SUPREME COURT OF QUEENSLAND

CITATION:	*R v DeSalvo* [2002] QCA 63
PARTIES:	**R** **v** **DESALVO, Derek Albert** (applicant/appellant)
FILE NO/S:	CA No 284 of 2001 SC No 93 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave to Appeal against sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2002
JUDGES:	McPherson JA, Williams JA, Byrne J Separate reasons for judgment of each member of the Court, McPherson and Williams JJA concurring as to the orders made, Byrne J dissenting
ORDER:	**Application for leave to appeal granted. The appeal is allowed and the sentence set aside. The applicant is sentenced to imprisonment for nine years, with a declaration that the pre-sentence custody period of 430 days be regarded as time served under that sentence.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – NON-PAROLE PERIOD OR MINIMUM TERM – QUEENSLAND – declaration of conviction of serious violent offence – relevant considerations – Manslaughter – *Penalties and Sentences Act* s161B(3). Whether the trial judge properly exercised the discretion to make a declaration of a serious violent offence under the *Penalties and Sentences Act* s161B(3) by considering the offender's prior criminal record when making the declaration. CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – POWERS OF APPELLATE COURT – whether the imposing of a longer term of imprisonment requires the applicant to be given an opportunity to withdraw his application for leave to appeal. *Penalties and Sentences Act (Qld)* s161B(3)

R v Bojavic [2000] 2 Qd R 183, applied
R v Keating [2002] QCA 19; CA No 251 of 2001, 6 February 2002, followed
Neal v The Queen (1982) 149 CLR 305, considered

COUNSEL: A.W Moynihan for the appellant
B Campbell for the respondent

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

[1] **McPHERSON JA:** The applicant was tried on a charge of murder but was found guilty of manslaughter and sentenced to a term of imprisonment for 8 years, with 430 days of pre-sentence custody being declared time served under the sentence imposed. The question which has been raised on this application is whether the learned sentencing judge properly exercised his sentencing discretion by making a declaration under s 161B(3) of the *Penalties and Sentences Act* that the applicant was convicted of a serious violent offence. The difference is that he would not be eligible for parole half way through the sentence at approximately 4 years but only when 80% had been served, or after about 6½ years of the 8 year sentence.

[2] Because the verdict of manslaughter was rendered in conjunction with a verdict of acquittal of murder, it fell to his Honour to make the necessary factual findings on sentence, which had, of course, to be consistent with those verdicts.

[3] The applicant had by arrangement gone to a suburban railway station to meet his victim in relation to a drug deal that was a source of some animosity between them. The applicant was seated in a car when the victim came up to him and spoke to him in an aggressive manner. The applicant, apparently feeling threatened or provoked, alighted from the car and, as the sentencing judge found, lunged at him with a knife delivering a single stab wound to his body, from which the victim died. The applicant drove off, but did not go very far before turning back to the scene to provide help and give himself up.

[4] His Honour found that the applicant had at the time recently injected himself with heroin but was functioning "comparatively normally" when he used the knife. He found that the applicant was upset at the verbal assault on him and decided to teach him a lesson by doing him some, although not serious, harm; but that in doing so he went too far and caused his death. There was a further finding that he knew the victim was unarmed when he stabbed him.

[5] In these circumstances the head sentence of 8 years imprisonment is not excessive, and was not argued to be so. At the sentencing hearing the Crown argued for a sentence of imprisonment of from 8 to 10 years. In support of a sentence at the higher end of the range, the applicant had a criminal record involving convictions in 1996 and 1997 for assault occasioning bodily harm. The details of those offences suggest that the applicant, who is some 27 years old, is a person who may be prone to use violence if crossed. On the other hand, he showed remorse by returning to the scene of the crime soon after the event and by offering to plead guilty to manslaughter at an early stage. The consequences of the victim's death have been tragic. He left three surviving children, one aged 11 years and twins aged 9½, as

well as a mother and a twin sister of his own. Their victim impact statements attest to the loss they have sustained.

[6] The problem remains, however, whether the declaration of a serious violent offence can be justified. The decision to make the declaration is a matter for the discretion of the sentencing judge, and, except for good reason, it ought not to be disturbed. The difficulty here is to identify the circumstances that lifted this particular offence outside the general range of manslaughter cases and called for the imposition of the additional punishment involved in deferring eligibility for parole until 80% rather than only 50% of the sentence has been served.

[7] It is true that, on the factual findings made by his Honour in sentencing, the applicant intended, at least to some extent, to hurt his victim and, using a knife to do it, went further than he intended. That is, however, a tragically frequent feature of offences of this kind, and one that is seldom absent from unintended homicides in general.

[8] It seems to me that, if in this case we were to uphold the declaration, it would be tantamount to saying that most, if not all, manslaughter offences, or at least those involving use of a knife, ought to attract a punishment of this dimension; that is to say, a declaration under s 161B(3). For my part, I am inclined to think that the current level of sentencing for manslaughter in cases like this may perhaps be somewhat lower than it should be. But the way in which to correct that state of affairs is to raise the general level of sentences for the crime, and not to use s 161B(3) of the Act as a means of correcting the deficit. All but a few offences of manslaughter are, in a sense, serious and violent; but making general use of the declaration procedure in such cases will leave very little scope for severely punishing those that are much worse than others. If the legislature had intended declarations to be made in all or most cases of manslaughter committed by a deliberate act but without meaning to kill or inflict grievous bodily harm, it would surely have said so instead of leaving the matter of a declaration under s 161B to the judge's discretion.

[9] The problem here, as I have already said, is that there is nothing to distinguish the applicant's offence from so many others of the same kind. Knives, guns, blunt instruments and physical violence are common concomitants of most of them. Consistently with what was said in *R v Bojavic* [2000] 2 Qd R 183, and in comparison to the facts and the decision in that case, I do not consider that there was any special feature of this offence that justified the making of the declaration here.

[10] Some suggestion was made before us that the applicant's prior criminal record might be used to support the declaration. An offender's previous record of offending always operates as a factor going to increase the penalty imposed for the offence for which he is being sentenced. It is, however, to my mind open to question whether offending behaviour on earlier occasions can properly be used to support a declaration under s 161B(3). As Thomas JA recently pointed out in *R v Keating* [2002] QCA 19, s 163B authorises the making of the declaration not in respect of the offender but in respect of the offence of which he has been convicted. It is therefore the subject offence or offences, and not any prior offence, that attracts the declaration. I do not consider that the applicant's criminal record, and in particular the convictions for assault in 1996 and 1997, afford a basis for the declaration that

the manslaughter conviction here is or ought to be considered a conviction of a serious violent offence, as distinct from being a reason (as those prior convictions certainly are) for imposing a heavier head sentence than a manslaughter conviction standing alone might otherwise attract.

[11] My conclusion therefore is that, in making the declaration in the present case, the discretion of the sentencing judge miscarried, and the declaration should be set aside. The result is not, however, that the declaration should simply be eliminated without reviewing the sentence as a whole. According to the decision in *R v Bojavic*, a sentence that involves a declaration under s 163B is or ought to be the result of a single integrated process. That has the consequence that, if one of its elements is removed, the whole process or its outcome is or may be affected and need to be reconsidered. In my view, considering it anew, a sentence of imprisonment for 8 years without a declaration would not sufficiently reflect the gravity of the offence committed by the applicant. For a homicide resulting from a deliberate act like the stabbing in this case, the appropriate head sentence falls properly within the range of 10 to 12 years imprisonment. Some discounting must, however, be carried out to reflect the applicant's remorse and his offer before trial to plead guilty to the offence of manslaughter of which he was ultimately convicted at trial. All matters considered, I would impose a sentence of imprisonment for 9 years.

[12] Some discussion took place as to whether the imposing of a longer term of imprisonment, but without the relevant declaration, might not require the applicant to be given an opportunity to withdraw his application for leave to appeal in accordance with what was said in *Neal v The Queen* (1982) 149 CLR 305. However that may be, counsel for the applicant sought and obtained instructions from his client in this matter to pursue the application for leave even though a longer term of imprisonment might follow.

[13] In the result, therefore, the application for leave to appeal should, in my opinion, be granted; the appeal should be allowed and the sentence set aside. The applicant should be sentenced to imprisonment for nine years, with a declaration that the period of his pre-sentence custody of 430 days is to be regarded as time served under that sentence.

[14] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McPherson JA and agree with all that he has said therein.

[15] There is no definition of "serious violent offence" in the *Penalties & Sentences Act* 1992, and the inclusion of a particular offence in the Schedule of Serious Violent Offences clearly does not mean that the mere commission of such an offence warrants the making of a declaration that the conviction was of a serious violent offence. So much is made clear by the wording of s 161B(3) of the Act. The court is given an express discretionary power to declare the commission of an offence specified in that Schedule to be a conviction for a serious violent offence. That must mean that there is something about the circumstances of the offence in question which takes it beyond the norm and justifies the making of the declaration; such circumstance though need not be categorized as exceptional. Given the concentration on the "offence" in ss 161A and 161B rather than on the "offender", the criminal history of the offender will not ordinarily be a decisive consideration on the exercise of that discretion: *R v Keating* [2002] QCA 19.

[16] Almost by definition manslaughter is an offence involving violence, and more often than not the use of some weapon is involved in that violence. In consequence it is not sufficient to say that the mere presence of either or both violence and use of a weapon as one of the circumstances justifies the making of the declaration.

[17] I agree with the order proposed by McPherson JA.

[18] **BYRNE J:** By s 161B(3) of the *Penalties and Sentences Act* 1992, a sentencing court may "declare the offender to be convicted of a serious violent offence as part of the sentence" if the offender is:

> "(a) convicted on indictment of an offence –
>
> (i) against a provision mentioned in the schedule; or
>
> (ii) of counselling or procuring the commission of … an offence against a provision mentioned in the schedule; and
>
> (b) sentenced to 5 or more, but less than 10, years imprisonment for the offence, calculated under section 161C."

[19] No other matters are expressed to be prerequisites for the exercise of the discretion. The specified conditions apart, the discretion s 161B(3) confers therefore is, as Thomas JA has said, "unfettered"[1]. It is a discretion to be exercised judicially: that is to say, rationally, on proper considerations. But it is not one dependent on special, or any particular, circumstances.

[20] So it is a sufficient justification for the making of a declaration pursuant to s 161B(3) that it contributes to a sentencing outcome which accords with the s 9 "sentencing guidelines" and such other statutory provisions and sentencing principles as may matter in the particular case.

[21] Here, several factors combined to persuade the judge to impose a head sentence at the lower end of the range[2] - eight years – with the applicant being required to serve 6.4 years:[3] that the offence involved a deliberate attempt to cause injury with a knife; there was but minor provocation; a life was lost; there was a criminal history of violence; and deterrence mattered. These were all considerations which it was proper to take into account in concluding that the circumstances of the case merited a s 161B(3) declaration[4] in the fashioning of a suitable sentence.

[22] No error of principle was involved in deciding to make the declaration. Nor was the overall sentence, though a substantial punishment,[5] beyond the range of a sound sentencing discretion.

[23] The application should be refused.

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1 *R v Keating* [2002] QCA 19, at p 5, McPherson JA and Ambrose J concurring.

2 *R v Bojovic* [2000] 2 Qd R 183.

3 S 135(2)(c) *Corrective Services Act* 2000.

4 That an offender's prior offences might be influential was affirmed in *R v Keating* (at p 6):

> "A single isolated act of violence may sometimes be thought to be less likely to attract a declaration than a case involving repeated commission of offences or a case where an offender's criminal history is one that tends to show the offence in a serious light so that a need is perceived to protect the community."

5 Incidentally, I agree with McPherson JA (see [8]) concerning the current level of sentencing in cases like this.