SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cowie* [2005] QCA 223
PARTIES:	**R** v **COWIE, Michael Alan** (applicant)
FILE NO/S:	CA No 42 of 2005 SC No 576 of 2004 SC No 78 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2005
JUDGES:	McPherson and Keane JJA and McMurdo J Judgment of the Court
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - GENERALLY - where applicant was convicted after trial of offences involving supply of a dangerous drug, kidnapping, receiving stolen goods and torture - where applicant had also pleaded guilty to stealing and two summary offences - where majority of offences related to the kidnap and torture of an 18 year old New Zealand man who sustained physical and mental injuries - where applicant had extensive criminal record and was a habitual drug user - where two co-offenders who had pleaded guilty received sentences of eight years imprisonment with serious violent offender declarations - where the applicant was sentenced to 12 years imprisonment with a serious violent offender declaration - where applicant submitted that appropriate sentencing range was between 10 and 12 years imprisonment and that the making of a serious violent offender declaration meant that any sentence should be at the lower end of that range - where making of

serious violent offender declaration was mandatory under s 161B *Penalties and Sentences Act* 1992 (Qld) - whether learned trial judge had taken the making of the serious violent offender declaration into account when imposing sentence - whether the mandatory obligation to make a serious violent offender declaration must be reflected by imposing a term of imprisonment at the lower end of the sentencing range

Penalties and Sentences Act 1992 (Qld), s 161A, s 161B

R v B [2000] QCA 110; (2000) 110 A Crim R 499, considered
R v Bojovic [1999] QCA 206; [2000] 2 Qd R 183, considered
R v Booth [1999] QCA 100; [2001] 1 Qd R 393, cited
R v Crossley [1999] QCA 223; (1999) 106 A Crim R 80, cited
R v Eveleigh [2002] QCA 219; [2003] 1 Qd R 398, considered
R v Herford [2001] QCA 177; (2001) 119 A Crim R 546, applied
R v Shillingsworth [2001] QCA 172; [2002] 1 Qd R 527, applied
R v Rankmore; ex parte A-G (Qld) [2002] QCA 492; CA No 223, CA No 285 and CA No 288 of 2002, 15 November 2002, cited
R v R & S; ex parte Attorney-General [1999] QCA 181; [2000] 2 Qd R 413, cited
R v Roelandts [2002] QCA 254; (2002) 131 A Crim R 603, cited

COUNSEL: D R Kent for applicant
D L Meredith for respondent

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

[1] **THE COURT:** On 16 February 2005 the applicant was convicted after a trial of two counts of supplying a dangerous drug, one count of torture, one count of kidnapping and one count of receiving. He also pleaded guilty to one count of stealing as well as two summary charges relating to the possession of a dangerous drug and the possession of property suspected of being tainted. The latter two summary offences were not connected in any way with the offences the subject of the trial.

[2] The applicant was sentenced to 12 years imprisonment for the offence of torture, four years imprisonment for the offence of kidnapping, two years imprisonment in respect of each of the charges of supplying a dangerous drug, 12 months for the receiving charge as well as 12 months for the stealing charge and six months each in respect of the two summary charges to which he had pleaded guilty.

The trial

[3] The offences in respect of which the applicant had pleaded not guilty related to the kidnapping and torture of the complainant, an 18 year old backpacker, who came to Australia from New Zealand on holiday.

[4] The complainant, who suffered a degree of intellectual impairment of which, it was accepted, the applicant was not aware, first contacted the applicant when he purchased drugs from him on the streets of central Brisbane. The following evening the applicant, in company with four other men, met the complainant again and took him to a squat in an abandoned building at Milton which was being shared by the applicant and some of the co-offenders.

[5] Over the course of several hours the complainant was subjected to various assaults in an effort to obtain property from him, particularly the PIN for the complainant's bankcard. During this period he was punched, kicked, burnt with a cigarette lighter and a piece of paper, choked with a chain and assaulted with a wooden bat. He was left with a psychological disturbance as well as injuries to an eye and to his right index finger.

[6] The Crown case against the applicant was that he was responsible for some of the assaults and was present while others occurred, although it was accepted that he was absent for at least some of the time when the complainant was being assaulted by others.

[7] The applicant's case was that the applicant, after some initial contact with the complainant, had absented himself from the squat and was not present at or part of the torture. It is clear that the jury rejected the applicant's case.

The sentence

[8] The applicant was born on 22 July 1976. Thus he was aged 26 at the time of the offences and 28 when he was sentenced.

[9] The applicant has a lengthy criminal history dating back to childhood which includes prison sentences of up to two years for offences of violence. He has been convicted of a considerable number of drug offences. The applicant's evident proclivity to offences involving personal violence is associated with his use of drugs.

[10] In sentencing the applicant, the learned sentencing judge commented that this case did not involve parties in a pre-existing domestic relationship, which has been the usual circumstance in most other cases of torture, but concerned a group of men seeking out a young and vulnerable victim who was unknown to them. This victim was tortured in darkness over a protracted period in a confined space without any prospect of rescue.

[11] Two of the applicant's co-offenders had pleaded guilty. Neither of the co-offenders had a significant criminal history for violence. They were sentenced to eight years imprisonment with serious violent offender declarations. The learned sentencing judge referred to the need to ensure appropriate relativity between the sentences imposed on the applicant's co-offenders and that to be imposed upon the accused. And it is clear, in this regard, that the learned sentencing judge accepted the submission of the Crown prosecutor that the applicant "has shown absolutely no remorse for his crime".

The application

[12] Before the learned sentencing judge, and again in this court, the applicant submitted that the appropriate range of sentence was between 10 and 12 years. That submission appears to concede that the sentence of 12 years which was imposed was not manifestly excessive. But it is argued that the sentence should have been at the lower end of that range, and specifically 10 years, because of the impact of s 161B of the *Penalties and Sentences Act* 1992 (Qld). Because the applicant's submissions accept that the appropriate sentence was at least 10 years imprisonment, his case is within s 161A(a) with the consequence that a declaration of a conviction of a serious violent offence is required by s 161B(1). Had he been sentenced to a term less than 10 years, the making of such a declaration would have been a matter for the exercise of the sentencing court's discretion under s 161B(3). The applicant argues that it was legitimate for the learned sentencing judge to sentence at the lower end of the appropriate range because of the impact of the declaration, and that her Honour did so in this case. Accordingly, it was said that her Honour only arrived at a sentence of 12 years because she had implicitly accepted the prosecution submission that the appropriate range was 12 to 14 years. Arguing that that range is too high, the applicant says that, because of the serious violent offence declaration, he should have been sentenced at the low end of a range of 10 to 12 years.

[13] Her Honour referred to the respective ranges advocated by the prosecution and defence without expressly accepting either submission, and then referred to the relevance of the declaration in these terms:

> "I should also keep in mind that a serious violent offender order will automatically be made on the penalty I impose upon you, and there is authority in the Court of Appeal which suggests that I should look towards the lower end of the appropriate range in those circumstances."

After referring to certain other considerations her Honour then expressed her conclusions for imposing the sentence of 12 years. Importantly, her Honour did not give reasons which, in terms, adopted the prosecution's range of 12 to 14 years and which then fixed 12 years at the lower end of that range because of the operation of the declaration. Nor, in our view, was her Honour obliged to reason in that way.

[14] The applicant cites two decisions in support of his suggested approach to sentencing when a declaration is made. They are *R v Bojovic*[1] and *R v B*.[2] Each of them involved a discretionary power to make a declaration of a serious violent offence rather than, as in this case, the declaration being required in consequence of the sentence being 10 years or more. In *Bojovic*, in the judgment of the Court at 191 - 192, it was said:

> "While the mandatory requirements of s 161B(1) will inevitably interfere with the courts' capacity to maintain parity and consistency, the same problem does not exist in relation to sentences under s 161B(3) where an additional sentencing discretion has been conferred. In such matters the courts have the power to maintain reasonable consistency between sentences, although they will of course heed the additional emphasis that has now been placed on protecting the community from violent offenders. As an example, if

1 [1999] QCA 206; [2000] 2 Qd R 183.
2 [2000] QCA 110; (2000) 110 A Crim R 499.

> according to ordinary principles a violent offence seems to call for a sentence of between six and eight years, and it is one where the discretion to make a violent offender declaration arises, such that it might but not must be made, the sentencing judge has the discretion in the event that a declaration is to be made, to impose a sentence toward the lower end of the applicable range. Conversely if the judge is to give the offender the benefit of declining to make such a declaration, it might be appropriate to consider imposing a sentence towards the higher end of the range. If this were not done, it is difficult to see how the sentencing judge could properly discharge his or her duty under s 9 of the Act. A just sentence is the result of a balancing exercise that produces an acceptable combination of the purposes mentioned in s 9(1)(a) to s 9(1)(e) of the Act."

In *R v B* a differently constituted court followed *Bojovic*. In the joint judgment of Moynihan SJA and Atkinson J it was said:

> "It is likely that a person who is convicted of the crime of torture particularly where it involves the intentional infliction of pain or suffering on more than one occasion will be declared a serious violent offender. To do so reflects the nature of the offence. It was clearly appropriate in this case. This declaration is part of the exercise of the sentencing discretion which is an integrated process (*Bojovic* at [31]) rather than a series of discrete steps. When such a declaration is made it is likely to have consequences on the rest of the sentencing discretion. First the sentencing judge may impose a sentence towards the lower end of the applicable range (*Bojovic* at [34]). Secondly if there is a plea of guilty, the appropriate reduction in sentence (*Penalties and Sentences Act*, s 13) will reduce the head sentence rather than require a recommendation for parole earlier than half the sentence to be served."[3]

[15] It is far from clear that those statements should be applied to a case like the present. Where the declaration must be made, there is no "balancing exercise" in the sense discussed in these cases. The concurring judgment of McPherson JA in *R v B* indicates the difference.[4] His Honour cited *R v Crossley*,[5] where the applicant was sentenced to terms of 10 years imprisonment for various robberies. The applicant in that case submitted that his sentences offended the parity principle when regard was had to the impact of the serious violent offence declaration. Pincus JA said in *Crossley*:

> "… if the judge thinks that two co-offenders would be fairly treated if one received twice the sentence fixed for the other and that the worse offender should be sentenced to 10 years, then the judge simply does that, imposes sentences of 10 years and five years, the result being that the worse offender, in a case caught by s 161A, is not eligible for parole until he has served eight years.
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> …
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> In my opinion, the law requires that where one of two co-offenders but not the other is caught by the 80 per cent requirement, that circumstance is to be ignored in considering parity between the two.

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3 [2000] QCA 110 at [32]; (2000) 110 A Crim R 499 at 505 - 506.

4 *R v B* [2000] QCA 110 at [4]; (2000) 110 A Crim R 499 at 500.

5 [1999] QCA 223; (1999) 106 A Crim R 80.

> Perhaps some judges might in practice be inclined to be less severe in fixing the head sentence on the more serious offender, in those circumstances, but there is no justification in strict principle for doing so."[6]

[16] In *R v B*, McPherson JA also cited *R v Booth*[7] as demonstrating that a sentencing judge may not impose a lower head sentence for an offence committed while on parole in order to ameliorate the requirement of s 156A(1)(b)(ii) of the *Penalties and Sentences Act* that a sentence committed while on parole must be cumulative on a sentence for which the offender was paroled.[8] His Honour continued:

> "The point being made is, however, that describing the exercise of the sentencing discretion, including the possibility of parole, as an integrated process rather than a series of discrete steps is, on the authority of *Bojovic*, true of a case where the discretion has been or is being exercised under s 161B(3) or s 161B(4) to make a declaration that the offender is convicted of a serious violent offence. It is much less true, if at all, of the sentencing process in *Booth* or *Crossley*. On the authority of those two decisions, no general discretion to reduce the head sentence arises where and simply because the requirements of s 161A(a) are satisfied."

[17] The reasoning in *Booth* has since been criticized in this court in *R v Shillingsworth*[9] and *R v Herford*.[10] In *Shillingsworth*,[11] Williams JA, with whom Thomas JA and White J relevantly agreed, held that the operation of s 156A in requiring a cumulative sentence was a consideration relevant to what was "just in all the circumstances" under s 9(1)(a).

[18] In *R v Eveleigh*[12] Fryberg J conducted an extensive review of these and other cases, from which he deduced that there were "[t]wo streams of thought [which] are identifiable".[13] One was represented by, amongst others, *Crossley* and *Booth*, which he said involved sentencing by a two-step process:

> "… [F]irst, determining the sentence which would have applied apart from the amendments; and then giving effect to the amendments, whether mandatory or discretionary. The existence or likely consequences of the second step were not to be used as reasons for reducing the sentence which would otherwise have been imposed."[14]

The second view, which he said was most clearly articulated in *Bojovic* and *Shillingsworth*, was that the "process remained an integrated one", so that "it was not only legitimate but essential for the sentencing judge to take account of the consequences of a declaration in fixing the period of a head sentence, even in cases where the declaration was mandatory".[15] His Honour said that in principle he would favour the first of those views, but that according to the authorities the second view has prevailed although "[i]t is true that no binding precedent has been

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6 *R v Crossley* [1999] QCA 223 at [22] and [27]; (1999) 106 A Crim R 80 at 85 - 87.
7 [1999] QCA 100; [2001] 1 Qd R 393.
8 *R v B* [2000] QCA 110 at [10]; (2000) 110 A Crim R 499 at 502.
9 [2001] QCA 172; [2002] 1 Qd R 527.
10 [2001] QCA 177; (2001) 119 A Crim R 546.
11 [2001] QCA 172 at [23] - [26]; [2002] 1 Qd R 527 at 532 - 533.
12 [2002] QCA 219; [2003] 1 Qd R 398.
13 *R v Eveleigh* [2002] QCA 219 at [99]; [2003] 1 Qd R 398 at 427.
14 *R v Eveleigh* [2002] QCA 219 at [100]; [2003] 1 Qd R 398 at 427.
15 *R v Eveleigh* [2002] QCA 219 at [101]; [2003] 1 Qd R 398 at 428.

established".[16] In *Eveleigh*, the applicant had been sentenced to a term of eight years and with a declaration that he was convicted of a serious violent offence. The present point did not have to be decided, because the declaration was not mandatory. His application was unanimously dismissed. The other members of the court found it unnecessary to express a view on matters relevant for the present case.

[19] In a case such as this, we accept that the inevitable declaration is relevant in the consideration of what sentence is "just in all the circumstances" in order to fulfil the purpose of sentencing which is prescribed by s 9(1), consistently with what was said in *Shillingsworth* and *Herford*. In the present case, the learned sentencing judge did consider that matter as is demonstrated by the passage we have set out. However, it is another thing to say that the sentencing court should invariably, or at least as a general rule, be constrained to sentence at the lower end of an appropriate range where the declaration is mandatory. That approach is not indicated by the terms of the statute and indeed in our view its acceptance would be contrary to the apparent purpose of Part 9A, which was to affect a prisoner's eligibility for parole rather than to result in some general lessening of sentences.

[20] The learned sentencing judge was not obliged then to adopt this approach of sentencing at the lower end of the range. Whilst taking the declaration into account, it was open to her to sentence at the high end of the appropriate range, after a balancing of all relevant considerations. And the applicant makes no submission as to why the serious violent offender declaration in the circumstances of this particular case warranted some lessening of the sentence. In our opinion, accepting for the moment that the appropriate range is 10 to 12 years as the applicant submits, there was no error in the exercise of a discretion to sentence at the high end of that range.

[21] Reference was made in this regard to *R v Rankmore; ex parte A-G (Qld).*[17] This was a case of an Attorney-General's appeal in which the sentence for torture was increased to 10 years. The case concerned a series of offences committed by the offender on a woman with whom he was in a relationship. There were events of torture on three separate occasions including extreme violence and cruelty. There were also two counts of rape in respect of which the offender had pleaded not guilty although he had pleaded guilty to torture.

[22] The applicant also referred to *R v R & S; ex parte Attorney-General.*[18] This was another Attorney-General's appeal where the offenders were sentenced to 11 years imprisonment for offences which, the applicant submits, were significantly more serious than the present. In that case, the offenders had pleaded guilty to the torture of an infant three years and four months of age. The offenders were the child's mother and her de facto husband. The violence was extreme, including broken bones, multiple serious soft tissue injuries, lacerations, in excess of 100 cigarette burns, neurological injuries, blood complications, infections, malnutrition and long-term psychological trauma. The infant was kept tied up and placed in cupboards.

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16 *R v Eveleigh* [2002] QCA 219 at [102]; [2003] 1 Qd R 398 at 428.

17 [2002] QCA 492; CA No 223, CA No 285 and CA No 288 of 2002, 15 November 2002.

18 [1999] QCA 181; [2000] 2 Qd R 413.

[23] The applicant also referred to *R v Roelandts*.[19] In that case, the offender had tortured his 30 year old pregnant fiancée by punching her to the floor, dragging her by the hair, punching her in the back, kneeing her, attempting to drown her at a secluded bush location and choking her to the point of unconsciousness with a towel. The offender had a previous conviction for torture less than two years earlier involving significant violence on another female. He pleaded guilty and was sentenced to four years imprisonment. He appealed; but the appeal was withdrawn at the Court's invitation. The Chief Justice intimated that he considered the appropriate starting point was a sentence of eight to 10 years reduced to six years for the plea of guilty, and the other members of the Court expressed their agreement.

[24] While the acts of violence perpetrated upon the complainant in the present case may be said to be less serious than those the subject of the offences in the cases to which the applicant's counsel has referred, those cases were all cases where the offender or offenders were related to, or in a relationship with, the complainant.

[25] That the injuries actually inflicted in the present case may be less serious than those inflicted in the cases to which the applicant's counsel has referred does not mean that the overall criminality of the applicant is significantly less than that of the offenders in those cases. That is because, as the learned sentencing judge noted, the offence of torture in this case was the result of the cold-blooded detention and torture for money by several men of a vulnerable man who did not know them and who was alone in a foreign country. These circumstances reveal a distinctly different form of criminality but one which is at least as serious as that involved in the decisions to which the applicant's counsel referred. Indeed the view was open to her Honour that the demands of deterrence are considerably stronger in this case than in the cases to which the applicant's counsel has referred because of the callous, impersonal, organized and financially motivated brutality visited upon the complainant by the applicant and his co-offenders.

Conclusion

[26] The application for leave to appeal against sentence should be dismissed.

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19 [2002] QCA 254; (2002) 131 A Crim R 603.