SUPREME COURT OF QUEENSLAND

CITATION:	*R v Richmond-Sinclair* [2009] QCA 98
PARTIES:	**R** **v** **RICHMOND-SINCLAIR, Alexandre Geraud** (applicant)
FILE NO/S:	CA No 215 of 2008 DC No 1148 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	2 April 2009
JUDGES:	Muir and Fraser JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant stomped on victim's head whilst he was in prison for a separate offence – where applicant charged with murder but convicted of the lesser offence of manslaughter – where applicant sentenced to 12 years imprisonment – whether requirement that the applicant serve 80 per cent of the 12 year sentence unjust in all the circumstances – whether the sentence fell outside the appropriate range of nine to 10 years – whether the circumstances of the offence warranted the making of a serious violent offender declaration – whether sentence manifestly excessive *R v Dwyer* [2008] QCA 117, considered *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365, cited *R v Mills* [2008] QCA 146, cited *R v Mooka* [2007] QCA 36, cited *R v Sanderson* [2003] QCA 338, distinguished *R v Sebo; ex parte Attorney-General (Qld)* (2007) 179 A Crim R 24; [2007] QCA 426, distinguished

COUNSEL:	D Boddice SC, with E J Williams, for the applicant (pro bono) M B Lehane for the respondent
SOLICITORS:	No appearance for the applicant Director of Public Prosecutions (Qld) for the respondent

[1] **MUIR JA:** I agree with the reasons of Fraser JA and with the order he proposes.

[2] **FRASER JA:** After a seven day trial on a charge of murder, on 28 July 2008 a jury found the applicant not guilty of murder but guilty of manslaughter. The jury returned a special verdict that it found the applicant guilty of manslaughter on the basis that he had stomped on his victim's head (rather than by causing his victim to fall). On 21 August 2008 the trial judge sentenced the applicant to 12 years imprisonment, declared that the applicant had committed a serious violent offence, and declared that 688 days spent by the applicant in pre-sentence custody was deemed to be time already served under the sentence.

[3] The judge also found proved a breach of an intensive correction order imposed in respect of an armed robbery the applicant had committed on 8 April 2005 and re-sentenced the applicant to 18 months imprisonment for that offence, that imprisonment to be served concurrently with the term for manslaughter.

[4] The applicant filed a notice of appeal against his conviction for manslaughter and an application for leave to appeal against sentence, but the applicant abandoned the appeal against conviction. The ground of his application for leave to appeal against sentence for the manslaughter offence is that the sentence was manifestly excessive.

Circumstances of the offence

[5] There was a good deal of conflicting evidence at the trial. The trial judge made the following findings concerning the basis upon which the applicant fell to be sentenced.

[6] When the applicant committed the offence he was 21 years of age, having been born on 28 July 1984. He was being held on remand at the Woodford Correctional Centre (a maximum security prison) for a breach of his intensive correction order. The applicant's victim, George Challis, was housed in the same unit in the prison. The applicant and the deceased were acquainted but there was no pre-existing animosity or friendship between them.

[7] The trial judge accepted that there may have been an argument between the applicant and the deceased at about 11.00 am on 1 July 2006, but rejected the applicant's version of that argument and his evidence that the deceased then hit his head on a fence. The trial judge regarded this argument, which took place a couple of hours before the incident in which the deceased received his fatal blow, as background only.

[8] Shortly before 1.00 pm on the same day there was an altercation in the exercise yard between the applicant and the deceased, in which the deceased was heard to say to the applicant, "Why did you call me a fucking maggot?". A fist fight followed in which the applicant threw punches, at least one of which caused an injury above the deceased's eye. After an intervention by prison officers the applicant and the deceased separated, apparently heading towards their respective cells.

[9] After the applicant had stopped for a drink of water on the way to his cell, the deceased approached the applicant from behind and made some (unknown) comment. (The judge sentenced the applicant on the basis that the jury must have regarded this conduct by the deceased of reviving the earlier argument as provocation which had not been excluded by the Crown). There was then a "brief and intense physical struggle" in which the applicant overpowered the deceased. The trial judge found that the applicant "punched him twice on the left side of his face. He went to the ground. You kicked him, then you stomped him on the side of his head. You stepped back, turned and kicked again, but the further kick did not connect." The jury, by its verdict, rejected the applicant's evidence that he did not stomp and that the deceased must have hit his head on a bolt when he fell.

[10] The applicant used such force that he had a sore hand and a sore foot (which may have been an aggravation of a previous ankle injury) of which he later complained. The trial judge found that when the applicant stomped on the side of the deceased's head the applicant intended to inflict grievous bodily harm. The stomp caused a chip fracture of the temporal bone and an associated linear fracture, which extended downwards to the base of the deceased's skull, causing a brain injury from which the deceased died on 12 July 2006.

[11] Immediately after the incident the prison officers ordered the applicant to go to his cell. The trial judge rejected the evidence of one of the prison officers that the applicant celebrated by doing a "high five" with another prisoner and accepted the applicant's evidence that he was merely saying farewell to that other prisoner. The trial judge found nevertheless that the overall picture was one of denial of responsibility and lack of remorse.

Sentencing remarks

[12] The trial judge observed that Woodford was a "tough prison", volatility in which was reflected in the fact that these events happened so quickly under the eye of prison officers moving from the officers' station to the unit; but that the offence was "vicious and brazen" and a breach of prison discipline.

[13] The circumstances which seemed to the trial judge to be particularly significant were that the stomp was inflicted with intent to cause grievous bodily harm but that the jury was not satisfied that provocation had been excluded; that a single blow resulted in the death of the deceased, but it was a blow in the context of an altercation in which the applicant threw a number of punches and kicks; that no weapon was involved; and that the offence occurred in a prison environment, which was an aggravating feature. The effect of the offence upon the deceased's family was devastating. Victim impact statements graphically described their grief and anguish, and the adverse effect it had on their daily lives, their relationship with others and their employment.

[14] The trial judge took into account that the applicant continued to deny responsibility throughout the trial, including denying having stomped on the deceased's head, his lack of cooperation and his lack of remorse.

[15] The applicant's youth was in his favour, but the trial judge also observed that the applicant had a criminal history which was disturbing for someone so young. In that respect the trial judge also noted that the applicant's offending in the community was fuelled by alcohol, which perhaps explained his record but was not

an excuse. The applicant's conduct in prison where he had no access to alcohol made it plain that there was an underlying problem of anger management control.

[16] The applicant's prior offending dated from about August 2001, when the applicant was aged only 17, when he was dealt with in the Magistrates Court for offences including wilful damage and one count of assaulting a police officer by spitting. On 11 December 2004 (the trial judge referred to February 2004, but nothing turns on this) the applicant committed two wilful damage offences, which the trial judge observed was alcohol-fuelled behaviour. Whilst the applicant was on bail for those wilful damage offences he committed an armed robbery with actual violence on 8 April 2005, again when affected by alcohol. The applicant broke into a convenience store at night and brandished a steak knife and demanded money from the sole female attendant. The trial judge observed that it was to the applicant's credit that after he sobered up he handed himself in and fully cooperated with the authorities.

[17] The judge who sentenced the applicant for the two counts of wilful damage and the armed robbery sentenced the applicant to twelve months imprisonment to be served by way of an intensive correction order to commence at the end of a sentence the applicant was then serving for an unpaid fine; that sentence was imposed even though that judge had been satisfied that the appropriate range of penalty was two and a half to three years in the ordinary case; in so sentencing the judge had taken into account the applicant's youth, his need for supervision and in particular for alcohol counselling and rehabilitation, his family support and the time he had spent on remand, and his having pleaded guilty to an ex-officio indictment. The trial judge noted that that sentencing judge had spelt out in the plainest of terms that if the applicant did not take advantage of the chance then afforded to him he would find himself in prison.

[18] In October 2005, when the applicant was still serving a sentence for the fine, he was sentenced to one month imprisonment for possession of a prohibited article. When he was released from prison on 25 January 2006 he began serving time under the intensive correction order, but he failed to report as required, failed to attend alcohol counselling as required, and was uncooperative and threatening in his attitude to staff. The result was that a warrant was issued for his arrest and he was taken into custody on 26 April 2006. That was why he was in Woodford prison on 1 July 2006. He had then been on remand for 66 days.

[19] After the manslaughter offence the applicant committed a further offence in prison on 21 November 2007 of wilful damage to a cell window.

[20] The trial judge observed of the good character references put before her Honour that the objective evidence relating to the applicant's conduct, both in the community and in prison, was at odds with those references.

[21] The trial judge remarked that had she been dealing just with the manslaughter the appropriate range would have been 11 to 12 years. Had her Honour been re-sentencing just for the armed robbery the range would have been one to two years. The trial judge expressly took into account that a sentence of 11 to 12 years for manslaughter would automatically carry with it a serious violent offence declaration and that the applicant would have to serve at least 80 per cent of that time before becoming eligible for parole. The trial judge took into account in fixing the sentence the pre-sentence custody from 1 July 2006 to 18 September 2006, the pre-sentence custody thereafter to be declared time already served under the sentence.

The trial judge also took into account pre-sentence custody between 26 April and 1 July 2006 in the concurrent sentence for the armed robbery.

[22] The sentence of 12 years imprisonment for the manslaughter offence was intended to reflect the totality of the applicant's criminality in both offences and to represent a sentence which was not crushing on the applicant's prospects for eventual rehabilitation and release.

The applicant's submissions

[23] On behalf of the applicant, Mr Boddice SC and Mr EJ Williams, who appeared pro bono, made four central submissions: first, that when regard was had to the requirement that the applicant serve 80 per cent of the term before becoming eligible for parole, the sentence was not a just one in all of the circumstances; secondly, that the sentence fell outside the appropriate sentencing range of between 9 and 10 years; thirdly, the sentence was manifestly excessive in that the circumstances of the offence did not justify the applicant being required to serve 80 per cent of a 12 year term; and fourthly, that nothing in the circumstances of the offence took it out of the norm in order to justify the making of a declaration that the applicant had committed a serious violent offence.

[24] The applicant conceded that, at first blush, the situation involving the stomping of the deceased's head called for a significant sentence, but not such as to exceed a 10 year term. It was submitted that the sentence was manifestly excessive having regard to the circumstances including the youthful age of the applicant, that he was not the instigator of the confrontation, that it occurred in a tough prison environment, that it was of a very brief duration, and that the applicant had desisted in an earlier confrontation and left the area before he was again approached by the deceased. The applicant faced a third confrontation in a frightening environment. It was submitted that this was not a "vicious" or "brazen" attack, as the trial judge had characterised it; that the applicant was not the initiator, that the event was very short, and that the blows were landed in a rage provoked by the deceased.

[25] It was submitted to be in favour of the applicant that in his evidence he admitted that he stomped. (What the applicant said in evidence was that the deceased "was stepping backwards and he's – he's fallen over, which had the appearance of a slip. He's fallen over and when he's landed on the ground I raised my foot, brought it down in a forwards – put it – brought it down in a forwards motion which connected with George. My heel hit George's arm, the front of my foot landed on George's torso, and George – George wasn't moving at all." When later asked by his counsel why he stomped on the deceased's arm and torso he said that he couldn't answer for that: "It was in the spur of the moment and I can't answer that.")

[26] Also submitted to be in the applicant's favour was that, so it was submitted, the applicant apologised to the deceased after an earlier altercation and in terms that demonstrated the frightening nature of the prison environment and his attempts to avoid trouble. (The applicant's evidence was: "Anyway, I've – I apologised to George for asking to go away and any – and for any offence he took to that and I apologised to George for pushing him into the fence, even though it was self-defence, purely because the last thing I wanted was any – any sort of trouble with another prisoner. I was 21 years old and it was – it is a very frightening environment. The last thing you want is trouble with another prisoner. George just told me to go away and he'll talk to me later.")

[27] As to the applicant's criminal record, it was emphasised that the previous offences in the community were alcohol related and the applicant had been remorseful and cooperated fully after the offences. (The material shows that when the applicant participated in an interview about the earlier armed robbery offence and made admissions he said that he was intoxicated at the time of the offence, he was remorseful for his actions, he had a problem with alcohol, and that was the reason he believed he had committed the offence. A court report revealed that the breaches of the intensive correction order were also related to the applicant's alcohol problem.)

[28] The applicant also emphasised the favourable references tendered on his behalf which spoke of a young man who had experienced some difficult teenage years, but had a strong network and a future of promise.

[29] It was accepted that the applicant had not entered an early plea of guilty or offered to plead guilty to manslaughter, but the applicant's counsel drew the Court's attention to the fact that the prosecutor and defence counsel informed the trial judge that defence counsel had approached the prosecutor before the trial to discuss the prospect of the applicant entering a plea of guilty to manslaughter; the prosecutor's response was that the trial would proceed on the indictment charging murder. (The transcript of the sentence hearing also reveals that defence counsel acknowledged that when the applicant was arraigned he did not plead guilty to manslaughter and that his case left to the jury was that there could be an acquittal based upon the applicant's contention that he was not responsible for the death of the deceased.)

[30] The applicant's counsel referred to the Court's conclusions in *R v McDougall & Collas* [2006] QCA 365 at [18] that the courts cannot ignore the serious aggravating effect upon a sentence where imprisonment of 10 years rather than, say, nine years imprisonment is ordered; the consequentially inevitable declaration under Part 9A of the *Penalties and Sentences Act* 1992 (Qld) that the offender has committed a serious violent offence and that the offender will then be required to serve 80 per cent of the term before becoming eligible for parole is relevant in considering whether the sentence is "just in all the circumstances", in order to fulfil the purpose of sentencing prescribed by s 9(1) of the Act; but that courts should not attempt to subvert the intention of Part 9A by reducing what would otherwise be regarded as an appropriate sentence; with the result that while a court should take into account the consequences of any exercise of the powers conferred by Part 9A, adjustments may only be made to a head sentence which were otherwise within the range of appropriate penalties for that offence. It was argued that the trial judge did not place sufficient weight on the impact of the (automatic) declaration when considering the overall sentence.

[31] The applicant contended that the appropriate sentence was nine and a half years, as submitted to the trial judge. The applicant's counsel referred to the following comparable decisions: *R v DeSalvo* [2002] QCA 63; *R v Sanderson* [2003] QCA 338; *R v Schubring; ex parte Attorney-General (Qld)* [2005] 1 Qd R 515, [2004] QCA 418; *R v Matthews* [2007] QCA 144; *R v Mills* [2008] QCA 146; and *R v Sebo; ex parte Attorney-General (Qld)* [2007] QCA 426.

Analysis

[32] As to the facts, to the extent that the applicant's point was that he reacted in the environment of a "tough prison" the trial judge took that into account. Otherwise the contention for the applicant based upon the applicant's evidence that he

apologised to the deceased after an earlier altercation finds no support in any finding and is not reconcilable with the trial judge's rejection of the applicant's evidence about the earlier argument and the finding that the earlier argument had no more relevance than as background. Similarly, the submission to the effect that the applicant was entitled to credit for an admission in his evidence that he stomped on the deceased must also be rejected. In the relevant passage the applicant sought to deny responsibility for the death of his victim by denying rather than admitting that he had stomped on the deceased's head. Plainly the jury did not accept the applicant's version.

[33] The trial judge otherwise took into account all of the matters upon which the applicant now relies as mitigating the seriousness of his offence, particularly including the provocation which the trial judge attributed as the explanation for the jury's rejection of the murder charge, the immediacy of the applicant's reaction to that event, and the intensity and very short duration of the following physical struggle.

[34] On her Honour's findings, which are not challenged in this Court, the applicant twice punched the deceased on his face, the deceased then fell to the ground, and it was while the deceased was lying on the ground that the applicant stomped on his head; and the applicant did so intending to cause the deceased grievous bodily harm and with sufficient force to cause the fatal injuries. On those appalling facts, and despite the brevity of the events and the provocation which explained the rejection of the murder charge, it was open to the trial judge, who had the advantage of having observed the applicant giving evidence and being cross-examined, to characterise the offence as "vicious and brazen".

[35] It must not be forgotten that the applicant violently caused the death of a fellow human being, with the resulting anguish and grief suffered by his family.

[36] The trial judge took into account in the applicant's favour his youth and the particular circumstances mitigating his criminal record, as well as the favourable character references. But the judge was also right to regard the fact that the applicant committed this offence in a prison as an aggravating feature of his criminality. The importance of the maintenance of prison discipline and the fulfilment of the State's obligations for the welfare of prisoners justify the trial judge's acceptance of the significance of general deterrence in sentencing for this offence.

[37] The discussion between the applicant's counsel and the prosecutor about the possibility of a plea of guilty to manslaughter relied upon by the applicant's counsel did not justify mitigation of the sentence in circumstances in which the applicant did not plead or offer to plead guilty to manslaughter, he continued to deny responsibility for his offence, and he swore to an exculpatory version of the facts which was ultimately rejected. There is also no challenge to the trial judge's finding that the applicant lacked remorse.

[38] There is no ground for thinking that the trial judge failed to apply the principles expressed in *R v McDougall & Collas* [2006] QCA 365 at [18]. Her Honour expressly took into account the serious aggravating effect of a sentence of 10 years or more that the applicant would inevitably be required to serve 80 per cent of the term before becoming eligible for parole.

[39] I turn then to consider the argument that comparable provocation manslaughter sentencing decisions support the contention that the sentence of 12 years, with the concomitant automatic declaration and requirement to serve 80 per cent of the term, was manifestly excessive.

[40] *R v Mills* [2008] QCA 146 was a case in which this Court reduced a sentence of 10 years to nine years and declined to declare that the applicant had committed a serious violent offence. That decision provides no support for the applicant's contention that the sentence in this very different case was manifestly excessive. Mills was a man of otherwise good character with no criminal history who entered an early plea of guilty to manslaughter by killing his wife. It is sufficient here to note that Keane JA observed (at [24]) that it was a "far cry from the brutal thuggery which characterises those examples of this crime which have attracted a sentence at the higher end of the range". Keane JA there cited some cases that are of more relevance here, including in particular *R v Sebo* [2007] QCA 426 and *R v Dwyer* [2008] QCA 117.

[41] In *R v Sebo; ex parte A-G (Qld)* Holmes JA, with whose reasons Keane JA and Daubney J agreed, analysed many comparable decisions, including all of the decisions that pre-dated *Sebo* which are cited here for the applicant. Holmes JA concluded that the manslaughter sentence in *Sebo* might properly have fallen between nine and 12 years. Accordingly, the sentence of 10 years imprisonment, which carried the requirement that the respondent serve 80 per cent of that term before becoming eligible for parole, was plainly not inadequate.

[42] The defence case in *Sebo* was that the 28 year old offender's 16 year old girlfriend had taunted him with claims of having slept with a number of men and, whilst standing next to the offender by his vehicle on the roadside, said that she would continue to deceive him. The offender struck her a number of times with a steering wheel lock and continued to do so after she had fallen to the ground; but he thereafter immediately took the seriously injured girl to the hospital; she later died as a result of her injuries. Although the offender initially denied having caused her injuries he later admitted his responsibility for the offence. He had no prior convictions, he offered a timely plea of guilty to the offence of manslaughter of which he was ultimately convicted, and he cooperated in the conduct of the trial.

[43] The applicant's counsel here emphasised the serious aspects of the offending in *Sebo*: the use of the steering wheel lock as a weapon, the youth and relative defencelessness of the victim, and the limited nature of the provocation which triggered it. On the other hand, reference might be made to that offender's cooperation and lack of any previous criminal history. Most significantly, in *Sebo*, as in all of the other comparable decisions upon which the applicant relies other than *R v Sanderson*, there had been an early plea or offer of a plea of guilty to manslaughter. When Holmes JA concluded that the sentence in *Sebo* might properly have fallen between nine and 12 years, her Honour was speaking of a sentence for a remorseful offender who had made a timely offer to plead guilty to manslaughter.

[44] The only case relied upon by the applicant as being comparable which did not involve a plea or an offer to plead guilty was *R v Sanderson* [2003] QCA 338. In that case, the applicant was sentenced to an effective 12 year term of imprisonment, comprising nearly two years pre-trial custody (which the trial judge thought could not be declared as time served) and the sentence of 10 years imprisonment.

Jerrard JA recorded the trial judge's conclusion that the appropriate sentence "could not be anything less than 12 years imprisonment". Fryberg J concluded that in light of sentences imposed in comparable cases, the notional head sentence of not less than 12 years imprisonment considered by the trial judge and the actual sentence of 10 years imprisonment which he imposed were not manifestly excessive but, in light of comparable cases, might be regarded as, "if anything, light". Because the applicant's counsel indicated a desire to withdraw the application for leave to appeal against sentence if the court considered that the sentence of 12 years was appropriate, the application was dismissed. For those reasons, although I would acknowledge that *R v Sanderson* was a more serious case, it is not a useful exercise to compare its facts with the facts of this case. It plainly cannot be regarded as an authority supporting the applicant's contention that the sentence of 12 years imprisonment in this case was manifestly excessive.

[45] The respondent relied upon *R v Dwyer* [2008] QCA 117 as supporting its contention that the sentence was within range. That 22 year old offender agreed to plead guilty to manslaughter once the medical evidence established that his punching and kicking of the 50 year old deceased had caused the death. The Crown accepted the plea on the basis that it could not prove that the offender had acted with the intention either to kill or do grievous bodily harm. The offender had a previous criminal history of broadly similar seriousness to that of this applicant. The applicant persisted in his attack on the deceased and his lack of remorse was reflected in his callousness, after he had beaten the deceased into a state of unconsciousness, by refusing his girlfriend's request that he call an ambulance and by initially giving a false story. Unlike this applicant, that offender subsequently admitted his responsibility for manslaughter.

[46] After referring to Holmes JA's review of the comparable decisions in *R v Sebo* and to the references in *R v Mooka* [2007] QCA 36 to the comparative width of the trial judge's discretion in the infinitely various circumstances of manslaughters, Keane JA observed that the sentence of 10 years imprisonment, which carried the requirement that the offender serve 80 per cent of that sentence before being eligible to apply for parole, was not outside the appropriate range.

[47] The sentence in this case of 12 years, with the automatic statutory obligation to serve 80 per cent of that term before eligibility for parole, is severe. But in light of the aggravating factors identified earlier, the range of nine to 12 years identified in *R v Sebo* where there was a timely offer to plead guilty, and the rejection in *R v Dwyer* of the contention that the sentence of 10 years was manifestly excessive for that youthful offender who pleaded guilty, I consider that the sentence of 12 years after the contested trial in this case was within the trial judge's sentencing discretion.

Order

[48] I would refuse the application for leave to appeal against sentence.

[49] **MULLINS J:** I agree with Fraser JA.