SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBI* [2013] QCA 369
PARTIES:	**R** **v** **HBI** (applicant)
FILE NO/S:	CA No 169 of 2013 SC No 479 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2013
JUDGES:	Margaret McMurdo P, Gotterson JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant's brother-in-law, A, shot and killed the deceased – where the applicant provided somewhere to store the car in which A had placed the deceased's body, provided A with a replacement vehicle and drove him to purchase pre-mixed concrete – where the applicant watched A lift the deceased into a 44 gallon drum, operated his tractor to lift the drum onto the back of his utility, watched A pour pre-mixed concrete and water into the drum and then made his utility available to A for the transport and disposal of the drum – where the 61 year old applicant had no previous convictions, acted out of a misguided sense of loyalty to a family member, suffered from chronic agitated depressive disease and had a young and needy son with symptomology consistent with Asperger's Syndrome – where the applicant initially denied knowledge of what happened to the deceased but subsequently cooperated with police – where the applicant pleaded guilty to accessory after the fact to murder – where the applicant was sentenced to five years imprisonment, suspended after 12 months with an operational

period of five years – where the applicant contends that his sentence was manifestly excessive and that the sentencing judge gave insufficient weight to factors of mitigation, especially his mental health issues – whether sentencing judge erred – whether sentence manifestly excessive

Criminal Code 1899 (Qld), s 307
Penalties and Sentences Act 1992 (Qld), s 13A

Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39, cited
R v Cooper, unreported, Helman J, Supreme Court of Queensland, Indictment No 604 of 2006, 14 September 2006, cited
R v Dileski (2002) 132 A Crim R 408; [2002] NSWCCA 345, cited
R v Goodger [2009] QCA 377, cited
R v Hawken (1986) 27 A Crim R 32, cited
R v Houghton (2002) 129 A Crim R 313; [2002] QCA 159, cited
R v McKenzie, unreported, Muir J, Supreme Court of Queensland, Indictment No 480 of 1997, 18 March 1998, cited
R v Murdoch and O'Brien, unreported, White J, Supreme Court of Queensland, Indictment No 92 of 2006, 25 May 2006, cited
R v Neuherz, unreported, White J, Supreme Court of Queensland, Indictment No 92 of 2006, 17 March 2006, cited
R v Tsiaras [1996] 1 VR 398; [1996] VicRp 26, cited
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, cited
R v Winston [1994] QCA 137, cited
R v Yarwood (2011) 220 A Crim R 497; [2011] QCA 367, cited

COUNSEL: A J Glynn for the applicant
P J McCarthy for the respondent

SOLICITORS: Robertson O'Gorman for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant pleaded guilty on 5 June 2013 to accessory after the fact to the murder of the deceased. On 7 June 2013, he was sentenced to five years imprisonment, suspended after 12 months with an operational period of five years. He has applied for leave to appeal against his sentence, contending it was manifestly excessive and that the judge gave insufficient weight to factors of mitigation, especially his mental health issues.

The circumstances of the offending

[2] The applicant had no prior convictions. He was 61 at sentence and 59 at the time of his offending, the circumstances of which were as follows. He married J in 2011 after having been in a relationship with her since 2006. They had one son, aged

seven at sentence. J's younger brother, A, was in a relationship with the deceased's estranged wife. The deceased was last seen on 20 December 2010. His body was found encased in concrete in a barrel in a creek bed near Caboolture on 5 February 2011 after extensive flooding in the area. The barrel was open at one end and the soles of his feet were protruding from the concrete. At the other end, the barrel seam had split and parts of a head, jaw, teeth and torso were visible. He had a severe gunshot wound to the head which would have caused instantaneous death. He also had an incised wound to the right carotid artery in the neck which would have caused significant bleeding and inevitable, although not instantaneous, death.

[3] The applicant accepted the prosecutor's description of his offending, based on his subsequent interviews with police:

> "[The applicant] told police that … [A] had turned up at the property late on the 20th of December of 2010 in the couples' red Hyundai. They had lent it to him after he had sold his previous vehicle. He had parked near the first shed at the top of the driveway and walked into the house. [The applicant] said he was told there was an argument or a fight with [the deceased] and that he had killed him. He claimed … that [the deceased] had got out of the car swinging a knife and that [A] had killed him somewhere on the Somerset Dam Road.
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> He stated that [A then] went and drove the red car into their shed further down the driveway and closed the doors. He directed [the applicant] and [J] to stay away from the vehicle, and then left in another vehicle belonging to [the applicant] and [J], a silver Hyundai. [The applicant] states that [A] returned some two days later and said that he was going to concrete [the deceased] into a 44 gallon drum. [The applicant] and [A] then drove to Toogoolawah and bought some 20 bags of pre-mixed concrete. When they returned the shed was opened and [the applicant] saw that somebody was sitting in the passenger seat of the red vehicle inside the shed. He states that [A] then opened the car door and retrieved a mobile telephone that was beeping, smashing it with his foot on a rock; he then put the remains in a plastic shopping bag.
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> [A] then placed the 44 gallon drum on its side, lifted the body out of the front passenger seat of the car and placed [the deceased] into the drum head first. He then tipped the barrel upright and [the deceased's] legs then fell into the barrel so that he was completely inside it. [The applicant] says he was then directed to get the tractor which [was] at the back of the shed, and they then used the bucket to lift the barrel and carry it over to the ute… [A] then filled the barrel with concrete and mixed in water from a hose. A lid was then put on the top of the barrel and the concrete bags were later burnt in a fire pit on the property. [The applicant] then describes how he, [J] and [A] then drove the ute towards Caboolture. They came to a set of units where [A] was staying, they retrieved their silver Hyundai that they had lent to him, and they drove back to the farm leaving [A] with the ute with the drum on the back of it. [The applicant] states that the next day he and [J] drove back towards

> Caboolture and met up with [A] on the side of the road. [The applicant] noted that the drum was still on the back of the [ute].
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> …
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> [The applicant] and [J] then got into the ute and then they drove around near Caboolture until [A] chose a spot. He then left [the applicant] and [J] at the side of the road and drove off. When [A] came back to collect them the barrel was no longer on the ute. [The applicant] states that they then all travelled back to Esk. He acknowledged to police that at [some] stage various items were removed from the red Hyundai and burnt, including the front passenger seat. He stated that [A] took the red car away and later told him that it had been burnt near Crow's Nest."[1]

[4] The prosecutor described the applicant's cooperation in these terms:

> "When initially approached by police [the applicant and J] denied any knowledge of what happened to [the deceased], they in fact supplied statements to that effect. [J] later contacted police, and I think that was on the 20th of February, some three days later and indicated that her account had not been truthful. Whilst she provided some information to police at that time she and [the applicant] declined to be interviewed based upon legal advice. The police investigation then centred upon their property and their associates. … on the 14th and 15th of March of 2011 [J] and [the applicant] participated in interviews with police. They then provided signed statements to police adopting those interviews after those interviews were completed."[2]

[5] [A] was charged with the deceased's murder. The applicant pleaded guilty after offering to give evidence for the prosecution in [A]'s trial. The prosecution took up that offer. [A]'s first trial commenced earlier this year but was aborted. A second trial commenced on 25 November 2013. The applicant gave evidence in both trials consistent with his undertaking. As a result, his sentence was conducted in accordance with s 13A *Penalties and Sentences Act* 1992 (Qld).

The submissions at sentence

[6] During the prosecutor's submissions, the deceased's sister read out a victim impact statement on behalf of the family, including his two teenage daughters and his eight year old son. She explained their pain in not knowing what had happened to the much-loved deceased for many weeks. The subsequent discovery of the body of this 6'3" man in a barrel caused further trauma. Their lives had been detrimentally changed forever.

[7] The prosecutor referred to cases including *R v Hawken*[3] and *R v McKenzie*[4] to submit that a sentence of seven to eight years imprisonment was appropriate. Parole eligibility was warranted after one-third to recognise his positive antecedents, guilty

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1 T2-5.26–T 2-6.25.
2 T2-5.13-22.
3 (1986) 27 A Crim R 32.
4 Unreported, Muir J, Supreme Court of Queensland, Indictment No 480 of 1997, 18 March 1998.

plea and cooperation. Additional credit should be given to recognise the s 13A cooperation so that ultimately a sentence of five years imprisonment, suspended after 12 to 18 months, was appropriate.

[8] The applicant's counsel emphasised his client's good work history, both with the public service and more recently on the family farm. His older sister was killed in a shark attack whilst they were swimming together when he was about 11 and this had detrimentally affected his life. He was closely involved in raising his seven year old son who had behavioural difficulties, possibly Asperger's Syndrome or autism.

[9] Counsel tendered a report from psychiatrist, Dr F. Ian Curtis.[5] In preparing his report, Dr Curtis referred to the applicant's medical records. The traumatic death of the applicant's sister had sensitised him to personal loss and depressive symptomatology and caused his mother to become chronically depressed. The family never recovered. More recently, the applicant and his brothers had fought over their father's will. Resulting legal expenses and lack of productivity of the 3,000 acre family farm during the dispute forced him to sell all but 140 acres of it. Subsequently, the property was affected by a five year drought. His mother developed cerebro-vascular dementia and caused a house fire on the property. He suffered poorly controlled insulin dependent diabetes, high blood cholesterol and degenerative spinal problems.

[10] Since 2003-4 and during the present offending, the applicant was suffering from a chronic agitated depressive disease. He also suffered from chronic, traumatic anxiety. The combined impact of his major depression and his diabetes "significantly impacted his discriminative judgement and skewed his behavioural responses habitually towards his lifelong investment in the care of family members."[6] His post-traumatic tendency is to do what he can to avoid conflict by being "overly compliant and tending to rationalise and misjudge critical circumstances such as the moral dilemma presented to him and [J] by a murderously stigmatised brother-in-law".[7] The low dose of anti-depressants he was taking at the time may have made him vulnerable to impaired judgment and phobic avoidant behaviour. Dr Curtis noted, however, that as [A] had left the red car in the shed for a few days, the applicant had ample time to revisit his initial decision to give assistance. Previously, he was a law-abiding citizen but he made bad, tragic and sustained choices which he now regrets and for which he was severely remorseful. He is likely to respond well to counselling and to appropriate anti-depressants and is a good candidate for rehabilitation. His depressive illness was poorly managed by his treating doctors prior to the offending and was aggravated by his diabetes.

[11] The applicant's counsel relied on *R v Dileski*[8] to submit that acting out of a misguided sense of loyalty (here, to family) was a mitigating feature. The applicant was also frightened for his family's safety. He believed the deceased was part of an outlaw motorcycle gang which would seek retribution against his family. He did not assist [A] with the deceased's body; his neck problems prevented this. He was cooperative with police and made incriminating admissions which significantly strengthened the case against him. *Hawken* should be distinguished on its facts.

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5 Ex 5.
6 Ex 5, p 16.
7 Ex 5, p 16.
8 (2002) 132 A Crim R 408.

[12] The applicant's mental illness, defence counsel submitted, reduced his moral culpability and limited or removed the relevance of general deterrence in sentencing: *R v Yarwood*.[9] The following exchange then occurred:

> "[DEFENCE COUNSEL]: Your Honour will see that of particular relevance is the proposition that mental illness may reduce the moral culpability of an offender and therefore has the effect of reducing or removing the concept of general deterrence as a basis for sentencing, and also specific deterrence.
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> HER HONOUR: Well, I accept that mental illness, short of insanity, may reduce the moral culpability. I accept that it may also reduce the claims of general and specific deterrence, but I'm not sure one follows from the other. But I don't know that it matters. I think they are separate points, really.
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> [DEFENCE COUNSEL]: Yes. I'm sorry. I've also interpreted it as meaning one leads to another, but yes, as your Honour points out, that even if they're not connected it still has the effect of, at least, reducing the significance of general deterrence in respect of this offender.
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> HER HONOUR: Yes. Yes. Yes, I accept that.
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> [DEFENCE COUNSEL]: Your Honour, the other proposition, which is referred to in Verdins and which appears to be accepted in Queensland, is the proposition which is at page 11. Number 5 – the existence of the condition at the date of sentencing, or its foreseeable recurrence, may mean that a given sentence would weigh more heavily upon the offender than it would on a person in normal health. My submission is that your Honour would be satisfied, firstly, that that would be the case here.
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> HER HONOUR: Yes.
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> [DEFENCE COUNSEL]: And secondly, that your Honour would be satisfied that this is a case where general deterrence either should be significantly moderated or it should be eliminated as a sentencing consideration, because of the conditions from which this man suffers. In particular, the fact that he suffers from a significant depressive illness or major depressive illness, and that the effect, or one of the effects, of his diabetes combined – both alone and combined with the evidence of the general depressive illness has the effect of affecting both his thinking and in particular his discriminative judgment. And that for those reasons, your Honour would take a very different approach to sentencing from that which is advocated by the Crown."[10]

[13] Defence counsel submitted that the starting point was a sentence of five to six years imprisonment rather than seven to eight as suggested by the prosecutor. Mitigating

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9 [2011] QCA 367, [22]-[26], [32]-[33].

10 T2–36.1-35.

factors including his mental illness required a fully suspended sentence or at least suspension after less than one-third. If sentenced to actual imprisonment, he would be at risk of retribution from others and would be especially vulnerable given his ill-health. The need to serve his sentence in protective custody would make his life more difficult than otherwise. Defence counsel's ultimate submission was that, in light of the applicant's additional s 13A cooperation, the appropriate sentence was four to five years imprisonment fully suspended or, if the judge determined he must serve some actual custodial period, suspended after six to nine months.

The sentencing judge's reasons

[14] The learned sentencing judge cited Thomas J's observations in *Hawken*[11] and noted that the maximum penalty for this offence was life imprisonment. Factors normally taken into account when sentencing for this offence included the circumstances of the homicide, particularly the actual conduct of the accessory, the accessory's knowledge of the nature of the homicide and the motivation for participating in an attempt to conceal it. After setting out the circumstances of the killing, the judge referred to its profound effect on the deceased's family.

[15] The applicant's involvement was to provide somewhere to store the red car in which [A] had placed the deceased's body. The applicant provided [A] with a replacement vehicle and drove him to purchase the concrete. He was present when [A] placed the deceased's body in the drum. He made his tractor available to [A] to move the drum and drove the tractor, lifting the drum into the tractor's bucket and carrying it to his utility. He provided [A] with his utility to remove the drum from the applicant's property and accompanied the drum in the utility, although he was not present when [A] ultimately disposed of the drum. The applicant accepted that [A] killed the deceased in circumstances amounting to murder, although he was not present at the killing. [A] had told him that after he and the deceased argued on the Somerset Dam Road, he killed the deceased after the deceased got out of the car swinging a knife. He knew that [A] did not appear or claim to be injured. He assisted [A] out of loyalty to [J] and misguided loyalty to [A].

[16] After referring to Dr Curtis's report, her Honour noted:

> "These matters of his mental health at the time of the offence are relevant because they render his moral culpability less than it might have been in their absence.
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> When approached by police initially [the applicant] gave a false account, which impeded their investigations. But subsequently [J] contacted police. [The applicant] then disclosed his role and nominated … [A] as the person responsible for [the] death. …
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> I accept that [the applicant] is deeply remorseful for what he did. He instructed his counsel to make a formal apology to the court. His plea of guilty indicates both his remorse and his willingness to cooperate with the administration of justice. Both are matters in his favour in the sentencing proceeding.
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> I accept that in all the circumstances [the applicant] is unlikely to reoffend. Thus, personal deterrence does not loom large in the

[11] (1986) 27 A Crim R 32, 38.

> sentencing considerations in this particular case. The community denunciation of what he did and general deterrence are still important considerations."[12]

[17] The applicant's son was now about seven years old and had behavioural problems and symptomatology which may be consistent with Asperger's Syndrome, although there had been no formal diagnosis. The applicant had been a caring and effective parent so that his incarceration would necessarily impact on the child. The offending was serious, however, so the penalty necessarily imposed for such an offence could be expected to impact adversely on an offender's family.

[18] In closed court, her Honour indicated that, but for the s 13A cooperation, the appropriate penalty was seven years imprisonment with parole eligibility after one-third. Having regard to his s 13A cooperation, her Honour sentenced the applicant to five years imprisonment to be suspended after 12 months with an operational period of five years. Consistent with s 13A, her Honour subsequently imposed that penalty in open court.

The competing contentions in this application

[19] The applicant's counsel emphasised that the applicant offended for two reasons. The first was his over-developed sense of loyalty to family. The second was his fear of retribution from associates of the deceased if the body was discovered on the applicant's farm. [A] arrived at the applicant's home late at night in the applicant's car. There was a body in the car. [A] left the car containing the body at the applicant's home. Whilst conceding the guilty plea was an admission that he assisted [A] knowing he murdered the deceased, [A] originally told him that [A] killed the deceased in circumstances suggesting self-defence. The applicant and [J] told [A] to go the police but he did not. Leaving the body on the applicant's farm for two days would have exacerbated the applicant's fear of the deceased's associates. He was then in a position from which he found it impossible to extricate himself, particularly because of his mental health issues. The applicant's counsel submitted that, in these circumstances, the head sentence should have been no higher than six years imprisonment before allowing for any matters of mitigation. The judge gave insufficient weight to the applicant's mental health issues as she specifically noted she was sentencing him to reflect community denunciation and general deterrence. Those factors were of no or limited relevance as his mental illness contributed to his offending: see *Yarwood*.[13] The cases of *Dileski*;[14] *Neuherz*;[15] *R v Murdoch and O'Brien*[16] and *R v Cooper*[17] demonstrated that, when all the mitigating features, including the s 13A cooperation were taken into account, the sentence which should have been imposed was four to five years imprisonment, suspended after no more than six months.

[20] Counsel for the respondent emphasised that sentencing is not a precise mathematical exercise. The sentence was within an appropriate exercise of discretion. Thomas J's observations in *Hawken* emphasised the community interest

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12 Transcript of sentence, 6.10-26.
13 [2011] QCA 367, [22]-[27], [32]-[34].
14 (2002) 132 A Crim R 408.
15 Unreported, White J, Supreme Court of Queensland, Indictment No 92 of 2006, 17 March 2006.
16 Unreported, White J, Supreme Court of Queensland, Indictment No 92 of 2006, 25 May 2006.
17 Unreported, Helman J, Supreme Court of Queensland, Indictment No 604 of 2006, 14 September 2006.

in isolating murderers from support and assistance and the relevance of general deterrence. In *R v Winston*, McPherson and Pincus JJA emphasised that "the most important consideration must almost always be the nature of the assistance afforded after the events, the reason why it was provided, and the extent to which it helped the primary offender to escape or delay detection, apprehension and punishment."[18] The sentencing judge acted in accordance with White J's observations in *Yarwood*.[19] The judge accepted that personal deterrence did not loom large and that the applicant's mental health rendered his moral culpability less than it might have been otherwise, but nevertheless considered that community denunciation and general deterrence remained of some importance. The applicant's mental health issues placed his offending in a similar range to that in *R v Houghton*[20] so that following a trial, the applicant could have expected a term of imprisonment in the range of nine years. The judge rightly concluded that a seven year term of imprisonment with parole eligibility after about one-third was appropriate to recognise mitigating factors other than s 13A considerations. The further moderation afforded by the judge in respect of s 13A factors was also appropriate.

Conclusion

[21] The applicant's conduct as an accessory after the fact to murder amounted to the commission of one of the most serious offences under the *Criminal Code* 1899 (Qld), punishable by a maximum of life imprisonment. As Thomas J explained in *Hawken*, it is conduct by which an offender stands between a murderer and the law:

> "It is in the interests of the community that murderers should be completely isolated from support and deprived of assistance and that such crimes be not covered up. The severe penalty … is a way in which the community protects itself and it is an aspect of the law's general deterrence against homicide."[21]

[22] The relevance of deterrence to the sentencing process may be removed or moderated where, as here, an offender is suffering from a mental illness at the time of the offence. As the High Court[22] noted in *Muldrock v The Queen*:[23]

> "53. …One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, in a passage that has been frequently cited, said this:
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> > 'General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others.'
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> In the same case, Lush J explained the reason for the principle in this way:

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18 [1994] QCA 137, 7-8.
19 Particularly at [22]-[26].
20 [2002] QCA 159.
21 (1986) 27 A Crim R 32, 38.
22 French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.
23 (2011) 244 CLR 120, [53]-[54].

> '[The] significance [of general deterrence] in a particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community.'
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> 54. The principle is well recognised. It applies in sentencing offenders suffering from mental illness…" (footnotes omitted)

[23] As this Court noted in *R v Goodger*[24] and in *Yarwood*,[25] citing with approval statements from the Victorian Court of Appeal in *R v Tsiaras*[26] and *R v Verdins*,[27] serious psychiatric illness not amounting to insanity is relevant to the sentencing exercise. It may reduce the moral culpability so that denunciation is less likely to be relevant. It may also make considerations of specific and general deterrence less relevant or even irrelevant. But whether considerations of general and specific deterrence should be moderated or eliminated as sentencing considerations will depend on the nature and severity of the mental illness and its effect on the offender's mental capacity at the time of the offending or at the date of sentencing or both.

[24] It is clear from the sentencing judge's discussion with defence counsel[28] and from her Honour's sentencing remarks[29] that her Honour understood and acted upon these principles. She determined that the applicant's mental illness lessened his moral culpability for the offending. As her Honour considered he was unlikely to re-offend, she did not place weight on personal deterrence as a sentencing factor. The clear inference from the judge's reasons is that her Honour accepted that, although community denunciation and general deterrence were lessened as sentencing considerations because of his mental illness, they remained of some significant relevance. This conclusion was open on the material before the judge. The evidence did not demonstrate that the applicant was functioning poorly as a farmer, partner and father at the time of the offence. His assistance to the murderer was extensive, varied and prolonged. As Dr Curtis observed, there was ample time for the applicant to revisit his initial misguided decision to assist [A]. Instead, he gave considerably more assistance over many days. Another judge may have reached a different conclusion on the material, but the applicant has not demonstrated any error in her Honour's approach which was consistent with the principles stated in *Muldrock*, *Goodger*, *Yarwood*, *Tsiaras* and *Verdins*.

[25] When looked at objectively, this was a moderately serious example of the offence of accessory after the fact to murder. It is true that the applicant did not witness the killing. Although [A] initially claimed to have killed the deceased in self-defence,

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24 [2009] QCA 377, [21].
25 [2011] QCA 367, [23]-[26], [33]-[34].
26 [1996] 1 VR 398, 400.
27 (2007) 16 VR 269; [2007] VSCA 102, [32].
28 Set out at [12] of these reasons.
29 Set out at [16] of these reasons.

the applicant's guilty plea is an acknowledgement that he assisted, knowing that [A] had murdered the deceased. That assistance did not go as far as handling the body, but it was extensive and over a prolonged period, much more so than in *Dileski*. Further, the applicant, a mature man with a good background, should have had at least some insight into the grave, anti-social nature of his conduct. A 59 year old's misguided sense of loyalty to a murderous family member is not a weighty mitigating feature, if it is one at all. Had the applicant been convicted after a trial and had he no mitigating features, cases like *Hawken*, *Winston* and *Houghton* suggest a sentence in the range of eight to nine years imprisonment with parole eligibility at the statutory half-way point would have been imposed.

[26] There were, as the applicant rightly emphasised and the sentencing judge appreciated, many mitigating circumstances. These included the applicant's general cooperation with the authorities after his initial denial to police, his timely plea of guilty, his remorse, his positive antecedents, his needy young son, and, importantly, his mental health issues. Cases such as *Neuherz* and *Murdoch and O'Brien* on which the applicant placed reliance are of no real assistance as they concerned youthful offenders with troubled backgrounds. The reasons of the single judge decision in *Cooper* do not provide sufficient detail for it to be of assistance. Before taking into account the applicant's significant s 13A cooperation and mental health issues, a sentence in the range of six to eight years imprisonment with parole eligibility after about one third would have been appropriate. His mental health issues required further moderation by setting parole eligibility after about one quarter of the sentence.

[27] Additionally, the applicant gave extensive and valuable cooperation under s 13A, as a result of which his time in prison will be much more difficult for him than otherwise. This was an important mitigating feature. Even so, the sentencing judge was right to conclude that in all the circumstances a period of actual detention was warranted. A sentence in the range of four to five years imprisonment suspended or with parole eligibility after six to 12 months was appropriate. The sentence imposed, though at the top of that range, was within it.

[28] It follows that the applicant has not demonstrated that the sentence imposed for this serious offence, even after taking into account the many mitigating features and the applicant's mental health issues, was manifestly excessive or that the judge erred in determining the sentence.

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

[30] **GOTTERSON JA:** I agree with the order proposed by Margaret McMurdo P and with the reasons given by her Honour.

[31] **DAUBNEY J:** I respectfully agree with the President.