SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gadd* [2013] QCA 242
PARTIES:	**R** **v** **GADD, Leslie David** (applicant)
FILE NO:	CA No 316 of 2012 SC No 876 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 August 2013
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2013
JUDGES:	Holmes JA and Atkinson and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to four indictable offences, including burglary by breaking, with violence, while armed, in company – where the applicant was sentenced to an effective sentence of eight years imprisonment with a serious violent offence declaration – whether the sentence imposed was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 161B(3) *R v Dougherty* & *Anor* [1999] QCA 73, cited *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365, cited *R v Richardson* [2010] QCA 216, cited *R v Riseley; ex parte A-G (Qld)* [2009] QCA 285, cited
COUNSEL:	S G Bain for the applicant P J McCarthy for the respondent
SOLICITORS	DME Law Pty Ltd for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of North J and the order he proposes.

[2] **ATKINSON J:** I agree with the reasons for judgment of North J and the order proposed by his Honour.

[3] **NORTH J:** On 31 October 2012 the applicant pleaded guilty to one count of burglary by breaking, with violence, while armed, in company (count 1); one count of malicious act with intent (unlawful wounding with intent to maim) (count 3); one count of armed robbery, in company with wounding (count 4) and one count of assault occasioning bodily harm, while armed, in company (count 5).

[4] The applicant was sentenced on 7 November 2012. In respect of counts 1, 3 and 4, the learned sentencing Judge imposed sentences of eight years imprisonment and the applicant was declared to be convicted of a serious violent offence pursuant to s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld).

[5] In his application for leave to appeal the sentence and his outline of submissions, the applicant sought to appeal the sentence for counts 1, 3 and 4 submitting that both the sentence imposed of eight years and the declaration of a serious violent offence were manifestly excessive, and that a sentence of six to seven years was appropriate.[1] At the hearing of the application, counsel for the applicant limited her submissions to the imposition of the declaration in the circumstances of a wounding with intent to maim.

[6] The circumstances of the offences were summarised in a statement of facts.[2] On the day of the offence, Jason Gravestein and his de facto, Ms Burton, had left their residence to attend a four wheel drive show. While the house was unoccupied, the applicant and another unidentified person broke and entered the residence. They were looking for money and drugs that were thought to be on the premises and had disguised themselves by placing jumpers or shirts over their heads. The applicant was armed with a loaded firearm. When Gravestein and Burton returned to the residence, they entered through the front door. Gravestein walked towards the kitchen area and as he went to turn on the kitchen light he was grabbed by one arm and pushed to the floor by the applicant. The applicant shouted to Gravestein, "Get on the ground. Get on the ground," repeatedly and one of the two called "Get back Emma. Get out of it Emma." Burton was behind Gravestein and she stated, "You called me Emma. I know you." Ms Burton sat on a lounge while the disguised companion held a Jim Beam bottle over his head and yelled at her. The applicant had the firearm in his hand and it was pointed at Gravestein. The applicant looked away to the side and pulled the trigger, shooting Gravestein in the leg. When the firearm discharged it was about 12 inches from Gravestein's leg. Gravestein felt pain in his leg and looked down. There was a hole in his shorts on his upper left leg and there was blood splatter on the floor next to the lounge. Gravestein said, "You shot me." The applicant replied, "Yeah. We're not fucking around. We know you've got the stuff. Where's your pot and the money?" After some further exchanges between the applicant and Gravestein, Gravestein retrieved some marijuana that was contained in the pantry and the applicant demanded more saying, "I know you've got more." The applicant then told Gravestein that he knew of a safe in the bedroom and he demanded that Gravestein open the safe and give him the money that he believed was kept there. The applicant and Gravestein walked

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1 No challenge was made to the term of four years imprisonment that was imposed for count 5.

2 Exhibit 5.

into the bedroom where, after a short exchange, there was a fight between the two during which Gravestein managed to pull the applicant's disguise off his face. Ms Burton recognised the applicant. After further struggling and fighting in which Gravestein sustained injuries to his head, Gravestein broke free and ran out of the back door calling for the police. The applicant and his companion left the premises and drove off at speed in a car that had been hired by the applicant. According to the statement of facts, Gravestein said that the marijuana that was stolen had cost him $6,000 but the applicant did not steal any of the money in the safe as Gravestein had not opened it.

[7] When sentencing, his Honour noted that the plea entered by the applicant was not early but the delay had been attributable to protracted discussions between legal representatives concerning the Crown's approach to a sentence if a plea of guilty were entered. Ultimately when the Crown clarified its position a plea was entered promptly. In the circumstances where the trial had been estimated to take five to seven days, his Honour noted that there was a significant advantage to the public in the plea and that he would take that into account. At the time of sentencing the applicant was 43 years of age. His Honour noted the applicant had a serious criminal history dating back to 1986 with regular appearances before the courts, including a conviction in the District Court in 1991 for breaking, entering and stealing and a conviction in the District Court in 2005 of grievous bodily harm. The grievous bodily harm conviction was in relation to an occasion where the applicant was involved in a dispute about drugs, and on that occasion the applicant was stabbed in the stomach before he shot the complainant in the chest in the course of a scuffle.

[8] His Honour was referred to a number of cases where sentences were imposed between six to nine years for offending akin to offences such as counts 1, 3 and 4. His Honour said that one judgment of this Court concerned offending that was comparable to the circumstances before him. In *R v Dougherty & Anor*[3] the applicants pleaded guilty to one count of house breaking, one count of assault occasioning bodily harm while armed in company, one count of unlawful use of a motor vehicle and one count of possession of amphetamine with a circumstance of aggravation. In that case, the applicants and one other unidentified person came to the property occupied by a family in search of money and drugs. They were dressed in dark clothing with balaclavas to avoid identification and were armed with loaded firearms. The male property owner was forced at the point of a loaded firearm with threats made to himself and to his family to open a safe. The offenders stole jewellery and cash. Subsequently a quantity of methylamphetamine was found in the possession of the offenders. It was an open question whether the family who occupied the premises were aware of the presence of the drugs at the premises. The circumstance where the family occupying the premises was confronted by masked gunmen who made threats and committed acts of actual violence to the male occupant was described by the learned sentencing judge as "a family's worst nightmare". In that appeal the two offenders, who sought leave to appeal their sentence, both had prior convictions (one had convictions for stealing offences, drug offences and driving under the influence of liquor and the other for dishonesty, assaulting police, drugs and notably trafficking in dangerous drugs) but neither applicant had a prior conviction for offences of violence. In her reasons for refusing leave to appeal McMurdo P, after referring to a number of comparable sentences,

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[3] [1999] QCA 73.

observed that the "head sentence of eight years is not manifestly excessive, by any means" and in circumstances where she observed that the offending constituted a very high level of violence she concluded that neither the sentence nor the making of the declaration was manifestly excessive. McPherson JA in his concurring remarks said:

> "Far from being excessive the sentences imposed here for offences of the degree of seriousness committed in this case are, to my mind, if anything, at the lower end of the scale of penalties for this type of home invasion."

[9] When his Honour turned to consider whether to make a declaration under s 161B he said[4]:

> "So your history is one which suggests that you're not someone who respects the law as do the circumstances of this case. It seems to me that that previous conviction [in the District Court in 2005] is relevant to the overall sentence which I should impose on you. It was also submitted to be potentially relevant to whether I should declare these offences as serious violent offences because of a tendency shown by you to commit offences of violence, but it seems to me that the preferable view is that that offence is not particularly relevant to whether this offence is a serious violent offence, because it is the offence which has to be serious and violent rather than the offender.
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> That is discussed to a significant extent in *R v McDougall and Collas* [2007] 2 Qd R 87 as well as in *R v DeSalvo* [2002] QCA 63 at paragraphs [8] to [10] and [15], and in the more recent decision of the Court of Appeal in *R v Richardson* [2010] QCA 216.
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> …
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> In respect of whether there should be a declaration that these are serious violence offences, [the prosecutor] relied upon a number of considerations all of which seem to me to be relevant apart from the previous offence of yours, namely that this was a serious example of a home invasion including the use of disguises, purposeful arming with a loaded firearm and intended violence from the commencement of the incidents which in itself was unprovoked and which he submitted reflected gratuitous violence. That seems to me to be significant as was the fact that it included the actual discharge of a loaded firearm.
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> There was also necessarily from the nature of the offence a degree of planning and premeditation involved in it, including what [defence counsel] submitted were amateurish attempts at disguise – and I take that into account; they were amateurish and overcome pretty rapidly by either you or your co-offender identifying Ms Burton and then her identification of you as someone she had known previously.

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4 At AR 62 & AR 64-65.

> [The prosecutor] also drew attention to the protracted nature of the use of violence including the use of other weapons such as the sword and the cricket bat. That was done by your co-offender and you are only liable in respect of that on the submissions that were made as party to the offence committed by him, but still the two of you went there and stayed there knowing that you wished to extract from the complainants the money and the drugs that were in their possession.
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> [The prosecutor] also drew attention to the significant injuries caused by your actions including the lacerations and that the struggle terminated because of the resistance shown by the complainant as opposed to any voluntary desistance by you.
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> [Defence counsel] submitted to me that the authorities indicated that there needed to be something out of the norm for offences of this nature which commonly involve the use of weapons to justify the declaration as a serious violent offence, and what was relied upon by [the prosecutor] in particular was the discharge of a loaded firearm which he submitted was not normal for a home invasion and was an example of gratuitous violence.
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> There does seem to me to be strength in that submission as on the facts led before me there was no suggestion for example that you used the firearm simply as a threat but almost immediately on the entry by the complainants back into their house used it apparently to intimidate, or certainly with the effect of intimidating."

[10] In *R v McDougall & Collas*[5] this court said:[6]

> "[15] This Court has considered the question of when it is appropriate to make a discretionary declaration that an offender has been convicted of a serious violent offence in a number of cases; and likewise the effect of that automatic consequence when a sentence of 10 years' imprisonment or more is imposed in respect of any of the 'serious violent offences' listed in the schedule to the Act. Decisions in which the applicable principles have been considered include *R v Collins* [2000] 1 Qd R 45, *R v Bojovic* [2000] 2 Qd R 183, *R v DeSalvo* [2002] QCA 63, *R v Eveleigh* [2003] 1 Qd R 398, *R v Bidmade* [2003] QCA 422, *R v A* [2003] QCA 538, *R v Orchard* [2005] QCA 141, *R v Cowie* [2005] 2 Qd R 533, *R v BAW* [2005] QCA 334, *R v BAX* [2005] QCA 365, *R v Lewis* [2006] QCA 121 and *R v Mitchell* [2006] QCA 240.
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> [16] Differences of view and emphasis have emerged in those decisions, with the principal disagreement being as to whether the discretion to declare that an offender has been convicted of a serious violent offence can arise when the

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5 [2007] 2 Qd R 87.

6 An authority that has been consistently referred to and applied: *R v Riseley; ex parte A-G (Qld)* [2009] QCA 285 at [41] and [42]; *R v Richardson* [2010] QCA 216 at [39] and [40].

circumstances of the case do not take it beyond the 'norm' for offences of that type. A secondary issue has been whether the exercise of the discretion has resulted in a 'two step' or an 'integrated' sentencing process. The joint judgment of the High Court in *Markarian v R* (2005) 215 ALR 213 discourages focus on those terms, and encourages the view that a sentencing court take into account all relevant considerations, and only relevant considerations.

[17] As the High Court stated in *Markarian v R*, the sentencing process is an integrated process directed to the determination of a just sentence. The exercise of the discretion conferred by s 161B(3) of the *Penalties and Sentences Act* thus falls to be exercised as part of, and not separately from, the conclusion of the process of arriving at a just sentence.

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[19] It is where the making of a declaration is discretionary that a difference in views has arisen about whether declarations are available as a sentencing tool, when the circumstances are not beyond the norm for that offence. The following observations may assist sentencing courts:

- the discretionary powers granted by s 161B(3) and (4) are to be exercised judicially and so with regard to the consequences of making a declaration;
  a critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole. By definition, some of the offences in the Schedule to the Act will not necessarily – but may – involve violence as a feature, such as trafficking in dangerous drugs or maintaining a sexual relationship with a child;
- the discrete discretion granted by s 161B(3)(4) requires the existence of factors which warrant its exercise, but the overall amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so;
- the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing;
- the law strongly favours transparency and accessible reasoning, and accordingly sentencing courts should give reasons for making a declaration, and only after giving the defendant an opportunity to be heard on the point;
- for the reasons to show that the declaration is fully warranted in the circumstances it will usually be necessary that declarations be reserved for the more serious offences that, by their nature, warrant them;

- without that last feature, it may be difficult for the reasons to show that the declaration was warranted;
- where a discretionary declaration is made, the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances; accordingly the just sentence which is the result of a balancing exercise may well require that the sentence imposed for that declared serious violent offence be toward the lower end of the otherwise available range of sentences;
- where the circumstances of the offence do not take it out of the 'norm' for that type, and where the sentencing judge does not identify matters otherwise justifying the exercise of the discretion, it is likely that the overall result will be a sentence which is manifestly excessive, and in which the sentencing discretion has miscarried; probably because of an incorrect exercise of the declaration discretion.

[20] The considerations which may lead a sentencing judge to conclude that there is good reason to make a recommendation apt to bring forward the offender's eligibility for parole will usually be concerned with the offender's personal circumstances which provide an encouraging view of the offender's prospects of rehabilitation, as well as due recognition of the offender's co-operation with the administration of justice.

[21] The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate-punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence".

(Footnotes omitted)

[11] In the view I take it cannot be demonstrated, in respect to either the sentence imposed or the declaration, that his Honour either took into account an irrelevant consideration or gave insufficient or excessive weight to any relevant consideration. In view of the age and criminal history of the applicant, the prospects of rehabilitation were slender, even fanciful. While making allowance for the applicant's cooperation with the administration of justice, the seriousness of the offending warranted the imposition of a sentence of imprisonment of eight years. In submissions Ms Bain, who appeared on behalf of the applicant, directed the court to

a number of cases where offending involved firearms resulting in the infliction of more serious injuries. She submitted that the relatively minor nature of the injury sustained as a result of the discharge of the firearm, being a wounding but not, for example, a grievous bodily harm, indicated that the offence was not a more than usually serious or violent example of the offences in question. It may be granted that the seriousness of the injury inflicted, the gravity of the suffering and the extent of the resultant disability suffered will often be a touchstone of the seriousness or violence of the offending in question, but those issues are not necessarily decisive of whether a declaration should be made. With respect to the declaration, his Honour was correct to identify that the gratuitous violence involving the discharge of a loaded firearm with a view to intimidating and forcing Gravestein to comply with the demands made of him elevated the circumstances to one outside the norm for even this type of offending. Indeed on one view of it, the circumstances before his Honour involving the actual discharge of the firearm and the deliberate wounding of Gravestein made this offending even more serious than that considered by this court in *R v Dougherty and Doyle*. In the circumstances before his Honour the sentence imposed was not manifestly excessive and the imposition of the declaration was appropriate. The combination of the sentence of eight years with the declaration is not a manifestly excessive sentence.

[12] I would refuse the application.