# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Moy* [2024] QCA 4 |
| PARTIES: | **R**<br>**v**<br>**MOY, Shane Thomas**<br>(applicant) |
| FILE NO/S: | CA No 110 of 2022<br>CA No 122 of 2023<br>SC No 2048 of 2021<br>SC No 971 of 2022 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | Supreme Court at Cairns – Date of Sentence: 2 June 2022 (Boddice J) |
| DELIVERED ON: | 30 January 2024 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 27 September 2023 |
| JUDGES: | Bond JA and Ryan and Kelly JJ |
| ORDERS: | **1. The application for leave to appeal is granted.**<br>**2. The appeal is dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – where the applicant was sentenced for offences of violence including manslaughter and a home invasion – where factual error made at first instance – where applicant to be re-sentenced – where the offending warranted a head sentence of more than 10 years imprisonment, which automatically attracted a serious violent offence declaration – where the Court had the option of declaring pre-sentence custody to be taken as time already served or of otherwise taking it into account by reducing the head sentence to one of under 10 years, thereby relieving the applicant of the automatic consequences of the Serious Violent Offence regime – where the Court decided to take pre-sentence custody into account rather than declare it, bringing the head sentence to one of under 10 years imprisonment – where the applicant argued that, additionally, parole eligibility ought to be brought forward from the date upon which it would arise under the *Corrective Services Act 2006* (Qld) to provide adequate recognition of his pleas of guilty – whether the sentence was manifestly excessive |

*Corrective Services Act 2006* (Qld), s 184(2)
*Penalties and Sentences Act 1992* (Qld), sch 1

*Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37, cited
*R v Callow* [2017] QCA 304, considered
*R v Dwyer* [2008] QCA 117, considered
*R v Granz- Glenn* [2023] QCA 157, considered
*R v McDougall; R v Collas* [2007] 2 Qd R 87; [2006] QCA 365, considered
*R v Mooka* [2007] QCA 36, considered
*R v Simeon* [2000] QCA 470, considered
*R v Skondin* [2015] QCA 138, considered
*R v Smith* (2022) 10 QR 725; [2022] QCA 89, considered

COUNSEL: G F Perry for the applicant (pro bono)
S L Dennis for the respondent

SOLICITORS: Gilshenan & Luton Legal Practice for the applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **BOND JA AND KELLY J:** We have had the advantage of reading in draft the reasons for judgment of Ryan J. Although we agree with most of her Honour's reasons, we reach a different outcome.

[2] The area in which we disagree with Ryan J is the question whether the discretion in relation to setting the parole eligibility date should be exercised in the way suggested by her Honour.

[3] In our view if (as we would agree) –

(a) a head sentence at the level identified by her Honour is an appropriate reflection of the applicant's pleas of guilty in the circumstances of this case; and

(b) no part of the period of pre-sentence custody should be declared to be time served but instead the whole of the period should be taken into account to reduce the head sentence down to 8 years and 6 months, thereby giving the applicant the very considerable advantage of not having to serve 80 per cent of the head sentence,

then no more is needed to justly recognise the impact of the various aggravating and mitigating factors applicable in this case. Indeed, to our minds, to fix a parole eligibility date at a date earlier than the date which would otherwise flow from the statutory default would be to give double recognition to either or both of the guilty pleas or the pre-sentence custody period.

[4] As Ryan J recognised, because of the factual error made and relied upon by the sentencing judge, it fell to this Court to re-sentence the applicant, unless, in the separate and independent exercise of its discretion, it concluded that no different sentence should be passed. The result of our agreement with Ryan J except in relation to the exercise of the discretion in relation to parole eligibility date is that

we conclude that no different sentence should be passed. Accordingly, we would not interfere with the order made by the sentencing judge.

[5] We would make the following orders –

(a) The application for leave to appeal is granted.

(b) The appeal is dismissed.

[6] **RYAN J:** The applicant pleaded guilty to the offences of burglary (by break, whilst armed, in company), robbery (whilst armed, in company, with personal violence) and manslaughter. He was sentenced to 8 years and 6 months imprisonment for the offence of manslaughter, and to concurrent sentences of 4 years imprisonment for the burglary and 4 years and 6 months imprisonment for the robbery. The sentencing judge expressly stated that he "took into account" the applicant's 783 days of pre-sentence custody in sentencing the applicant but declared that it was not to be taken as time already served under the sentence imposed. His Honour did not fix a parole eligibility date.

[7] The applicant applied for leave to appeal against sentence, arguing two grounds. The first was that the sentencing judge erred in fact in finding that the applicant committed the offence of manslaughter while he was on bail for the offences of burglary and robbery. The Crown conceded that that factual error had been made and relied upon by the sentencing judge as a matter which made the applicant's criminality more serious. It therefore fell to this Court to re-sentence the applicant, unless, in the separate and independent exercise of its discretion, it concluded that no different sentence should be passed.[1] There was no need for this Court to consider the applicant's second ground.

[8] The applicant argued as follows. In real terms, bearing in mind that the applicant spent 783 days in custody prior to sentence, his effective head sentence was one of ten years, 7 months, and 2 days imprisonment. And in real terms, he must serve 6 years, 4 months, and 23 days before his eligibility for parole arises, applying s 184(2) of the *Corrective Services Act 2006* (Qld). That is a non-parole period of 60 per cent of the effective head sentence. The applicant contended that such a sentence was excessive. The applicant took no issue with the head sentence imposed but argued for parole eligibility after the applicant had served – in real terms – 40 or 50 per cent of the effective head sentence (of 10 years, 7 months, and 23 days).

[9] For the reasons which follow, I would grant the application for leave to appeal and allow the appeal. I would re-sentence the applicant by fixing 10 April 2025 as the date upon which the applicant would become eligible for parole. That date is five years into the effective head sentence; and at a point a little less than 50 per cent of it. I would not otherwise vary the sentences imposed at first instance.

**Factual basis for the pleas of guilty**

[10] The sentence proceeded on two agreed schedules of fact and a "timeline".

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1 *Kentwell v The Queen* (2014) 252 CLR 601 at 615 [35] (per French CJ, Hayne, Bell and Keane JJ).

[11] The facts of the burglary and robbery offences (a "home invasion") were briefly stated.

[12] On 13 March 2020, the complainant was at his girlfriend's house when the applicant, his girlfriend [X] and a man [Y] entered through the front door and started shouting (the burglary). All parties knew each other. The applicant and X demanded money from the complainant. He refused and ran to a bedroom. The applicant, X and Y followed him. The applicant punched the complainant, but the complainant did not sustain identifiable injuries.

[13] The applicant took a 20 cm meat cleaver from the kitchen and struck the back of the complainant's head with it twice, causing a 3.5 cm long laceration. He stole $480 in cash from the complainant's wallet and prescription medication from his bag.

[14] At the time of the commission of these offences, the applicant was on bail for an alleged contravention of a probation order which had been imposed on 28 December 2019.[2]

[15] On 27 March 2020, the applicant was arrested and charged with an offence of public nuisance. He was granted bail.[3]

[16] The applicant was therefore on bail for an alleged contravention of a probation order and an alleged offence of public nuisance when he committed the offence of manslaughter on 3 April 2020. He had not by that date been charged with the home invasion offences. As conceded, the sentencing judge erred in thinking that the applicant was on bail for the home invasion offences when he committed the manslaughter. He was not charged with the home invasion offences until 6 April 2020.

[17] On 10 April 2020, the applicant was charged with doing grievous bodily harm to the deceased. The deceased died on 16 April 2020. The charge was then upgraded to manslaughter.

[18] The deceased was a homeless man, who spent some nights at the applicant's unit before his death. He was an alcoholic and had liver cirrhosis.

[19] On 3 April 2020, the applicant, the deceased and others were drinking together in the applicant's unit. The others included X, Pitt, and Riley. The applicant's unit was on the second floor of a two-storey unit block. There were stairs from the ground floor to a landing on the second floor. There was access from the landing to the applicant's unit.

[20] The applicant appeared to be "picking on" the deceased and there was an increase in the applicant's aggression towards the deceased throughout the evening. The applicant was heard to say that the deceased "rubbed him on the arse in the kitchen and asked [the applicant] to get it on".

[21] The deceased called triple 0 at 9.58 pm. He was heavily intoxicated. He said someone [the applicant] would not stop pulling his hair and he had been smacked in the face. He wanted the ambulance to attend to take him from the property. He said he was not yet bleeding. The call ended unexpectedly. The triple 0 operator called

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2 I note that the applicant's criminal history does not contain an entry recording a finding of guilt for this alleged contravention nor a re-sentencing of the applicant for the original offence.

3 I note that his criminal history does not contain an entry recording a finding of guilt for this offence.

back. X answered. The operator heard the applicant abuse the deceased in the background.

[22] The applicant picked up the deceased by his long hair, so that he was standing. He took him by the shirt and shoved him towards the front door, saying something like, "fuck you cunt, get out of my house". Riley attempted to intervene. He saw the applicant holding the deceased by the "scruff of the neck" with one hand, and the back of his shorts with the other. Riley put his arm around the applicant's neck to slow him down and said, "don't kill him, don't kill him" as the applicant and the deceased approached the top of the stairs. The applicant said, "I'm gonna fucking smash you and kill you. I'll show you who the fuck I am".

[23] The applicant pushed the deceased down the stairs from the landing. The deceased stumbled, before steadying himself by grabbing the handrails of the stairs. The applicant told him again to "get out" and pushed him aggressively. The deceased fell down three or four steps. The applicant told him to "fucking get up". The applicant forced the deceased into the direction of the unit block's mailboxes. This was where police and paramedics found the deceased when they arrived at the scene at 10.30 pm. Witnesses heard a continuing assault in the area of the mailbox. They heard "get up" said repeatedly. They heard yelling and screaming.

[24] The deceased was taken to hospital. He described being pushed down the stairs, potentially causing a degree of concussion, and being dragged across the carpark, before being assaulted at the mailbox where he was kicked in the abdomen and back.

[25] After the kicking, the applicant ceased his assault on the deceased of his own accord. But he yelled out to other residents of the unit block, "is there any witness to come out? I'll show you"; "fucking dogs"; "did anyone hear that? No? Otherwise you'll get smelly fish". He continued to be in an agitated state for a period of time. After he returned to his unit, the unit block reverberated as if he was jumping up and down.

[26] When police arrived, the applicant was on his balcony, overlooking the mailbox. He was intoxicated and obnoxious. He called out, "I was gonna throw him down the stairs if he did not leave'; "I wouldn't hit that cunt he's not worth it"; "He's lucky he didn't get thrown down the stairs"; and (towards the deceased) "don't try and fucking lie".

[27] A police body worn camera captured images of the deceased bleeding from his head in the area of his ear (where he had recently-removed stitches) and bleeding from his nose, as well as bruising to his face.

[28] The fatal injury suffered by the decease was a laceration to his spleen causing blood loss but it was not immediately detected. When the deceased arrived at hospital at 11 pm on 3 April 2020, in addition to the facial bleeding and bruising, he reported neck pain and grazing/bruising over his right scapula. He had a large bruise over his right flank, and he reported tenderness in his lower spine. Although images (I infer CT scan images) were taken of him that evening, the injury to his spleen was not detected. He remained in hospital, primarily to "sober up". He was discharged the next day, 4 April 2020. He re-admitted himself on 5 April 2020, reporting pain to his body and a nosebleed. He was discharged in the afternoon. He was re-admitted on 6 April 2020 with a nosebleed and increased pain in the left flank area.

A repeat CT scan demonstrated an intracapsular haematoma of the spleen with extensive bruising of the surrounding soft tissue. On 7 April 2020, the deceased was hemodynamically unstable, and an emergency laparotomy revealed a large volume of free blood in his abdomen. His spleen was removed. A "re-look laparotomy" was performed on 10 April 2020. The deceased suffered a further catastrophic bleed on 16 April 2020, and died that day.

[29] Because of his liver dysfunction, the deceased was likely to bruise more easily; clot less effectively; and bleed for a longer period, than a person without that dysfunction. Also, he had an enlarged spleen, which meant it was at greater risk of injury, even after a minor trauma, than a spleen which was not enlarged.

[30] When interviewed on 10 April 2020 – before the deceased's death – the applicant denied all violence apart from a slap to the deceased's face. He said that the deceased was trying to "touch [him] and stuff" and he told the deceased to leave him alone. He said the deceased tried to grab his "arse" and had been disrespectful in the applicant's home. He admitted to marching the deceased down the stairs, grabbing him by "the scruff" of his shorts and neck and, as he did so, the deceased fell over. He said the deceased also fell over "on his own volition". He said he knew the deceased had a bad liver and was routinely hospitalised as a result. He said he was aware that the deceased was on the phone to the ambulance and anticipated their arrival.

[31] The sentence proceeded on the basis that the fatal injury to the deceased's spleen was sustained by either the force of the deceased's "impact on the stairs"; or a kick, or a combination of both. The number of kicks was unknown. Their force was unknown, but it was enough to render the injury foreseeable.

**Other matters relevant to the exercise of the sentencing discretion**

[32] The applicant was 50 years old when the offences were committed. He was 52 at sentence and is 54 now.

[33] The prosecutor described the pleas of guilty, in relation to all of the offences, as of "significant utilitarian value" and submitted that they ought to be "tangibly reflected in the penalty". In his written submissions he wrote:

> "1 The penalty for the offence of Manslaughter is broadly between 7 – 9 years imprisonment.
>
> 2 …
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> 3 [Sentences for] [t]he offences of burglary and robbery can be imposed concurrently. It is submitted that the penalty for manslaughter is one of 9 years imprisonment. To properly reflect both offences of violence (whilst on bail), the court need not set a parole eligibility date."

[34] The prosecutor also referred to the following –

(a) The applicant had a lengthy and persistent criminal history, which revealed his long association with alcohol and drugs.

The applicant had conviction for offending in Queensland, New South Wales, the Northern Territory and Western Australia. I note that the applicant's

criminal history was dominated by appearances in courts of summary jurisdiction. He had only rarely been sentenced by a higher court, and not since February 1999. His criminal history did not include any offence of violence which had been punished by imprisonment, apart from a sentence of 3 months imprisonment, 2 years probation, and a $500 fine, imposed by the Magistrates Court in Cairns on 16 May 2008 for drugs, weapons and associated offences, including dangerous conduct with a weapon. The applicant had not been sentenced to imprisonment for any offence since then.

(b) He committed all of the offences whilst on probation.

(c) He committed the manslaughter offence while on bail for an offence of public nuisance and for an alleged contravention of the probation order.

(d) The home invasion was relatively unsophisticated. The applicant and his co-offenders entered the home by opening an unlocked door. The applicant was not armed when he entered the property. The complainant was not able to articulate the reason why the applicant demanded money from him. The actual injury imposed was managed conservatively (four stitches) and there was no victim impact statement from the complainant.

(e) The home invasion was listed for trial. Ten weeks before its listed date, defence sent a submission to the prosecution about factual matters which was accepted, and the matter resolved by way of a plea of guilty.

In those circumstances, I would treat the plea to the home invasion offences as timely.

(f) The fatal injury could have been caused by one kick. It was likely a forceful kick. The deceased was a vulnerable victim.

(g) The plea to manslaughter was a late plea, after the medical witnesses had been cross-examined at committal.

However, the deceased's "section 93B" statements were not disclosed until after the committal. An application to exclude them from the evidence at trial was dismissed.

The applicant's conviction for manslaughter at trial depended on the jury accepting the deceased's statements and excluding the possibility that the fatal injury was sustained during one of the deceased's self-reported "falls".

(h) The prosecutor emphasised that the prosecution case on manslaughter was "not without its challenges". The plea of guilty had significant utility "by confirming the conviction, the co-operation with the administration of justice, bringing closure to the family, and evidencing some remorse".

(i) As revealed by victim impact statements, the deceased's death had a profound effect on his family.

[35] Defence counsel referred to the following matters –

(a) The applicant's background was of marked dysfunctionality. His mother died when he was nine. He was raised by his alcoholic step-father, who physically and sexually abused him. He cared for his younger step-siblings. He turned to drugs and alcohol at a young age and his life had been plagued by

addiction. He ran away from home at 16. He slept on the streets and took whatever employment he could anywhere in Australia.

(b) The applicant had previously been kind to the deceased. He allowed the deceased to sleep at his unit occasionally and fed him when required. There had been no prior acts of violence.

(c) The manslaughter was properly characterised as an offence of drunken rage or anger.

(d) The applicant had participated in relevant drug rehabilitation whilst on remand and wished to re-establish contact with his two children upon his release from custody.

(e) The applicant's plea of guilty to manslaughter was significant. He was sorry for his behaviour on the night – as reflected by his plea of guilty.

[36] Defence counsel contended for a sentence of 9 years imprisonment, with eligibility for parole fixed at the halfway point of the total period of imprisonment which the applicant was liable to serve (that is, 9 years plus 728 days of pre-sentence custody). In his submission, the fixing of a parole eligibility date would reflect: (a) the steps taken by the applicant towards his rehabilitation; and (b) how the matter "played out" to the point at which the plea of guilty was entered – which included the late delivery of a critical statement and the need to investigate the complications of the deceased's poor health otherwise.

**Comparable decisions**

[37] I considered the following manslaughter sentencing authorities, which were referred to at first instance or on this application: *R v Simeon* [2000] QCA 470; *R v Mooka* [2007] QCA 36; *R v Dwyer* [2008] QCA 117; *R v Skondin* [2015] QCA 138; *R v Callow* [2017] QCA 304; *R v Granz-Glenn* [2023] QCA 157.

***R v Simeon***

[38] Simeon was sentenced to 7 years and 6 months imprisonment on his plea of guilty to manslaughter. When aged 27, he attacked the deceased, eight hours into a birthday party, because he thought the deceased struck his (Simeon's) son. The attack included headbutts, punches and kicks, including punches to the deceased's face while he was on the ground. The fatal blow was probably one below and behind the deceased's right ear. The deceased was dead upon arrival at hospital. The force of the blow was moderate. On the evidence, because the deceased was heavily intoxicated, no greater degree of force was necessary to cause the subarachnoid bleeding which led to death. At the time, Simeon was affected by alcohol too. He had a previous good record and experienced great remorse.

[39] He successfully appealed against the sentence imposed at first instance.

[40] The Court held that the head sentence, while "by no means a light one", could not properly be reduced. But the lack of a recommendation that Simeon be considered for early parole gave insufficient weight to circumstances extrinsic to the offence, such as Simeon's previous good record and his unusually guilt-stricken reaction to the offence, which had resulted in a depressive illness. The Court added to the head sentence a recommendation that Simeon be considered for parole after having

served 2 years and 9 months (33 months) of the sentence of 7 years and six months (90 months) – that is, at a little over one-third of the way into the head sentence.

***R v Mooka***

[41] At an RSL club, after drinking heavily and, in his words, "totally blind", Mooka, aged 25, killed the deceased. They'd just met. The deceased said something to anger Mooka. Entirely the aggressor, he struck the deceased "a mighty blow" to the side of the head with a pool cue. The deceased fell unconscious to the ground. He suffered a deep laceration to his left ear and a fractured skull. His brain was badly bruised. He died 11 days later. The sentencing judge found that the deceased had done nothing provocative.

[42] After the attack on the deceased, Mooka continued to behave aggressively, including by swearing, abusing other patrons, swinging a metal-framed chair aggressively and challenging others to fight him. He punched a security officer in the throat as he was being ushered out of the club. He went on to another establishment and, in an act of gratuitous unprovoked violence, forcefully punched a stranger in the back of the head.

[43] He had a bad criminal history, which included convictions for assaults. He had previously been imprisoned. He was sentenced to 10 years imprisonment, which was automatically declared to be a serious violent offence. His application for leave to appeal against sentence was refused.

***R v Dwyer***

[44] Dwyer was originally charged with murder. The Crown accepted his plea to manslaughter in full satisfaction of that charge.

[45] Dwyer was heavily intoxicated when he killed the 51-year-old deceased during an argument. He felled the deceased with one punch then kicked him. Dwyer failed to call an ambulance for at least half an hour after he had rendered the deceased comatose. The deceased suffered a cardiac arrest. He had facial fractures, traumatic shock, elevated blood pressure, and cardiac arrhythmia. Dwyer made self-interested attempts to conceal his guilt and threatened his ex-girlfriend if she informed on him. Dwyer intended to plead not guilty on the basis that there was an issue as to the cause of death of the deceased. After the Crown produced expert opinion to the effect that there was no doubt that Dwyer's assault upon the deceased led to his death, Dwyer agreed to plead guilty to manslaughter. The Crown accepted that he had acted without an intention to kill or do grievous bodily harm to the deceased.

[46] He was sentenced to 10 years imprisonment, with a declaration that 585 days of pre-sentence custody was to be taken as time already served under that sentence. He was sentenced at the same time for offences of going armed so as to cause fear; assault; dangerous operation of a vehicle while affected by an intoxicating substance; possessing a knife in a public place; and two offences of disqualified driving. He was sentenced to shorter, concurrent terms of imprisonment for those offences, and he was disqualified from holding or obtaining a drivers' licence for two years.

[47] Dwyer was 22 when the offences were committed and 24 at sentence. He had a significant criminal history which included relatively serious offences of violence, including assaulting a 14-year-old boy, for which he was sentenced to two and a half years imprisonment, with parole recommended after 10 months.

[48] His application for leave to appeal against sentence was refused, the Court noting that Dwyer killed the deceased, who had been kind to him, by way of a brutal beating in the context of alcohol fuelled aggression, then showed him callous indifference.

***R v Skondin***

[49] Skondin was convicted after a trial of manslaughter and sentenced to 10 years imprisonment on 7 April 2014.

[50] His application for leave to appeal against sentence was allowed, by majority (Holmes JA (as the former Chief Justice then was) and Atkinson J, Applegarth J dissenting) and his sentence was reduced to 9 years imprisonment with parole eligibility arising on 20 March 2017 – that is, after he had served 5 years imprisonment, with a declaration that his 784 days of pre-sentence custody was to be taken as time already served.

[51] Skondin, who was a little drug affected at the time, and the deceased, whom he did not know well, got into a fight in a supermarket. CCTV footage showed the deceased moving away from Skondin down the aisle. Skondin threw one punch of moderate force, with his non-dominant hand, which killed the deceased. The punch landed behind the deceased's ear, tearing his vertebral artery. The mechanism by which death was caused was rare. The trial judge found that Skondin had decided to hurt the deceased in anger and frustration that the deceased would not accept that he was not a police informant. His blow was cowardly, struck when the deceased was unguarded and defenceless. And he walked away, after the deceased fell, leaving others to assist him.

[52] Skondin was 39 when the offence was committed and 42 at sentence. He had a criminal history, which commenced when he was 13 and included six counts of malicious injury. He was often detained or imprisoned. He had spent 12 years of his adult life in jail for offences which included armed robbery (for which he was sentenced to 6 years imprisonment) and using an offensive weapon to prevent a police investigation.

***R v Callow***

[53] The deceased intervened to protect Callow's ex-partner when he saw Callow trying to pull their child away from her, including while she was on the ground and while Callow's partner was attempting to intervene. Callow punched the deceased in the face and kneed him in the stomach. The deceased fell onto the edge of the roadway. The back of his head hit the bitumen and he died the next day. Callow pleaded guilty to unlawfully assaulting his ex-partner and his child (domestic violence offences) and manslaughter. He was sentenced to 8 and a half years imprisonment for the manslaughter, with concurrent sentences of 18 months imprisonment imposed for the assault offences. (He was convicted but not further punished for

three summary offences dealt with at the same time.) His parole eligibility date was set at three years.

[54] At first instance, the prosecution submitted that the "range" for the offending was 7 – 9 years imprisonment. Callow's counsel submitted that a sentence of 7 years imprisonment was appropriate, with parole eligibility arising after one-third. The sentencing judge considered *Skondin* the most comparable decision.

[55] Callow entered his plea of guilty a week before the trial was due to commence. He was 23 when the offences were committed and 24 at sentence. He had no criminal history although he committed the offences whilst on bail and persistently breached his bail after being charged. He had endured sexual abuse at a young age, turned to drugs at 14 or 15, and had a complex range of psychological problems.

[56] His application for leave to appeal against sentence was refused. The offending conduct was described as a persistent cowardly attack on more vulnerable people – while his own partner was trying to prevent the attack upon the deceased and after his former partner and their child had left the area.

***R v Granz-Glenn***

[57] The deceased was killed during a home invasion by five offenders, including Granz-Glenn. Granz-Glenn drove the four other offenders to the shipping container in which the deceased and her partner lived. One of the co-offenders [E] was armed with a loaded, sawn-off rifle. One carried a meat cleaver. One carried a bat. Hearing the offenders approach, the deceased's partner armed himself with nunchucks. He saw fingers reaching through a gap between the doors to the shipping container. He swung the nunchucks towards the door. E discharged a single bullet, which struck the deceased in the back of the neck and killed her. The five offenders ran from the shipping container. It was not suggested that they knew that anyone had been fatally injured.

[58] E was tried for felony murder. He was acquitted of that charge and convicted of manslaughter on the basis of criminal negligence in the way in which he handled the loaded rifle. He was sentenced to 9 years imprisonment, with 1236 days of pre-sentence custody declared as time already served.

[59] The other four, including Granz-Glenn, pleaded guilty to manslaughter and were sentenced on the basis that they were parties to a common unlawful purpose to rob the deceased, which contemplated violence to such a degree that the intentional killing of the deceased was a probable consequence of their purpose. Each was sentenced to 9 years imprisonment, with a declaration that their pre-sentence custody was to be taken as time already served.

[60] Granz-Glenn's application for leave to appeal against sentence was refused. Among other arguments, he argued that the sentence imposed gave insufficient weight to mitigating factors. He contended that, having served about 3 and a half years imprisonment prior to his sentence, the sentencing judge ought to have fixed an immediate parole eligibility date.

[61] In refusing the application, Bond JA, with whom Flanagan JA and Bradley J agreed, noted the benefit to Granz-Glenn achieved by the reduction of the head sentence which would otherwise have been imposed. His Honour said (citations omitted):

> "[12] This Court has acknowledged that the extent of the reduction of a sentence to reflect an early plea of guilty is frequently a reduction of the non-parole period to one third of the head sentence. But it has also made clear that it is a practice not a hard and fast rule. In each case a discretion must be exercised and "[t]he factors relevant to setting a non-parole period include the specific circumstances of the offender including his antecedents, character, and any prior criminal history".
>
> [13] In the present case the sentencing judge specifically considered all those relevant circumstances. It is clear … that the applicant obtained the benefit of his relevant mitigating circumstances by way of reduction of the head sentence which the judge would otherwise have imposed. Given the real possibility that a head sentence could otherwise have been set at 10 years or greater (with the statutory mandatory consequence that the applicant would have been required to serve 80% of the head sentence before being eligible for parole) that was of very considerable benefit to him."

[62] Of course, while the sentencing judge in *Granz-Glenn* did not fix a parole eligibility date, leaving eligibility to arise when the applicant had served one half of the head sentence, her Honour did make a declaration that his pre-sentence custody was to be taken as time served. This meant that, in real terms, his non-parole period was no longer than four and a half years.

**Relevant sentencing authorities**

[63] Treating parole eligibility at the 50 per cent mark as the default position (as it is under statute), the Court of Appeal in *R v McDougall; R v Collas* [2007] 2 Qd R 87 discussed the circumstances in which a court might bring forward or postpone parole eligibility. In the context of a discussion of the serious violent offence regime and the making of a serious violent offence declaration in the exercise of the sentencing discretion, the Court said (footnotes omitted):

> "[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."

[64] Where a sentencing judge reduces a sentence which would otherwise have been over ten years imprisonment for an offence included in Schedule 1 of the *Penalties and Sentences Act 1992*, the sentencing judge must take care not to give an offender a double benefit, as explained by Applegarth J in *R v Smith* [2022] QCA 89 at [79] to [83]:

> "[79] One complexity is in dealing with a sole offender who pleads guilty to an SVO offence, such as drug trafficking, that warrants in the circumstances a sentence in the vicinity of 10 years.
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> [80] If the offender's conduct and circumstances warrant a sentence of less than 10 years, then a guilty plea ordinarily will be reflected in parole eligibility after a third. However, in a more serious case in which the circumstances would warrant a sentence of more than 10 years in the absence of a guilty plea, the usual course is to take account of the guilty plea "at the top". In other words, the guilty plea is accounted for in a reduction of the head sentence. This sometimes has the effect of reducing the sentence to less than 10 years, thereby avoiding an automatic SVO. The plea having been taken into account in arriving at a head sentence, the applicant is not ordinarily entitled to the usual benefit of a guilty plea in being eligible for parole at the one-third point. To confer such a double benefit probably would constitute an appellable error. Avoiding the compulsory 80 per cent non-parole period is a significant advantage.
>
> [81] Authorities about the SVO statutory regime have emphasised that in arriving at a sentence that is "just in all the circumstances", courts cannot ignore the serious aggravating effect upon a sentence of an order of 10 years rather than, say, nine years. In considering what head sentence to impose, a judge must take into account the operation of Part 9A of the Act. However, courts should not attempt to subvert the intention of Part 9A by reducing what would otherwise be regarded as an appropriate sentence.
>
> [82] Sentencing in a case in which a sentence that carries an automatic SVO declaration is open, but not inevitable, remains an integrated process. The process requires consideration of all of the circumstances of the case and relevant sentencing principles, including those set out in s 9 of the Act. In its simplest formulation, the sentence arrived at must be "just in all the circumstances" and, subject to mandatory minimum non-parole periods, the sentence as a whole must be a just one, not solely in relation to the head sentence.

> [83] Sentencing principles, including having regard to the period that the defendant must spend in custody before being eligible for parole, may lead to the imposition of a sentence of less than 10 years in circumstances in which it would not be just to require the defendant to serve eight years before being eligible for parole. If the overall sentence is just in all the circumstances, then such an outcome does not subvert the purpose of Part 9A by reducing what would otherwise be regarded as an appropriate sentence. Instead, it leads to the most appropriate and just sentence in all the circumstances. Such a sentence may have the benefit of subjecting an offender to a longer period of supervision in the community on parole than would be achieved by an automatic SVO, assuming in both cases that parole will be granted shortly after the eligibility date."

**Re-sentencing**

[65] The applicant's offending was very serious and had tragic consequences. However, the manslaughter did not involve the use of a weapon and the applicant ceased his assault upon the deceased of his own accord. His carry on after his assault upon the deceased reflected his obliviousness to the seriousness of the harm he had caused, and probably his level of intoxication – although his intoxication does not operate in mitigation of penalty.

[66] The applicant's pleas of guilty (to all the offences, but particularly to the manslaughter) warranted meaningful, but not "double", recognition. His co-operation in the administration of justice was of real value having regard to the evidence of the deceased's health otherwise. It also provided the deceased's family and friends with certainty and closure.

[67] The evidence of the applicant's remorse was very limited, but I would proceed on the basis that the applicant was sorry for his behaviour, as his barrister submitted, and that his plea to manslaughter reflected some remorse.

[68] While the applicant's criminal history is lengthy and persistent, he could not be said to have a history of violent offending.

[69] His 783 days of pre-sentence custody had to be either declared or otherwise taken into account. That 783-day period commenced on 10 April 2020 and ended on 1 June 2022.

[70] The applicant did not suggest that, on pleas of guilty, the appropriate head sentence was any lower than 10 years and 7 or 8 months. Such a sentence would attract an automatic declaration that the applicant had been convicted of a serious violent offence, and his parole eligibility date would automatically be postponed until the point at which he had served 80 per cent of such a head sentence.

[71] In my view, taking all aggravating and mitigating factors into account; paying due regard to the benchmarks set by the comparable authorities, particularly *Skondin*, *Callow*, and *Granz-Glenn*; and giving meaningful recognition to the applicant's pleas of guilty leads to a head sentence of 8 years and 6 months imprisonment, and

the fixing of 10 April 2025 as the date upon which the applicant will be eligible for parole.

[72] As at first instance, the head sentence of 8 years and six months is arrived at by taking into account the whole of the period of pre-sentence custody to reduce the head sentence to below ten years imprisonment, thereby allowing a discretion over the non-parole period.

[73] Relieving the applicant of the consequences of a mandatory serious violence offence declaration goes some way towards meaningful recognition of his pleas of guilty (the primary factor in mitigation of penalty). But in my view, bearing in mind the lengthy period of pre-sentence custody, more is needed to justly recognise the pleas and other matters in mitigation, whilst still bearing in mind the seriousness of the offending, the applicant's criminal history, and the factors which aggravated the offending, such as that it occurred whilst the applicant was on probation and on bail.

[74] That additional mitigation may be found in bringing forward parole eligibility from the date which would otherwise be determined by legislation (on my calculations, 2 September 2026)[4] to 10 April 2025. By 10 April 2025, the applicant will have in fact served 5 years imprisonment, which is about 47 per cent of ten years and eight months.

[75] Under the sentence that I would impose, upon his release, the applicant would be supervised for a lengthy period in the community under a parole order, and liable to a return to custody were he to breach the conditions of his parole.

[76] To conclude: I would make orders –

(a) granting the application for leave to appeal;

(b) allowing the appeal;

(c) fixing 10 April 2025 as the date upon which the applicant will be eligible for release on parole; and

(d) otherwise, making no change to the sentence imposed at first instance.

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[4] 4 years and 3 months into the head sentence of 8 years and 6 months.