincoln will be deported after he is paroled. As in *Schelvis*, no submission was made that Lincoln's time in prison would be more burdensome for him because of his apprehension that he might be deported after serving the custodial component of his sentence.[85] There was nothing before the sentencing court in Lincoln's case to suggest that this was something that weighed heavily on him such that it should have any material impact upon his sentence.[86]

[71] This second contention is also without substance. As Lincoln has not made out either of his proposed grounds of appeal, his application for leave to appeal against sentence should be refused.

Renwick's application for leave to appeal against sentence

Renwick's contentions

[72] It is logical to next deal with Renwick's application. He contends that the judge erred in failing to take into account his genuine attempts to assist authorities to find the deceased's remains and the risks associated with those attempts; he was entitled to credit for this co-operation even though it was not ultimately useful.[87] He also submits that his Honour erred in undervaluing the risk that he placed himself in because of his co-operation, namely, retaliation from other prisoners. What was significant, he submits, is that because of his co-operation his time in custody would be more onerous.

[73] He next contends that the judge erred in not taking into account the delay between offence and sentence as relevant to rehabilitation. The judge's sentencing remarks, he submits, suggest that his Honour did not take into account the long delay because it was caused by the prosecution gathering evidence as to what happened and it was not assisted in that process by Renwick. But, he contends, his Honour should have considered Renwick's rehabilitation during the lengthy period of delay: *R v Law Ex-parte Attorney-General*.[88]

[74] His final contention is that the sentence was manifestly excessive. He emphasises that he was involved in the offence on only one day.[89] His role was driving Kister's car three hours out of Mackay and disposing of the body in bushland. He pleaded guilty at an early time. His involvement arose out of his use of amphetamines and his fear of those who asked him to dispose of the body. He submits that the judge placed too much emphasis on *HBI*, which concerned an accessory after the fact to

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83 Above, [81].
84 Above, [82].
85 *Schneider v The Queen* [2016] VSCA 76, [24] – [26].
86 *Schelvis* [2016] QCA 294, [83].
87 *R v KAK* [2013] QCA 310, [43] – [45].
88 [1996] 2 Qd R 63, 66; [1995] QCA 444.
89 See fn 52.

murder. He was an accessory after the fact to manslaughter, which does not involve a murderous intent. He emphasises that in *Ambrose* the mature offender was sentenced to three years imprisonment with parole after 12 months, in circumstances where he assisted others conceal the body of the recently killed deceased; the body was found the following day. Renwick emphasises that he has a relatively good character and employment history, and submits he should have received a sentence in the range of that imposed in *Ambrose*.

Conclusion in Renwick's application

[75] When taking into account co-operation with the authorities as a mitigating sentencing feature, not only is the fact of co-operation relevant, but also how effective the co-operation was. Extensive, productive co-operation will ordinarily attract a larger sentencing discount than extensive non-productive co-operation. It was not until about four years after the offence that Renwick assisted the police in trying to locate the body, unsurprisingly without success. The primary judge was right to give this co-operation little weight as a mitigating factor. It was better than nothing and deserving of modest recognition but it came far too late to be fruitful. Nor did the assertion that Renwick would be at risk in prison because of his unsuccessful efforts to assist police in locating the body after four years warrant a significant sentencing discount. The judge was understandably sceptical about the assertion. Renwick did not seek to lead further evidence in this appeal to show that he had been or was currently at risk in prison because of his co-operation. The judge was entitled to give this matter little or no weight as a mitigating factor. The real issue is whether Renwick's sentence is manifestly excessive.

[76] Renwick is right to emphasise the distinction between his criminal behaviour as an accessory after the fact to manslaughter, punishable by 14 years imprisonment, and that in *HBI*, involving accessory after the fact to murder, punishable by life imprisonment. But Renwick was a mature man who became involved in this dreadful offence through his use of amphetamines and his fear of those who killed the deceased. He then involved the much younger Kister who worked for and lived with him. Renwick's successful disposal of the body has caused deep additional grief to the deceased's family. This is a more serious example of the offence than *Ambrose*. The mitigating features in Renwick's case were that he did not have a significant criminal history, he gave late and unfruitful co-operation with the authorities, he entered a timely guilty plea, he did not re-offend in the lengthy post-offence period and he had good work history so that his future rehabilitation was not without promise.

[77] General deterrence is most important in cases of this kind so that killers know they cannot avoid justice through the assistance of others in disposing of evidence. Stern penalties are also warranted to show the community's deep disapproval of those who dispose of the bodies of homicide victims, depriving the victims' families of the opportunity to appropriately farewell their loved ones. After considering all the relevant features of this case, I remain unpersuaded that Renwick's sentence of five years imprisonment with parole eligibility after 20 months was manifestly excessive or that the primary judge erred in determining that sentence. Renwick's application for leave to appeal should be refused.

Kister's application for leave to appeal against sentence.

Kister's contentions

[78] Kister's counsel emphasises that his client was only 21 at the time of the offence and had no significant or relevant criminal history. He was then living with the 36 year old Renwick and his partner and was also an employee at the nightclub where Renwick was manager. He was informed on the morning of 16 April 2012 that his distinctive vehicle had been used to abduct the at least badly injured deceased. He did not know the deceased, Lincoln or Oakley and was to receive no benefit from his involvement. Renwick told him he was in fear of those who had abducted the deceased. Kister was concerned that his vehicle would be seized by the police. In those circumstances he foolishly agreed to allow his vehicle to be used and to assist Renwick in the disposal of the body but even then he played a subsidiary role. He accompanied Renwick as a passenger whilst Renwick drove Kister's vehicle to the area where they left the body. They returned to Mackay on 17 April when he and Renwick attempted to clean the bloodied vehicle.

[79] Counsel emphasises that Kister pleaded guilty at an early time and did his best to assist police in locating the body. Given his youth, lack of prior convictions, and his more limited role in the offence, together with his excellent family support, work history and references, counsel submits that he is an excellent candidate for rehabilitation. He contends that a sentence of three years imprisonment with parole release or suspension after nine months properly reflects principles of denunciation and deterrence as well as the mitigating features which make him considerably less culpable than Renwick.

Conclusion in Kister's application

[80] There is no doubt that Kister involved himself in a serious example of a serious offence. His conduct meant the body was never found and made it far more difficult for the police to find and bring to justice all those responsible for the killing. The disposal and concealment of the body has added to the deep grief of the deceased's family. However, at 21 Kister was clearly immature. As the sentencing judge found,[90] he acted out of a misguided sense of loyalty to the 36 year old, frightened Renwick who was both his manager and with whom he lived. Kister has excellent prospects of rehabilitation given his strong family support, lack of prior convictions, excellent work history and impressive post-offence conduct. As his counsel recognised, despite these mitigating features, the applicant's serious anti-social conduct must be punished by a sentence heavy enough to deter others and to show the community's deep disapproval of such lawless and heartless behaviour. A real distinction, however, should have been drawn between Kister and Renwick. I consider a head sentence of five years imprisonment for Kister, the same as that imposed on Renwick, manifestly excessive, even given Kister's considerably earlier parole eligibility date.

[81] Unlike the other members of the Court, I would grant the application for leave to appeal against sentence, allow the appeal, set aside the sentence of five years imprisonment and instead impose a sentence of four years imprisonment. Kister's counsel encouraged the court to consider a suspension rather than a parole eligibility. Given Kister's comparative youth and that his immaturity caused him to involve himself in this dreadful offending, I do not consider this an appropriate case for a suspended sentence. He would benefit from the structure, support and control offered by parole. I consider his many mitigating features warrant a parole

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90 Sentencing Remarks, 3 June 2016, AB 120.

eligibility slightly earlier than that given by the primary judge. I would set parole eligibility at the date of delivery of this judgment.

Proposed orders in CA No 159 of 2016 and CA No 172 of 2016:

In CA No 159 of 2016, ***R v Zane Tray Lincoln***:

The application for leave to appeal against sentence is refused.

In CA No 172 of 2016, ***R v Stephen Dale Renwick***:

The application for leave to appeal against sentence is refused.

[82] **MORRISON JA:** I have had the considerable benefit of reading the reasons prepared by the President. I agree with those reasons and the orders proposed in respect of the applicants Lincoln and Renwick. I have come to a contrary conclusion to that reached by the President in respect of the applicant Kister, and in view of the President's analysis of the background, I am able to state my reasons for doing so without rehearsing those matters.

[83] Kister was employed as a security guard at the Mackay nightclub where Renwick was manager. He was 21 and seven months when he participated in the disposal of Mr Pullen's body. He was charged on 24 July 2013 when he was nearly 23 and eight months old. He entered a plea of guilty on 31 May 2016, when he was over 25 years old.

[84] His participation in the events included the following:[91]

(a) there was no evidence that he knew of or participated in the assault upon Mr Pullen, but someone took his car and Mr Pullen was put in it soon after he was assaulted;

(b) at about 5.00 am on the same morning Kister was seen with Renwick outside Renwick's house, in the company of some other men;

(c) Kister and Renwick left the scene together, leaving the other men behind;

(d) sometime later Kister and Renwick returned together;

(e) that afternoon Kister went with Renwick to pick up an excavator which had been hired in Kister's name; Kister signed for the machinery and he and Renwick took the excavator to Renwick's house;

(f) later that night Renwick and Kister left, in Kister's car; Mr Pullen's body was in Kister's car;

(g) together Renwick and Kister took Mr Pullen's body, in Kister's car, to a remote location and disposed of it;

(h) Renwick drove out to the area where the body was disposed of;

(i) at one point on the drive back towards Mackay Renwick was seen to be driving;

(j) both Kister and Renwick cleaned the car;

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91 Drawn from the Agreed Schedule of Facts and what was accepted by the learned sentencing judge in his sentencing remarks.

(k) Kister's car was seized on 11 July 2012, about three months after Mr Pullen was killed; and

(l) on 12 July 2012, Kister was interviewed and denied any knowledge of Mr Pullen or his absence.

[85] On several occasions, in the course of the sentencing hearing, the learned sentencing judge asked counsel for Kister why Kister had become involved. The explanations were as follows:

(a) "[T]he best explanation that has come about is that his vehicle had been used and he thought that it would be seized and in … the early hours of this morning when he's called upon … He thought his vehicle that he used, was central to his income, would be seized and it would be over for him …";[92]

(b) he knew of Renwick's concern about the people who were involved;[93]

(c) "… it really occurred in terms of a lapse of judgment in those circumstances and I've expressed the concern that he saw with Renwick and the thought that his whole existence would disappear …";[94] and

(d) at one point the learned sentencing judge said, in an evident attempt to understand the submission, "So Renwick's motivation is fear and your client's motivation is loyalty to Renwick, to the extent there is any motivation"; the response was:

> "Well that was a concept that was really investigated in some depth with three conferences with my client and he saw the concern of Renwick and thought … that his vehicle would be taken from him and seized as part of this."[95]

[86] What is evident from those passages is that two reasons were expressed. One was the apprehension of Renwick's fear, the other was a selfish concern over loss of his vehicle and its impact on his welfare.

[87] In his sentencing remarks, the learned sentencing judge identified the reasons for the involvement in the offence. There are three relevant passages, as follows:

(a) "Their involvement in the offence, in Mr Renwick's case, is said to come about firstly, because he was a user of amphetamines at the time, and secondly, because he was in fear of those who asked him to dispose of the body, those people being unidentified. In Mr Kister's case, his involvement, as I've mentioned to his counsel, is quite puzzling in such a serious matter";[96]

(b) "The submission made to me is that the vehicle was taken on the night without his knowledge, his keys being left in a place at the nightclub. He was advised in the morning that the vehicle had been used in this offence. He thought that he himself would be implicated. He was concerned his vehicle would be seized. His vehicle was important to him in terms of making his income. And he was aware that Renwick was concerned about the third parties, who remain unidentified. So he went with Renwick to dispose of the body, and

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92 AB 108 line 44 to AB 109 line 10.
93 AB 109 line 21.
94 AB 110 line 39.
95 AB 112 line 38.
96 AB 118 line 5.

assisted Renwick with the washing of the vehicle afterwards. As I've mentioned, there was something involving the excavator. He was involved in that, as well";[97] and

(c) "I should mention in Mr Kister's case particularly his youth, and perhaps his misguided loyalty to Renwick… I accept Mr Lynch's submission that his client should be distinguished because of his youth and his lesser involvement".[98]

[88] In light of what was put to the learned sentencing judge, particularly in response at AB 112 line 41, it is by no means clear to me that the learned sentencing judge sentenced Kister on the basis that he acted out of a misguided sense of loyalty to Renwick. That was no more than a possibility. Immediately following the reference to it in the sentencing remarks, his Honour records acceptance of the submission that the distinguishing features were Kister's youth and his lesser involvement.

[89] In terms of that involvement, I find it difficult to distinguish between Kister and Renwick. The only relevant difference is that Renwick drove Kister's vehicle out and (probably) back when they disposed of Mr Pullen's body. But the reason for that seems to have simply been that Kister was unfamiliar with the area.[99] Nonetheless, the vehicle used was Kister's vehicle, which he lent for that purpose, and he went along in his own vehicle to achieve that purpose. No other relevant distinction between Renwick and Kister was identified in any part of the effort to dispose of the body, from the time they left to after they had finished cleaning the car. In those circumstances it seems to me to be difficult to draw any logical distinction based on the fact that Renwick happened to drive and had greater familiarity with the area.

[90] However, the learned sentencing judge accepted that the distinguishing features were Kister's age and lesser involvement. Those two factors resulted in the different parole eligibility date applying to Kister, even where the head sentence was the same as that for Renwick.

[91] In the course of the sentencing hearing, the learned sentencing judge asked counsel for Kister for a submission about how the distinction between Renwick and Kister would manifest itself in terms of the sentence. The response was:

> "Lower, in terms of the actual time that he serves because of his age. It would ordinarily, in my submission, be reflected in his age, the fact of the lesser involvement in terms of not being the driver, not having any association with any of those other at all, not knowingly, and in my submission that would be reflected in the time he actually does."[100]

[92] In my view, it is evident that counsel for Kister sought only a difference in terms of the actual period of imprisonment to be served, rather than a difference in head sentence. That is a factor which presents an obstacle when assessing whether the sentence imposed was manifestly excessive.[101]

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97 AB 118 line 30.
98 AB 120 line 43 – AB 121 line 2.
99 AB 110 line 44, AB 117 line 3.
100 AB 113 lines 11-15.
101 *R v Frame* [2009] QCA 9 at [6].

[93] I do not consider that Kister's age at the time of the offence is so compelling a factor that it leads to a finding that the sentence was manifestly excessive. He was over 21 then, but over 25 at the time of sentence. The references tendered on his behalf do not suggest an immature 21 year old, but rather the contrary.[102]

[94] In terms of the authorities that were cited, some assistance can be gained as to whether the sentence imposed in this case was manifestly excessive. I do not consider that *R v HBI*[103] is of much assistance as it involved the offence of being accessory after the fact to murder, where the maximum penalty is life imprisonment as opposed to here, where the maximum is 14 years. However, three single judge decisions, referred to in the course of argument, provide some assistance. *R v Ambrose*[104], *R v Brown*,[105] and *R v Kay*[106] all dealt with the offence of being accessory after the fact to manslaughter. The essential features of each are as follows:

(a) in *Ambrose*, a 58 year old man provided assistance by helping to move a body, placing it in the back of a utility, driving for some distance and off the road to dump the body; after initially refusing to cooperate with police, a full account was given about a week later; there was cooperation attracting the operation of s 13A of the *Penalties and Sentences Act*; the body was located within about three days of having been dumped; the sentencing judge referred to *R v Winston*[107] where it was remarked that the most important consideration in such cases must always be the nature of the assistance afforded after the event, the reason why it was provided, and the extent to which it helped the primary offender to escape or delay detection, apprehension or punishment; the offender's criminal history included offences involving violence, but linked to alcohol issues; a sentence of three years with a parole release date after one-third was imposed;

(b) *Brown* concerned a woman who was in a relationship with a man who committed murder; her assistance was in the form of providing clothing and attempts to create a false alibi, by use of photographs and Facebook posts; she pleaded guilty to the offence of accessory after the fact to manslaughter; parity questions arose in relation to the offender Kay and Brown's mother, who were each sentenced in respect of their own conduct, to three years imprisonment with immediate parole; the case was regarded as an exceptional one because imprisonment would lead to her seven children being disadvantaged; there was evidence of psychological trauma in childhood as well as physical abuse, a three year term of imprisonment was imposed, with immediate release; and

(c) *Kay* involved a woman who provided assistance in the same general circumstances as *Brown*; her assistance was in the form of taking photographs in order to create a false alibi, assisting to destroy evidence, and permitting her property to be used as a place where the body was buried; her attempts to assist included lying to the police some months after the death, the delay caused by her efforts amount to about six weeks; she had excellent prospects of rehabilitation and no criminal history; she had a number of children in her

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102 For example, AB 214, AB 215, AB 216 and AB 219.
103 [2013] QCA 369.
104 Indictment 445/2012, Applegarth J, 26 April 2013.
105 Indictment 338/2016, Byrne SJA, 8 July 2016.
106 Indictment 668/2015 and 338/2016, Byrne SJA, 21 April 2016.
107 [1994] QCA 137.

> care, which were regarded as exceptional circumstances by the sentencing judge, as incarceration of the offender would disadvantage the children; a three year sentence was imposed.

[95] The level of assistance in *Ambrose* is generally similar to that here, but that assistance only caused minimal delay in relation to the detection of the primary offender. That is not the case here where the assistance has been instrumental in preventing the discovery of the killers. The lower sentence in *Ambrose* is also explicable by the impact of the credit to be given for cooperation attracting s 13A of the *Penalties and Sentences Act*. As the learned sentencing judge in that case said, that credit, alone, would reduce the sentence to one of between four and five years.

[96] In this case, Kister's counsel sought that the difference between he and Renwick be recognised in the period of time to be served, and it was. Renwick was eligible for parole after 20 months, or one-third of the head sentence. Kister was eligible for parole after 12 months, significantly less than Renwick. That difference adequately recognised the difference in age, involvement and excellent prospects of rehabilitation.

[97] For the reasons above, I am unpersuaded that the sentence imposed on Kister can be shown to have been manifestly excessive. I would refuse his application for leave to appeal.

[98] **PHILIPPIDES JA:** I agree that the applications for leave to appeal against the sentences imposed on Lincoln and Renwick should be dismissed for the reasons given by McMurdo P.

[99] I add that in so far as the application by Lincoln raised the failure to consider properly the prospect and effect of deportation, the applicant sought to rely on *R v UE*,[108] where it was said:[109]

> "It is undoubtedly correct that, in an appropriate case, the prospect of deportation may be a relevant factor, personal to the offender, to be considered in mitigation of sentence… While the prospect of deportation may be a relevant mitigatory factor, the sentencing court cannot be asked to speculate about that prospect or as to the impact of deportation on the offender. Proof that deportation will in fact be a hardship for the particular offender will be required."

[100] The proposition in *UE* was recently adopted in *R v Schelvis; R v Hildebrand*.[110] The difficulty with the submission, as the respondent identified, was that the only evidence before the Court as to Lincoln's personal circumstances relevant to the hardship which would result from removal from Australia to New Zealand was that Lincoln had lived in Australia for a considerable time and was married with children. There was also evidence that Lincoln had commenced another relationship. On the basis of the state of that evidence, there was no substance in the submission as to hardship.

[101] As for the application by Kister for leave to appeal against his sentence imposed on 3 June 2016, I join with Morrison JA in concluding that the application should be dismissed. The contention that the five years imprisonment with a parole eligibility date fixed at 2 June 2017 (after serving 12 months) on a plea of guilty to being an

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108 [2016] QCA 58.
109 [2016] QCA 58 at [16].
110 [2016] QCA 294 at [76].

accessory after the fact to the manslaughter of Timothy John Pullen was manifestly excessive has no prospects of success.

[102] The deceased was killed on or about 16 April 2012. On 11 July 2012, as part of the police investigation of the deceased's disappearance, the applicant's vehicle was taken by police for investigation. In two statements on 12 July, the applicant denied any knowledge of the deceased's fate. Subsequently, forensic examinations revealed the presence of the deceased's blood in the vehicle. On 24 July 2013, he was charged with being an accessory after the fact to murder. On 31 May 2016, after the prosecution offered to reduce the charge to accessory after the fact to manslaughter, Kister entered a plea.

[103] Kister's involvement as an accessory has been outlined in the reasons of the President and the additional reasons of Morrison JA.

[104] As the respondent submitted, Kister undertook significant efforts to conceal the body of the deceased. He allowed his car to be used and accompanied Renwick in taking the body to a remote location. Because of his success in disposing of the deceased's body, so that it has never been found, his assistance to the deceased's actual killer has been significant. The offer to assist in locating the body was made four years after the disposal of the body and in circumstances where it was unlikely that the search for the body was likely to be successful.

[105] The sentence imposed on Kister must be looked at as a whole. It is clear that the approach taken by the sentencing judge to ameliorate Kister's sentence to take into account the matters of mitigation in Kister's favour, in addition to his plea, such as his lesser involvement, age and cooperation, was to fashion a sentence that would lessen, to the greatest extent permissible, the actual period of incarceration rather than also moderating the head sentence. The sentence thus imposed of five years imprisonment, requiring only one fifth of it to be served (12 months) before being eligible for parole, could by no means be said to be manifestly excessive.

[106] Kister's actions in successfully disposing of the deceased's body have resulted in the deceased's family being deprived of the opportunity to give the deceased a proper burial and has assisted his killer to evade being brought to justice for his death. That factor is a very serious aspect of the offending. The sentence imposed was well within the appropriate range required to be a sufficiently denunciatory and deterrent sentence for such an offence.