SUPREME COURT OF QUEENSLAND

CITATION:	*R v Matthews* [2007] QCA 144
PARTIES:	**R** **v** **MATTHEWS, Brett Allan** (applicant/appellant)
FILE NO/S:	CA No 21 of 2007 SC No 14 of 2007 SC No 15 of 2007 SC No 5 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 May 2007
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2007
JUDGES:	McMurdo P, Holmes JA and Lyons J Judgment of the Court
ORDER:	**1. Application for leave granted** **2. Appeal allowed** **3. Sentence varied by substituting a sentence of nine years imprisonment and setting aside the declaration of a serious violent offence; the declaration of a pre-sentence custody period of 366 days is maintained**
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 GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – GENERALLY – where the applicant was sentenced, on a plea of guilty, to 10 years imprisonment for manslaughter – whether the trial judge erred in employing a notional head sentence of 12 to 13 years – whether the sentence imposed was manifestly excessive *R v Auberson* [1996] QCA 321; CA No 248 of 1996, 3 September 1996, cited *R v Bojovic* [2000] 2 Qd R 183, cited *R v Clark; ex parte A-G* [1999] QCA 438; CA No 68 of 1999, 22 October 1999, considered

R v Cummins [1999] QCA 117; CA No 376 of 1998, 16 April 1999, cited
R v DeSalvo (2002) 127 A Crim R 229, considered
R v George; ex parte A-G (Qld) [2004] QCA 450; CA No 316 of 2004, 26 November 2004, cited
R v Katia; ex parte A-G (Qld) [2006] QCA 300; CA No 111 of 2006, 22 August 2006, considered
R v McDougall & Collas [2006] QCA 365; CA No 83 of 2006, 22 September 2006, cited

COUNSEL: R A East for the applicant/appellant
M J Copley for the respondent

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

[1] **THE COURT**: The applicant for leave to appeal against sentence, Brett Allan Matthews, pleaded guilty on ex officio indictments to one count of manslaughter, one count of unlawfully possessing a motor vehicle with circumstances of aggravation, two counts of fraud and two counts of stealing. He also pleaded guilty to two charges of driving while disqualified.

[2] The charge of unlawful killing arose when the applicant in a fit of amphetamine induced rage strangled Kelly Walsh because he wrongly believed that she had been involved in a burglary at his home which had led to his wife's suffering a miscarriage when she gave chase to burglars. The applicant's belief had been induced by his ingestion of amphetamine and it was clear that both he and Ms Walsh had consumed excessive amounts of drugs and alcohol prior to Ms Walsh's death.

[3] The applicant was 31 years old when the killing occurred and was 36 at the date of sentence. He had a lengthy criminal history, which began with an armed robbery with actual violence at the age of 18. Its circumstances could not have been too serious; having spent three days in custody, the applicant was given three years probation. Apart from one offence of assault occasioning bodily harm in company in 1997, for which he received one month's imprisonment, the balance of the history consisted of offences of dishonesty, drug offences and breaches of bail undertakings and court orders, resulting in sentences ranging from probation to 12 months imprisonment.

[4] The applicant was sentenced to 10 years imprisonment for the manslaughter conviction, with the learned sentencing judge indicating that without the circumstances in his favour the appropriate penalty would have been a term of imprisonment of 12 or 13 years. Pre-sentence custody of 366 days was declared. The other offences on which the applicant was sentenced all occurred some years after the killing; the dishonesty offences appeared to reflect a drug user's funding of his habit. His Honour did not impose any further penalty in respect of them but merely recorded convictions on the basis that the applicant had already spent 246 days in custody in respect of them, which could not be declared. He ordered that the applicant be disqualified from holding or obtaining a driver's licence for five years.

[5] The applicant submits that the learned sentencing judge erred in employing an excessive notional head sentence of 12 to 13 years; in mistakenly taking the view that this Court had indicated a need for increased sentences in manslaughter cases; and, in consequence, in imposing a sentence which was manifestly excessive.

The circumstances of the offences

[6] On 28 May 2001 the body of Kelly Walsh, aged 27, was found lying on a grass verge on the outskirts of Brisbane. The Post Mortem Examination Report dated 4 October 2001 sets out the Summary and Interpretation of the findings as follows[1]:

> "1. The two most likely explanations for her death are drug toxicity and/or neck compression, each acting alone or in combination – essentially the same as at the time of the autopsy. Drug toxicity renders a person more vulnerable to the effects of neck compression.
>
> 2. The drug levels of amphetamine, methylamphetamine and codeine are not especially high but are within the ranges reported to have been associated with fatalities. There was evidence of both fresh/recent intravenous injection and previous intravenous abuse.
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> 3. The post-mortem evidence suggesting neck compression consists of:
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> - Purple discolouration (suffusion) of the face.
> - Petechiae (tiny areas of bleeding) inside the eyelids (and elsewhere).
> - Abrasion and bruising over the left neck.
> - A curved abrasion under the chin.
> - Abrasions over the nape of the neck (and on top of the right shoulder).
> - Internal bruising to the right of the voice box.
>
> 4. Possible methods of neck compression include use of a hand, hands or an arm.
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> 5. However, neck compression as the final fatal event, although a distinct possibility, cannot be proven based on post-mortem evidence alone.
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> 6. The other injuries (involving the legs, arms, hands, chest, abdomen and scalp) were relatively minor. They were consistent with blunt impacts during some kind of struggle. There was a possible shoe print over the abdomen, but no bruising or internal injuries.
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> 7. One possibility to be considered is that the amphetamines had caused violent behaviour. This could have led to a struggle, including pressure to the neck during attempted restraint.
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> 8. As noted in the report, many of the marks on the skin were consistent with ant [sic] activity or occurrence post-mortem, for example if the body had been moved.
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> 9. Based on the foregoing, I formed an opinion as to the cause of death as shown below and have issued a certificate to that effect.

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[1] Appeal Record Book p 76.

Cause of Death
1 (a) Drug Toxicity & Possible Neck Compression."

[7] The circumstances of the death of Ms Walsh remained unsolved until April 2005 when the applicant's wife gave information to the police which implicated the applicant and another man, Stephen Smith.

[8] When Mr Smith was interviewed on 19 December 2005[2] he said that he had been driving the car with the applicant and Ms Walsh together in the back seat: "[w]hilst I was driving along the highway, I started to hear her gasp. I could [hear] Matthews hitting Kelly. I never said anything and I never saw anything. I could [hear] him hitting her a few times and then he was strangling her because of the gagging sounds that she was making." Shortly after they became aware that Ms Walsh was dead, her body was left in bushland on the outskirts of Brisbane. It was found the following morning.

[9] After Mr Smith's interview with police, the applicant's wife attended the Correctional Centre where the applicant was incarcerated to secretly record their conversation. She told the applicant that she had been summoned for an inquiry into Ms Walsh's death and she sought his advice about what she should do. The applicant urged her to tell the truth. He told her that what had happened had troubled him every day since it had occurred and "ate at him like a cancer".

[10] The applicant subsequently agreed to be interviewed by police and admitted responsibility for the death of Ms Walsh.[3] He told the police that purely by chance he saw the deceased, whom he knew, in Nambour when he and Mr Smith were out purchasing and injecting amphetamines. She had then joined them on a journey to Beenleigh to collect some of Mr Smith's belongings; during that journey both the applicant and Ms Walsh had injected speed on at least three occasions. The applicant estimated that he had consumed about a gram of speed, as well as smoking cannabis and drinking vodka, while the deceased had about half a gram of speed. On their return to the Sunshine Coast, the conversation turned to people who were mutual acquaintances and he confronted the deceased about her possible involvement in a burglary at his home, which had indirectly led to his wife's miscarriage when she had given chase to the burglars. He told the police that when she was confronted about this, Ms Walsh had "a half grin expression on her face" before asking "oh, is that when your missus miscarried on the side of the road".

[11] The applicant said, in the interview, that he "just went fucking crazy". He admitted to striking the deceased then throttling her whilst pushing her head down towards her lap. He squeezed her neck as hard as he could because he had "never been that angry, I've never been that wild … I was just in a fucking blind rage". Smith pulled over, and the applicant had left the car to calm down when Smith told him that Ms Walsh was not moving. Her death, the applicant said, had played on his mind for many years and felt like a weight around his neck. He had told others about it, expecting that they would advise the police.

[12] The Crown accepted the plea to manslaughter on the basis that it could not prove intent, given the combined effects of intoxication and blind rage on the applicant.

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2 Quote from Statement of Stephen Smith, Appeal Record Book p 29 line 20.
3 Statement of Agreed Facts, Appeal Record Book p 55.

The Ground of Appeal

[13] The applicant contends that the learned sentencing judge erred by employing a notional head sentence of between 12 and 13 years; particularly when the Crown had submitted, in reliance on the cases *R v Clark; ex parte A-G*[4], *R v Cummins*[5] and *R v Auberson*[6], that the appropriate head sentence lay between 9 and 11 years. He had mistakenly regarded those cases as no longer indicative of the sentencing range, observing that since they were decided, "the Court of Appeal has on at least two occasions remarked that the penalties imposed for manslaughter had become a little inadequate and that they should be, as a general rule, increased"[7].

[14] The applicant relies on a series of recent Queensland decisions for the proposition that the sentencing range for manslaughter in cases of this kind lie between 8 and 12 years imprisonment:

(a) *R v Bojovic* [2000] 2 Qd R 183 (8 years)
(b) *R v Arnoutovic* [2001] QCA 89 (9 years)
(c) *R v Stepto* [2002] QCA 10 (9 years)
(d) *R v MP* [2004] QCA 170 (9 years)
(e) *R v Corcoran* [2004] QCA 441 (9 years SVO)
(f) *R v George; ex parte A-G (Qld)* [2004] QCA 450 (9 years)
(g) *R v Schubring; ex parte A-G (Qld)* [2004] QCA 418 (10 years)
(h) *R v Duncombe* [2005] QCA 142 (10 years)
(i) *R v Katia; ex parte A-G (Qld)* [2006] QCA 300 (8 years)
(j) *R v McDougall & Collas* [2006] QCA 365 (8 years SVO)
(k) *R v Mooka* [2007] QCA 36 (10 years)

[15] That range was made explicit, the applicant said, in *R v DeSalvo*[8]. McPherson JA, with whom Williams JA agreed, said at [11]:

> "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."

[16] The applicant contended that the learned sentencing judge's view that this Court had advocated an increase in the penalties imposed for manslaughter was erroneous. His Honour referred in the course of submissions to a judgment of McPherson JA; he perhaps had in mind *R v DeSalvo,* in which the latter said at [8]:

> "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."

That comment fell far short, the applicant submits, of an expression of opinion by the Court of Appeal that there should be an increase in the sentencing range for

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4 [1999] QCA 438.
5 [1999] QCA 117.
6 [1996] QCA 321.
7 Appeal Record Book p 43.
8 (2002) 127 A Crim R 229.

manslaughter; and it should in any case be considered in relation to the circumstances of that case, which involved a stabbing.

[17] The applicant argues that there was, in any event, nothing about this case which would have made the top of the sentencing range the starting point for imposition of the head sentence. No weapon was used, the applicant's criminal history was that of a drug addict rather than a man given to violence (so that protection of the community was not the dominant consideration) and the offence itself was the product of rage and intoxication rather than any longstanding malice. Another significant factor was the level of drug toxicity in the victim, which meant that she was especially vulnerable to neck compression.

[18] In addition, the applicant submits that there were significant factors in mitigation which should have reduced the sentence. There was a plea of guilty to an ex officio indictment, which expedited the administration of justice and spared the victim's family and prospective witnesses the ordeal of a trial. The applicant had co-operated extensively with the police. His admissions, which were consistent with Smith's account and the post-mortem findings, significantly strengthened the case against him; without them the Crown's ability to prove the cause of death would have been much weaker. He had exhibited genuine remorse, urging his wife to tell the truth.

[19] Ultimately, the applicant submits that a head sentence of between eight and nine-and-a-half years should be substituted. He argues that it is not a case for declaration of a serious violent offence (SVO), there being no circumstances that took the offence outside of the norm or put it in a category of offending which was more serious than usual.

The respondent's submissions

[20] Counsel for the respondent did not seek to contend that the starting point for the head sentence in this case could be as high as 13 years, suggesting that the learned sentencing judge's reference could only have applied to the situation had the applicant not pleaded guilty. He was unable to identify any particular decision of this Court which would support his Honour's view that it had advocated an increase in sentences from the range illustrated by *Clark*, *Cummins* and *Auberson.* He argued that notwithstanding any error on his Honour's part, the sentence could be supported by reference to the decisions in *R v Katia; ex parte A-G (Qld)*[9] and *R v George; ex parte A-G (Qld)*[10]. Those cases, both of which involved pleas of guilty to manslaughter where death resulted from a single blow to the head, showed that a term of imprisonment of 10 years was within the appropriate range.

[21] In *Katia*, a term of eight years with a parole recommendation after three years was imposed. Katia was 18 at the time, with no criminal history, and had a promising future, despite a problem with intoxicating substances which had led to the offence. He had surrendered himself to police within days of the killing. In *George*, the respondent, who was 21, had delivered a single, ultimately fatal punch to a heavily intoxicated and defenceless man who had earlier been injured in an altercation with the respondent and others. The respondent had a criminal history: two convictions for assault and another for grievous bodily harm. On an Attorney-General's appeal the Court substituted a sentence of nine years imprisonment: the minimum, it said,

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9 [2006] QCA 300.

10 [2004] QCA 450.

that could be imposed given the persistent violence of the respondent on the night in question and the brazen act of king-hitting a defenceless and injured man after police had intervened. The Court declined to make an SVO declaration, but made no recommendation for parole.

[22] The respondent submits that the circumstances of this case make it appropriate that the head sentence be longer than those imposed in *Katia* and *George*. Death was caused not by a single blow but by a sustained assault, despite the deceased's vigorous resistance, and the deceased's body was dumped in a field. The applicant did not confess until four and a half years after the event, and his prospects of leading a useful and law abiding life, given his previous criminal history, were not as promising as those of the respondent in *Katia*, or even *George*.

Error in exercise of discretion

[23] An analysis of the cases already mentioned does not justify a starting point for the head sentence in this case as high as 13 years. Nor was any case identified in support of the learned sentencing judge's impression that this Court had expressed a view that penalties ought to be increased in cases of manslaughter of this kind. Notwithstanding the respondent's submission that any such error should not be regarded as significant if the sentence itself could be supported, these were errors which inevitably affected his Honour's exercise of the sentencing discretion. It follows that the application for leave must be granted, the appeal allowed and the discretion now exercised afresh.

[24] In arriving at an appropriate sentence, one begins of course, with the fact that the applicant was responsible for the brutal death of a young woman, causing great grief to her mother and brother. It is relevant, however, that there was no weapon involved; that there was at least perceived provocation; and that the deceased's "drug toxicity" was clearly a significant factor in her death. It is also noted that the post-mortem certificate does not reveal extensive injuries other than some bruising and abrasions and the Statement of Agreed Facts[11] tendered at the sentencing hearing in fact indicated that the injuries to the deceased's legs, arms, chest and scalp were "relatively minor"[12]. There are a number of factors in mitigation: the applicant's evident remorse, his exhortation to his former wife to tell the truth, his full confession to the police, consistent with Smith's evidence and the post-mortem findings, and his plea of guilty on an ex officio indictment. It is of considerable significance that although there was some uncertainty about the cause of death, the post-mortem certificate indicating it as "Drug Toxicity and Possible Neck Compression", the applicant chose not to take advantage of that area of doubt. This approach has, as Counsel for the applicant submitted at the hearing[13], both expedited the administration of justice and reduced to some extent the suffering of the deceased's family.

[25] A sentence of nine years appropriately reflects the seriousness of the offence and the factors in mitigation. Counsel for the respondent, called on to identify any features of the case which took it "out of the 'norm'" in the sense referred to in *McDougall & Collas*[14] so as to require the imposition of an SVO, could point only to the fact that the level of violence was greater than that in the single punch cases and that the

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11 Appeal Record Book p 53.
12 Appeal Record book p 57.
13 Appeal Record Book p 30 lines 1-5.
14 [2006] QCA 365 at [19].

body was dumped. Those features are not sufficient to warrant the exercise of the discretion.

ORDERS

1. Application for leave granted.

2. Appeal allowed.

3. Sentence varied by substituting a sentence of nine years imprisonment and setting aside the declaration of a serious violent offence; the declaration of a pre-sentence custody period of 366 days is maintained.