SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smith* [2019] QCA 186
PARTIES:	**R** **v** **SMITH, Joshua Vincent** (applicant)
FILE NO/S:	CA No 19 of 2019 DC No 778 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 11 February 2019 (Richards DCJ)
DELIVERED ON:	13 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2019
JUDGES:	Sofronoff P and Fraser and Morrison JJA
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to entering a dwelling with intent to commit an indictable offence with the circumstances of aggravation that he threatened to use actual violence, was armed with a dangerous weapon, and was in company with other persons – where the applicant was sentenced to three years' imprisonment with a parole release date after serving 12 months – where the applicant had the support of his family and had not reoffended whilst on bail for 19 months after the offence – whether the sentencing judge failed to take the applicant's family support and behaviour on bail into account in sentencing the applicant CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant pleaded guilty to entering a dwelling with intent to commit an indictable offence with the circumstances of aggravation that he threatened to use actual violence, was armed with a dangerous weapon, and was in company with other persons – where the applicant was sentenced to three years' imprisonment with a parole release date after serving

12 months – where on appeal, the applicant's co-offender, MCY, was sentenced to 20 months' imprisonment with parole release after 55 days in pre-sentence custody – where the applicant's co-offender, Maskey, was also sentenced to three years' imprisonment with a parole release date after serving 12 months – where Maskey was further sentenced to a concurrent term of 12 months' imprisonment and was disqualified from driving for three years for the offence of dangerous operation of a motor vehicle – whether the applicant's sentence lacked parity with his co-offenders

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to entering a dwelling with intent to commit an indictable offence with the circumstances of aggravation that he threatened to use actual violence, was armed with a dangerous weapon, and was in company with other persons – where the applicant was sentenced to three years' imprisonment with a parole release date after serving 12 months – whether the sentence imposed was manifestly excessive

Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, cited
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
Rees v The Queen [2012] NSWCCA 47, cited
R v MCY [2018] QCA 275, considered
R v WAJ [2010] QCA 87, cited

COUNSEL: A S McDougall for the applicant
C N Marco for the respondent

SOLICITORS: Lawler Magill for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Fraser JA and the order his Honour proposes.

[2] **FRASER JA:** The applicant seeks leave to appeal against his sentence of three years' imprisonment with a parole release date after serving 12 months. The sentence was imposed upon his plea of guilty to entering a dwelling with intent to commit an indictable offence with circumstances of aggravation that he threatened to use actual violence, was armed with a dangerous weapon, and was in company with other persons. The application is made upon the grounds that the sentence is manifestly excessive, the sentencing judge failed to take into account the applicant's mitigating factors, and the sentence lacks parity with the sentences imposed upon the co-offenders Maskey and MCY.

[3] The sentence proceeded upon an agreed schedule of facts. The applicant and MCY had been casually dating for about three months and MCY and Maskey had known each other for about six to twelve months. MCY and the complainant had previously been in a relationship and have a daughter (who I will call "D") who was then six years old. Each had custody of D at different times and there were no formal orders about custody. D was residing with the complainant and there had been a dispute between him and MCY about her custody. The day before the offence, MCY sent the complainant abusive text messages in which she demanded that the complainant give her custody of D. The complainant refused to do so.

[4] On 4 July 2017 at about 9.15 am, the applicant and Maskey entered the complainant's house in Caboolture through a partially open garage roller door. The applicant was armed with a wooden bat and Maskey was armed with a hunting knife 30 – 40 cm in length. They had their faces covered. They opened the door to the complainant's bedroom where he was in bed with his partner and their eight month old child. Maskey entered the bedroom wielding the knife and demanding D. The complainant jumped up and grabbed a machete from under the bed to force the applicant and Maskey down the hall into the garage and ordered them to leave the house. When the complainant entered the hallway he saw the applicant carrying a wooden bat. Maskey stated that he was here to get D. The complainant stated that she was his daughter and told the applicant and Maskey to get out of his house. The complainant's brother appeared and assisted him in pushing the applicant and Maskey into the garage. The applicant and Maskey continuously yelled. They swore and asked where D was whilst waving their weapons towards the complainant.

[5] D entered the garage whilst MCY was outside screaming to be given D. MCY entered through the garage door and called out to D. The complainant repeatedly told the applicant, MCY and Maskey to get out of the house. The applicant and Maskey repeatedly demanded that the complainant give them D and said that they would not leave without her. Maskey kept swinging the knife around. Several times it came within centimetres of the complainant and his sister, who was also in the garage at that time. MCY walked towards D. The complainant's sister grabbed her by the throat and pushed her back against the garage door. Maskey approached the complainant's sister and swung the knife towards her legs.

[6] Maskey picked up D and he, the applicant and MCY left the garage. D was screaming and crying. They entered a vehicle parked in the driveway and drove away at speed. Maskey was the driver, the applicant was in the front passenger's seat, and MCY and D were in the rear seats. The complainant and his brother followed in a car but lost track of the vehicle when Maskey drove through a red light at excessive speed. Late in the afternoon of the same day police found the applicant and D at a park. They voluntarily accompanied police to the station. Police found MCY and a vehicle, analysis of which identified fingerprints belonging to Maskey and the applicant. MCY voluntarily accompanied police to the station. Maskey was identified by the complainant and others. He was found by police and taken to the police station. The applicant and Maskey declined to participate in a record of interview.

[7] MCY gave two statements to police, the first of which downplayed her role and knowledge of what was going to happen. The agreed schedule of facts refers to the following content of the second statement. At Maskey's unit on the day before the offences she read to the applicant and Maskey the messages between her and the

complainant. The applicant "asked if she wanted him to mediate with [the complainant]" and MCY agreed. There was no mention of violence. Maskey offered to drive. Maskey and the applicant discussed the matter further and then told MCY not to worry as they would get her daughter back. The next morning, the applicant and Maskey found a photo of the complainant and said that he was a "big boy" and they should do some research of these people. They went to the car before MCY. When she arrived she saw a bat inside the car. She gave them the address and they drove to the complainant's residence. As they arrived, MCY saw Maskey remove a large knife from the front passenger seat footwell. Both the applicant and Maskey had masks in their hands and the applicant was carrying a bat. They entered the residence. MCY entered a few minutes later after she heard yelling from inside.

Failure to take into account mitigating factors

[8] Counsel for the applicant submitted that the sentencing judge had not taken into account that the applicant had the support of his family and had not reoffended whilst on bail for 19 months after the offence.

[9] That the applicant has family support is indicated by some of the favourable references supplied to the sentencing judge and also by a statement in a report by a psychologist that, notwithstanding the applicant's concern about one family member consuming too much alcohol, the applicant's family largely provide him with positive support. At the sentencing hearing counsel for the applicant submitted that the applicant had good family support, his parents were together in court to support him, and his partner also supported him. The sentencing judge, who imposed the sentence immediately after hearing the submissions by counsel for the applicant, referred to the support available to both Smith and Maskey, observing that they both had good work histories and obviously had support in the community and partners who cared for them. There is not such significance in the details of the family support of a mature offender like the applicant as to suggest that the sentencing judge's omission to refer to it in more specific terms indicates an omission to take it into account.

[10] As to the submission made to the sentencing judge that the applicant had not reoffended whilst on bail for the offending, immediately after making that submission the applicant's counsel referred the sentencing judge to a psychologist's report which referred to the applicant's having engaged in inpatient-rehabilitation for his illicit drug use and having maintained abstinence from illicit drugs. The sentencing judge referred to the evidence upon those topics, and the similar evidence in relation to Maskey, when observing that both offenders had long-term drug addictions and were both working to conquer those addictions and the sentencing judge went on to observe that the applicant had been abstinent since 2016 and attending counselling. I have already mentioned that the sentencing judge observed of both offenders that they had support "in the community" including partners who cared for them. Those remarks indicate the sentencing judge understood that the applicant had not reoffended whilst on bail.

Parity

[11] MCY had earlier successfully appealed against her sentence of 20 months' imprisonment with a parole release date after about four and a half months' imprisonment. That sentence was reduced to 20 months' imprisonment with parole release on the date of

the hearing of the appeal, MCY having spent 55 days in pre-sentence custody. The leniency of MCY's sentence is explained by her extensive cooperation with the police (she implicated herself and her co-offenders and gave other information to police), her undertaking to give evidence against her co-offenders in accordance with her statement, and other, significant personal factors which are detailed in *R v MCY*.[1] The sentencing judge in that case had articulated the sentence which would have been imposed were it not for MCY's cooperation as one of three years' imprisonment with parole after 10 months. Ryan J, with whose reasons the President agreed, described that notional sentence as a "relatively high one having regard to the applicant's role in the offending (she was not a principal offender: she was directed to stay in the car); absence of physical harm; and taking into account the applicant's personal circumstances",[2] and held that it was not manifestly excessive.[3]

[12] Maskey was given the same sentence as the applicant for the count of entering the dwelling with intent to commit an indictable offence with the circumstances of aggravation. For his additional offence of dangerous operation of a vehicle he was sentenced to a concurrent term of 12 months' imprisonment and was disqualified from driving for three years.

[13] The sentencing judge concluded that given the principles of parity the only appropriate sentence was one similar to the notional sentence of three years with parole after ten months imposed on MCY, which was described in the Court of Appeal as being a high sentence but not manifestly excessive.

[14] As was submitted for the applicant, the "parity principle" is designed to ensure equality before the law, equal justice according to law generally requiring that "like cases be treated alike" and that there should be "differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law".[4] Accordingly, a Court may reduce a sentence which is otherwise within the sentencing discretion if a disparity between that sentence and a co-offender's sentence gives rise to an objectively legitimate sense of grievance or creates the appearance that justice has not been done; conversely, no intervention is justified where the disparity between the sentences is explicable by differences in the circumstances of the offences or the offenders.[5]

[15] The parity principle is not attracted by every disparity between different co-offenders' sentences. In *R v WAJ*,[6] I stated:

> "In [*Postiglione v The Queen* (1997) 189 CLR 295] Kirby J insisted that perfect consistency between the sentences of co-offenders is not necessary and that a sentence is to be reviewed only where the disparity is such as to engender, in the words of Gibbs CJ in *Lowe v The Queen* at 610, a "justifiable sense of grievance" on the part of the prisoner or "give the appearance that justice has not been done." In *Postiglione*, Gummow J said at 323, that the principle for which

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1 [2018] QCA 275.
2 [2018] QCA 275 at [181].
3 [2018] QCA 275 at [184].
4 *Green v The Queen* (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ).
5 *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295; *Green v The Queen*.
6 [2010] QCA 87 at [12]. See also *R v AAH* [2009] QCA 321 at [10].

> *Lowe* is authority is that the Court of Criminal Appeal intervenes "where the difference between two sentences is manifestly excessive and such as to engender a justifiable sense of grievance by giving the appearance, in the mind of an objective observer, that justice has not been done". Put another way, the question is whether an objective comparison of the sentences manifests what Mason J called in *Lowe v The Queen* at 611, a "badge of unfairness"."

[16] Similarly, in *Rees v The Queen*[7] Garling J (with whose reasons McFarlan JA and, in this respect, R S Hulme J agreed) referred to Kirby J's statement in *Postiglione* and stated:

> "Hence, the discrepancy required to be identified between sentences is one which is not merely an arguable one, but one which is "*marked*", or "*manifest ... such as to engender a justifiable sense of grievance*" or else it "*[appears] that justice has not been done*": *Lowe v The Queen* at 610 per Gibbs CJ (Wilson J agreeing), at 613 per Mason J at 623-624 per Dawson J; *Postiglione* at 301 per Dawson and Gaudron JJ, at 323 per Gummow J, at 338 per Kirby J; *R v Taudevin* [1996] 2 VR 402 at 403 per Hampel AJA, at 404 per Callaway JA; *DGM v R* [2006] NSWCCA at [46] per Latham J (McColl JA agreeing); *Green* at [31] per French CJ, Crennan and Kiefel JJ, at [105] per Bell J."

Parity with Maskey's sentence

[17] Counsel for the applicant acknowledged in his outline of argument that the applicant and Maskey both had criminal histories involving limited entries for offences involving violence. The applicant's offence of violence was committed when he was only 17 and his other offences were drug related. They were both mature offenders, the applicant having been 31 when he committed the offence and Maskey then having been 37. The applicant indicated his plea of guilty in the week when his trial was due to commence. Maskey indicated his pleas when the indictment was presented. Maskey was sentenced on the basis that he had attended counselling for his drug addiction and had been drug free for a shorter period than the applicant. The applicant had attended counselling and been drug free since 2016. That was described by the sentencing judge as a factor in his favour. Each of them declined to participate in a police interview. Overall the differences between their personal circumstances are not significant in the context of sentences for this very serious offending.

[18] In support of the contention that the applicant should have been given a less severe sentence than the sentence imposed on Maskey, counsel for the applicant emphasised three points. The first is that Maskey was armed with a knife, whereas the applicant held a piece of wood described as a bat, and Maskey played a much more aggressive and threatening role in the home invasion. The schedule of facts suggests that Maskey generally made more overt threats, although the applicant did wave the wooden bat around during part of the offending. This point lacks substantial significance in circumstances in which the applicant and Maskey embarked upon and continued to participate in the offending in company with each other.

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7 [2012] NSWCCA 47 at [50](2) and (3).

[19] The second point concerns a letter written by the complainant. He wrote that he had decided not to proceed with the charges against the applicant because "I don't feel it is right as … [MCY] and …. Maskey were the main two offenders so I don't feel comfortable if [the applicant] was to be sentenced for a long period of time while the main offenders have had minimal punishment" and that his understanding was that the applicant "was talked into it and manipulated by … [MCY]." The relevance of those opinions is not apparent.

[20] In relation to the suggestion that the applicant was manipulated by MCY, counsel for the applicant referred to his submission before the sentencing judge that the applicant "felt compelled to help" MCY, in their short casual relationship he had become strongly attracted to her, he believed her when she said that she thought that the child was at risk of sexual harm, and he "instructs that he did not instigate the burglary and that he only agreed as he thought there was a child at risk." These submissions are not readily reconcilable with the statements made by MCY recited in the agreed schedule of facts. In any event they do not form a substantial ground for distinguishing between the culpability of Smith and Maskey; in that respect the sentencing judge stated in the sentencing remarks that MCY had shown the exchange of text messages to both the applicant and Maskey, she had suggested that the child was being molested, and instead of any of them contacting the police, they "decided to go around and visit the complainant".

[21] The third point is that Maskey was also charged with dangerous operation of the motor vehicle in circumstances in which the child was a passenger. Upon this point the sentencing judge observed towards the beginning of the sentencing remarks that the dangerous operation of the vehicle was tied up with the whole episode of offending and did not have a significant bearing on the proceeding. Consistently with that remark, the sentencing judge concluded that there was no reason to add time in custody to Maskey's sentence on account of the additional offence because it was not something that added to the criminality in the particular circumstances of the case. In that respect, it is relevant that the applicant also made his getaway in the vehicle. Furthermore, Maskey did receive some additional punishment for the dangerous operation offence. He was disqualified from driving for three years, which substantially exceeded the mandatory disqualification period of six months. In these circumstances, the fact that Maskey was convicted of this additional offence does not justify a conclusion that the parity principle required the applicant to be given a more lenient sentence.

Parity with MCY's sentence

[22] In relation to the argument concerning parity with MCY's sentence, the applicant focused upon four points. First, it was submitted that the applicant was operating at MCY's request. That is inconsistent both with the statement of MCY referred to in the agreed schedule of facts and the submissions by the prosecutor adopting that statement. In any event, as was pointed out for the respondent, the submissions made to the sentencing judge by the applicant's counsel did not go so far as contending that the applicant committed his offence at MCY's request.

[23] The second and third points made by the applicant's counsel are that the applicant's sentence proceeded on the basis that MCY had told the applicant that a child was at risk and that when police located the child she was in a park in the company of the applicant whereas MCY was in her unit. Neither point has any particular

significance for the relative culpabilities of the applicant and MCY in the context of this serious home invasion offence.

[24] The applicant's fourth point is that there was little discernible difference between the culpability of the applicant and MCY, given that she also entered the premises whilst her co-offenders were armed. The sentencing judge could reasonably regard the applicant as being more culpable, given that MCY did not herself threaten violence, the agreed schedule of facts contains no indication that MCY encouraged her co-offenders to arm themselves, and that schedule refers to MCY's statement that she saw the knife only after Maskey removed it from the footwell and she entered the residence only after she had heard yelling. As was also submitted for the respondent, the applicant was older (MCY was 24 years old at the time of the offence), he had a worse and relevant criminal history (MCY's criminal history consisted of one offence of permitting use of a place for which no conviction was recorded and she entered into a recognisance to be of good behaviour for six months), and MCY made admissions to police.

[25] The significant disparities between the personal circumstances and circumstances of the offending of the applicant and MCY readily explain the differences between their sentences.

Manifest excess

[26] Fortunately no person was physically injured as a result of this offending, but a victim impact statement by the complainant describes serious emotional consequences of the offending suffered by him, his partner, and their four young children, (all under the age of ten) who were in the house at the time of the offending. As the sentencing judge observed with reference to remarks made in this Court in relation to MCY's offending, vigilantism of this kind required deterrence by an appropriately severe penalty; that was particularly so in circumstances in which the applicant in company with another mature man chose to enter the house armed and then to threaten the occupants for the return of a child despite knowing that there was an eight month old child in the house. In these circumstances, and particularly in light of the Court's decision that MCY's notional sentence of three years imprisonment with parole after ten months was not manifestly excessive, the sentence imposed upon the applicant is not excessive.

Proposed order

[27] I would dismiss the application.

[28] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.