SUPREME COURT OF QUEENSLAND

CITATION:	*R v Simpson* [2019] QCA 205
PARTIES:	**R** **v** **SIMPSON, Shane Arthur** (applicant)
FILE NO/S:	CA No 60 of 2019 SC No 293 of 2019 SC No 250 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 7 March 2019 (Applegarth J)
DELIVERED ON:	4 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	23 September 2019
JUDGES:	Fraser and Gotterson JJA and Crow J
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 the applicant pleaded guilty to one count of manslaughter committed against his biological son who had just turned two years of age – where the applicant was convicted and sentenced to 12 years imprisonment – where the applicant drove his son to a park near the Logan River and then deliberately abandoned him in the park – where there was no reported sign of the son having been seen alive again – where the applicant continued to lie about the whereabouts of his son for 10 years – where the applicant then confessed to his son's death some 10 years later – where the applicant contended on appeal that this case fell within the middle range in terms of seriousness of offending – where the applicant also contended on appeal that the learned sentencing judge did not state what discount was given for his confession and plea of guilty – whether the sentence was manifestly excessive *R v Chard; Ex parte Attorney-General (Qld)* [2004] QCA 372, discussed *R v JV* [2014] QCA 351, discussed *R v Randall* [2019] QCA 25, discussed *R v Riseley; Ex parte Attorney-General (Qld)* [2009]

QCA 285, discussed
R v Smith [2019] QCA 33, discussed

COUNSEL: J W Fenton for the applicant
C W Heaton QC for the respondent

SOLICITORS: Fuller & White Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** The applicant, Shane Arthur Simpson, was charged with an offence of manslaughter against s 303(1) of the *Criminal Code* (Qld). The count on which he was indicted alleged that he unlawfully killed Baden Bond on a date unknown between 1 and 16 May 2007 at Eagleby. The deceased child had just turned two years of age. The applicant and his partner, Dina Colleen Bond, were his biological parents. By the same indictment, Ms Bond was charged with offending against s 544 of the *Code* by assisting the applicant whom she knew to be guilty of a crime, to escape punishment.

[3] At a sentence hearing held on 4 March 2019 in the Supreme Court at Brisbane, both the applicant and Ms Bond pleaded guilty to these offences. At the same time, the applicant also pleaded guilty to four summary offences which it is unnecessary to detail for present purposes.

[4] The applicant was convicted and sentenced to 12 years imprisonment for the manslaughter offence. As he was required by law to do, the learned sentencing judge made a serious violent offence declaration, the effect of which is to require the applicant to serve 9.6 years of the sentence before becoming eligible for parole.

[5] Convictions were recorded for the summary offences but no further penalty was imposed in respect of them. The manslaughter offending occurred at a time when wholly suspended sentences of three months imprisonment for serious assault and six months imprisonment for breach of an intensive correction order and other offending including possession of drugs, imposed at the Beenleigh Magistrates Court on 30 August and 8 December 2006 respectively, were operational. Those suspended sentences were activated by the learned sentencing judge to be served concurrently with the manslaughter sentence. A period of some 721 days of pre-sentence custody was declared to be time served under the sentence.

[6] At the same hearing, Ms Bond was sentenced in effect to three years imprisonment. A like declaration as to time served was made in her case. A parole release date at the date of sentence was fixed.

[7] On 14 March 2019, the applicant filed an application for leave to appeal to this Court against his sentence.[1]

Circumstances of the offending and its subsequent concealment and disclosure

[8] The following is drawn from a Statement of Facts tendered at the sentence hearing[2] and from the transcript of a record of interview of the applicant by police in 2017.[3]

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1 AB 1-3.
2 Exhibit 1: AB 105-115.
3 Exhibit 2: AB 116-181.

[9] On a day in May 2007, the applicant drove Baden to a park near the Logan River. It was dusk. The park was deserted. The applicant sat with Baden first in the car and then next to a bench in the park. There was a boat ramp about 50 metres away.

[10] The applicant spoke to Baden for 15 minutes or more. Then he told Baden that he was sorry. He jumped up, went back to the car and drove off, leaving Baden behind. He did not look back.

[11] There was no report of Baden having been seen alive again. It was accepted at sentence that Baden perished sometime after he had been abandoned by the applicant. It was also accepted that the applicant had been under a duty imposed by s 286 of the *Code* to protect his son from danger and that he had failed to discharge that duty. He had deliberately placed Baden in obvious danger and then abandoned him.

[12] Baden was the fifth of the applicant's and Ms Bond's children. He was the product of a complicated home birth. He was hospitalised and found to have drugs in his system. He was also assessed as possibly having a mild form of cerebral palsy.

[13] Upon discharge from hospital, Baden was taken in care by the Department of Child Safety ("the Department") as were his siblings. He remained in care for 18 months and was returned to his parents in October 2006 subject to continuing Departmental supervision.

[14] The applicant and Ms Bond showed hostility and a lack of care towards Baden. He was seen with bruises on his face at times. His room was often locked and family members who visited were told not to enter it. His nappies were often left unchanged and there was a smell of urine and faeces in the room. The applicant and Ms Bond referred to Baden in derogatory terms such as: "little cunt", "devil's child" and "evil".

[15] The last documented sighting of Baden alive was on 27 March 2007. On 16 May 2007, Centrelink was advised by the applicant and Ms Bond that Baden was no longer in their care. They did so in order to avoid trouble with Centrelink. However, advice to that effect was not given by them to the Department. Soon afterwards, the applicant and the rest of the family moved to New South Wales.

[16] In the years that followed, on occasions when the subject of Baden arose, both the applicant and Ms Bond told a variety of lies as to his fate. They lied to the Department of Family and Child Services in New South Wales, to police and to a federal magistrate. On such occasions, the applicant would refer to Baden in terms which evidenced both hostility and malice towards the child.

[17] On 16 March 2017, the applicant was required to give evidence concerning Baden's whereabouts at a Crime and Corruption Commission hearing. He was arrested at the end of the hearing and taken to the watch house. Later, he participated in a record of interview at a police station.

[18] In the interview, the applicant admitted that he had deliberately left Baden in a park near a boat ramp to the Logan River at Eagleby some 10 years earlier. He said that he had hoped that someone would find him and look after him. He told police that "everything got too much" and that he "was just tired of caring for him". The

applicant said that he did not surrender Baden to the Department because he was afraid that if he did, his other children would be taken away.

The applicant's personal circumstances and history of offending

[19] The applicant was 39 years old at the time of the subject offending and 51 years of age at sentence. He has an extensive criminal history involving 34 separate sentencing occasions. His offending dates from 1985 and has involved wounding, minor drug offences and property offences including theft. As I have noted, two suspended sentences were operational when the subject offending occurred.

Sentencing remarks

[20] In his sentencing remarks, the learned sentencing judge referred to the circumstances of the offending, the concealment of it and its ultimate disclosure. His Honour said that the applicant had planned to abandon Baden and that he had carried his plan into effect.

[21] During the course of his remarks, the learned sentencing judge made the following observations:

> "Whilst the charge is based on your omission to take precautions to avoid danger to Baden and in failing to remove him from danger, this is not a simple case of neglect. It was your act in abandoning him which placed him in great danger. Baden did not need to be abandoned. He might have been placed in the care of the community and the community might have found foster carers for him"…[4]
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> "Your gross negligence is of an extreme kind. Your abandonment of this vulnerable child where you did and when you did showed a selfish indifference to his care and to your duty as a parent"…[5]
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> "By any measure, abandoning a toddler on dark at a deserted place beside a river carried a high risk of death to a vulnerable child. You practically invited a tragic end to his life. Against the background of neglect and malice, abandoning Baden and then never returning to save him places this in the worst category of case of manslaughter by criminal neglect"…[6]
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> "The criminal offending did not consist of mere neglect. It involved a positive, deliberate act of abandonment which endangered the child's life. It involved a blatant omission to take precautions to avoid danger to the child and also a continuing failure to take precautions to remove the child from danger"…[7]
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> "If your offending had ended when you drove off, then it would have involved an act of callous abandonment and disregard of your child's safety and a flagrant breach of your duty to take precautions to avoid danger to him. However, your criminal negligence continued. It deprived

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4 AB 93 ll33-37.
5 AB 94 ll1-3.
6 AB 95 ll14-18.
7 AB 99 ll13-16.

> him of any chance of being saved. One can only speculate about how long he survived and what his mental state must have been"…[8]
>
> "The numerous aggravating circumstances place this as an extremely serious case of criminal negligence. The degree of departure from the standard to be expected of a parent, even one in your disadvantaged circumstances, was extreme. The extreme vulnerability of your victim warrants a sentence which denounces your conduct and deters others from committing the same or similar offences. Yours was a callous act of abandonment. You placed a two year old in mortal danger."…[9]

[22] His Honour was sceptical that the applicant had hoped that Baden would have been found. The remoteness of the location, the adjacency of the river, the time of day and the absence of anyone else told against that.[10]

[23] The learned sentencing judge referred to the applicant's personal circumstances including his disadvantaged upbringing. That together with the applicant's history of substance abuse was apt to explain his poor parenting skills, his Honour thought.[11] He took them into account as mitigating circumstances.[12]

[24] The applicant's early plea to manslaughter upon the presentation of a new indictment was also taken into account as a mitigating circumstance. The learned sentencing judge explained that the significance of the plea was its utility for the efficient operation of the criminal justice system. That called for a reduction in the sentence from that which would have been warranted had there been no plea.[13]

[25] However, his Honour stressed that, in this case, the plea was not a manifestation of remorse or contrition. There was an absence of remorse. Further, the applicant's post-offence conduct showed no contrition, only a selfish desire to escape justice over a period of almost 10 years.[14] There was to be no reduction on that account.[15]

[26] As the statements extracted from the sentencing remarks illustrate, the learned sentencing judge regarded the criminality of this offending as extremely serious. His Honour expressed the view that the active conduct in carrying into effect a planned abandonment of the extremely vulnerable Baden together with the omission in failing thereafter to retrieve him, rendered of limited assistance as comparators, sentencing decisions involving impulsive physical violence borne out of frustration and cases of neglect only.[16] Of the sentencing decisions for manslaughter of infants cited to him, his Honour did not identify one as being closely comparable. Generally, they exhibited mitigating circumstances that were more weighty than in this case, in his Honour's view.

[27] The learned sentencing judge concluded his sentencing remarks as follows:

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8 AB 100 ll17-21.
9 AB 101 ll41-46.
10 AB 93 ll17-19.
11 AB 100 ll5-9.
12 AB 101 ll38-39.
13 AB 101 ll16-34.
14 AB 101 ll31-49.
15 Ibid.
16 AB 98 l32 – AB 99 l35.

> "In arriving at an appropriate sentence for manslaughter, I must take account of the consequences of imposing a sentence of 10 years or more, namely, the automatic making of a serious violent offence declaration and a requirement to serve 80 per cent of that sentence before being eligible for parole. Having done so and reflected on the matter, I consider that in all the circumstances your offending justifies a sentence of more than 10 years. I take account of your early plea of guilty in reducing what otherwise would have been an appropriate sentence for manslaughter. In all the circumstances, I consider that the most appropriate sentence for that offence is one of 12 years imprisonment."[17]

The ground of appeal

[28] The proposed appeal involves one ground of appeal only. It is that the sentence is manifestly excessive.

Applicant's submissions

[29] The applicant's contention that his sentence is manifestly excessive rests on the fact that his offending involved neither violence nor prolonged neglect or suffering to Baden and on the proposition that the sentence is "outside the established range of eight to 10 years imprisonment".

[30] For the latter proposition, the applicant drew upon the sentencing decisions of this Court in *R v JV*,[18] *R v Chard; Ex parte Attorney-General*[19] and *R v Smith*.[20] Reference was also made to the following observation of Keane J in *R v Riseley; Ex parte Attorney-General*[21] which involved appeals against sentence by both the Attorney-General and the offender:

> "Reference to this Court's decisions in *Chard* and *Hall*[22] suggests that a sentence of eight years imprisonment, even without a serious violent offence declaration is a distinctly heavy sentence for this category of offence once mitigating factors such as the plea of guilty and the respondent's rehabilitation are taken into account."[23]

[31] The applicant observed that some of these decisions concerned actual violence. It was submitted that this case fell within the middle range in terms of seriousness of offending. It was not apt to be categorised as "extreme" as the applicant suggested the learned sentencing judge had done.

[32] In addition, the applicant criticised the manner in which the learned sentencing judge dealt with the allowance to be made for the confession and the early plea of guilty. The utility for the administration of justice had been significant, it was submitted. Without the confession, there may not have been a case to answer.

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17 AB 102 ll2-10.
18 [2014] QCA 351.
19 [2004] QCA 372.
20 [2019] QCA 33.
21 [2009] QCA 285.
22 [2002] QCA 125.
23 At [36].

Without the plea, the Crown would have had to run a lengthy trial with the attendant difficulties of proving death in the absence of a body.

[33] The applicant's criticism was that notwithstanding those factors, the learned sentencing judge did not specifically state what discount was being given for the confession and the plea. The applicant conjectured that his Honour must have started from a head sentence of 14, or perhaps 15, years imprisonment which was not supported by the authorities.

[34] In conclusion, the applicant submitted that his sentence should be substituted by one of nine years imprisonment with or without a serious violent offence declaration.

Respondent's submissions

[35] The respondent noted that the applicant did not allege any specific error on the part of the learned sentencing judge. The law as to when an appellate court may intervene for manifest excessiveness or inadequacy in a sentence is well settled. Consistently with the recent exposition of it in *R v Pham*,[24] intervention will be justified when, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

[36] The respondent submitted that there was no sentencing decision in which the offending was closely comparable to that in this case. The learned sentencing judge had correctly said that this was not simply a case of failure to protect the child from danger. It was the series of planned actions of the applicant that had put his child in a position of danger with a catastrophic and entirely predictable outcome. Baden had been subjected to a period of suffering of unknown duration which began with his abandonment and continued until he perished.

[37] His Honour was correct, it was submitted, to regard with circumspection the applicant's expressed hope that someone might find Baden and look after him, and to characterise the applicant's reason for non-involvement of the Department for fear that his other children might again be taken into custody, as selfish disregard for Baden's welfare.

[38] It was further submitted that the matters in mitigation had been carefully and appropriately taken into account.

[39] The respondent contended that the decision in *Chard* did not set a range of eight to 10 years for the manslaughter of an infant child. That that is so is illustrated by observations of this Court in the recent decision of *R v Randall*[25] with respect to a head sentence before allowance for a plea of guilty, of 11 years.

[40] In summary, the respondent submitted that the applicant's sentence was not erroneously high. It did not compel a conclusion that there must have been a misapplication of principle.

Discussion

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24 [2015] HCA 39; (2015) 90 ALJR 13 per French CJ, Keane and Nettle JJ at [28].

25 [2019] QCA 25 at [33].

[41] Implicit in the applicant's submission is the proposition that because the applicant's conduct did not involve physical violence to Baden's body, it was no more than mid-range offending for manslaughter. The absence of violence insulated the offending from characterisation as an extremely serious case of criminal negligence. That is a proposition I would not accept.

[42] In my view, a number of circumstances warranted characterisation of the offending as extremely serious. The criminal negligence led to the death of an extremely vulnerable child who was totally dependent that evening on his father to care for him and to keep him safe. The offending did not consist of mere neglect. It involved a positive deliberate act of abandonment which endangered Baden's life. There was then a blatant omission to take precautions to avoid danger to him coupled with a continuing failure to remove him from danger.

[43] Further, the offending occurred against a background of neglect, detachment and even animosity directed towards Baden. Rather than surrendering him to the Department where he could be cared for, the applicant placed Baden in mortal danger out of selfishness.

[44] I have reviewed the sentencing decisions to which the Court has been referred. None of them is closely comparable to the present.

[45] In *JV*, a father pleaded guilty to two counts of manslaughter of his twin children who were about 18 months old when they died. The offender was sentenced to concurrent terms of imprisonment of eight years for both offences and a parole eligibility date was fixed after he had served three years and nine months. The offender was the family breadwinner and his partner attended to domestic duties. The twins were rarely brought out of their bedroom and the direct cause of their deaths was malnutrition rather than starvation. The offender pleaded guilty on the basis that he did not provide the twins with sufficient food and therefore he had caused their deaths pursuant to the operation of s 286 of the *Code*.

[46] The offender in *JV*, was 28 years old at the time of the offending. He had no relevant criminal history. His partner who was regarded as being the primary offender, was sentenced to eight years imprisonment with parole eligibility after serving five years and two months.

[47] In that case, the sentencing judge noted that the offender's conduct was "bordering on wilful blindness" and was an "extensive and protracted departure from what might be regarded as reasonable community standards". An application for leave to appeal the sentence to this Court was refused. In reasons for the refusal, it was said of cases that had been cited to that Court, that they revealed a pattern in which the extent of departure from reasonable community standards is reflected in the severity of the sentence and also that they indicated that a notional sentence of eight to nine years imprisonment tended to prevail in instances of protracted, cruel harm to an infant child which has resulted in fatality.[26] In that case, the protracted, cruel harm was essentially in the nature of attenuated neglect.

[48] In *Chard*, the offender was 21 years old at the time of the offending and had a significant non-violent criminal history. He had a low IQ and had attended opportunity school.

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[26] Per Gotterson JA at [31] (Morrison JA and McMeekin J agreeing).

[49] The offender contrived to spend time alone with his partner's young child towards whom he had at times been physically abusive. It was inferred that the offender had used some form of blunt force trauma to cause multiple injuries to the child including fractured ribs. Ultimately, the child died of broncho-pneumonia induced by acute brain damage resulting from oxygen deprivation.

[50] On an Attorney's appeal, the offender, who had entered an early plea and had made some steps to address his anti-social behaviour, was re-sentenced to an effective term of eight years imprisonment of which he was to serve four years before becoming eligible to apply for post-prison community-based release. The Court observed that the prolonged abuse of a baby of that age would call for a head sentence at least in the range of eight to 10 years. It regarded the offending as more serious than an isolated instance of shaking that resulted in an infant's death.[27]

[51] The offender in *Smith* was 21 years old when he offended. He had a limited criminal history which included some violence. He was a frequent user of dangerous drugs and had a constantly irritable and aggressive mood. He pleaded guilty to the manslaughter of his partner's infant. This offender punched, slapped, head-butted, pinched and dropped the baby on numerous occasions. He seemed to take sadistic delight in having the baby cry. The day before its death, he isolated the baby from its mother. She found it slumped over with fresh bruises to its forehead. The offender dissuaded the mother from seeking medical attention. The cause of death was head and spinal injuries from blunt force trauma or shaking.

[52] The sentence imposed at first instance was one of nine years imprisonment with a serious violent offence declaration. On appeal, reference was made to the sentences in *JV*, *Chard* and *Riseley*, in none of which a serious violent offence declaration had been made. In re-sentencing the offender, this Court set aside the declaration and fixed parole eligibility after service of five years of the nine year sentence.

[53] In *Riseley*, the offender pleaded guilty to unlawfully killing a 19 day old baby boy. His partner was the mother of the child. During the night, he shook the infant and struck him about the head. The baby sustained severe brain injuries from which he died. The offender delayed in seeking medical attention for him.

[54] This offender was 21 years old at the time. He had a criminal history of no relevance. He came from a disadvantaged background and had been sexually abused as a child. His prospects of rehabilitation were assessed as being good.

[55] At first instance, a sentence of eight years imprisonment had been imposed and a serious violent offence declaration had been made. The Attorney General's appeal against sentence was dismissed. On the offender's appeal, the declaration was set aside and a parole eligibility date at about three and a half years was fixed.

[56] Lastly, in *Randall*, the offender killed his 10 week old son with a powerful punch to the baby's stomach. It happened on the first occasion of his having sole care of the child. The offender had had careers as a physics teacher and then as a police officer. Various factors in his career had made him miserable. He was extremely frustrated. For several years he denied responsibility for the death, protesting that he had noticed that the baby was not breathing and that it was as he was trying to administer CPR to the child that it must have been injured.

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27 Per Williams JA at [23] (de Jersey CJ and Jones J agreeing).

[57] The Crown accepted a plea to manslaughter two days before the offender was to be tried for the child's murder. The Crown also accepted that the fatal blow was delivered spontaneously. After examining a number of sentencing decisions, the sentencing judge concluded that but for the guilty plea, he would have sentenced the offender to a term of 11 years imprisonment. It was not disputed on appeal that in the absence of any mitigating factors, a sentence of imprisonment in excess of 10 years would have been warranted.[28] Allowing for the plea, the offender was sentenced to nine years imprisonment with parole eligibility after five years. He was refused leave to challenge the fixing of parole eligibility beyond the half way mark of the sentence.

[58] These cases demonstrate that there is no established range of eight to 10 years imprisonment as a head sentence for the manslaughter of an infant. In *Chard*, this Court spoke of a range of at least that and in *Randall*, it was accepted that a head sentence may exceed 10 years.

[59] The applicant's offending was an extremely serious case of manslaughter. It involved a planned abandonment at dusk of a two year old child to an almost certain death and a failure thereafter to retrieve him from the peril. The abandonment was motivated by selfishness. Its fateful consequences were unknown to others on account of the applicant's dissembling lies over many years. In these appalling circumstances, it was open, in my view, for the learned sentencing judge to have arrived at a sentence which, after allowing for the plea and the limited mitigating circumstances, exceeded 10 years.

[60] It is well established that sentencing is not an exercise in addition and subtraction.[29] It was therefore unnecessary for his Honour to have nominated a starting point from which he was deducting a specified period of time for the plea and mitigating circumstances in order to arrive at the sentence of 12 years.

[61] The sentence imposed does not, to my mind, compel a conclusion that there must have been a misapplication of principle. This ground of appeal has not been made out.

Disposition

[62] Since the sole ground of appeal cannot succeed, leave to appeal must be refused.

Order

[63] I would propose the following order:

1. Application for leave to appeal against sentence refused.

[64] **CROW J:** I agree.

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28 At [21].

29 *Barbaro v The Queen* [2014] HCA 2; (2014) 253 CLR 58 per French CJ, Hayne, Kiefel and Bell JJ at [34].