SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ali* [2018] QCA 212
PARTIES:	**R** **v** **ALI, Muhumed Samow** (applicant)
FILE NO/S:	CA No 194 of 2017 SC No 344 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 29 August 2017 (Atkinson J)
DELIVERED ON:	14 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2018
JUDGES:	Fraser and Gotterson JJA and Burns J
ORDERS:	**1. Grant leave to appeal;** **2. The appeal be allowed in part;** **3. Set aside the sentence imposed for the offence of going armed in public so as to cause fear and substitute a sentence of two years imprisonment;** **4. The sentences and orders otherwise made at first instance remain unaffected.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted after a trial of attempted murder – where the sentence for attempted murder was 10 years imprisonment with an automatic serious violent offence declaration – where the applicant pleaded guilty at the outset of the trial to dangerous operation of a motor vehicle, common assault and going armed in public so as to cause fear, for which the sentences were two years imprisonment, three years imprisonment and three years imprisonment, respectively – where the applicant drove his vehicle into the complainant's

street and deliberately collided with her vehicle – where the applicant retrieved a machete from his vehicle, chased the complainant and struck her between five and seven times with the machete – where the applicant was prevented from further attacking the complainant by the intervention of the complainant's neighbours – where the sentencing judge found that the applicant held an intention to kill at all times, from when he drove into the complainant's street to when he struck the final blow – whether the sentencing judge wrongly found that the applicant held an intention to kill at all times – whether the applicant's sentence is manifestly excessive

Corrective Services Act 2006 (Qld), s 180, s 182
Criminal Code (Qld), s 69(1), s 538
Evidence Act 1977 (Qld), s 132C
Penalties and Sentences Act 1992 (Qld), s 12A, s 161A, s 161B

Cheung v The Queen (2001) 209 CLR 1; [2001] HCA 67, cited
R v Dwyer [2008] QCA 117, cited
R v Hicks [2017] QCA 14, considered
R v Jurcik [2001] QCA 390, considered
R v Mallie; ex parte A-G (Qld) [2009] QCA 109, considered
R v Reeves [2001] QCA 91, cited
R v Rochester; ex parte A-G (Qld) [2003] QCA 326, considered
R v Sauvao [2006] QCA 331, considered
R v Seijbel-Chocmingkwan [2014] QCA 119, considered
R v Tevita [2006] QCA 131, cited
R v Williams [2015] QCA 276, considered
R v Witchard & Ors; ex parte A-G (Qld) [2005] 1 Qd R 428; [2004] QCA 429, cited

COUNSEL: L Ackermann for the applicant
D C Boyle for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **GOTTERSON JA:** I agree with the orders proposed by Burns J and with the reasons given by his Honour.

[3] **BURNS J:** On 13 March 2017, the applicant appeared in the Supreme Court at Brisbane for the first day of his trial. He faced an indictment charging the following

counts:

1. dangerous operation of a motor vehicle (**count 1**);
2. attempted murder (**count 2**);
3. in the alternative to count 2, unlawful wounding with intent to do grievous bodily harm (**count 3**);
4. in the alternative to count 3, unlawful wounding (**count 4**);
5. common assault (**count 5**); and
6. going armed in public so as to cause fear (**count 6**).

[4] Each of these offences was alleged to have been committed on the morning of 10 September 2015 during a single episode of offending on a suburban street at Wacol. The applicant had previously been in a relationship with the complainant on counts 2 to 4 and, for that reason, each of those counts was stated to be a domestic violence offence for the purposes of s 12A of the *Penalties and Sentences Act* 1992 (Qld). The complainant on count 5 was a man who saw the complainant on counts 2 to 4 being attacked by the applicant and came to her aid.

[5] When arraigned, the applicant pleaded not guilty to counts 2 and 3 (attempted murder and the first alternative of wounding with intent) but guilty to count 4 (the second alternative of wounding simpliciter). He also pleaded guilty to the remaining counts on the indictment, that is to say, count 1 (dangerous operation of a motor vehicle), count 5 (common assault) and count 6 (going armed in public so as to cause fear).

[6] The Crown did not accept the applicant's pleas of guilty in full discharge of the indictment and so his trial proceeded on the count of attempted murder and its alternatives. When called on during the second day of trial, the applicant elected not to give or to call any evidence. On the third day, the jury found him guilty of attempted murder. His sentencing hearing was adjourned to a date to be fixed and he was remanded in custody.

[7] On 29 August 2017, the applicant was sentenced by the learned primary judge to various terms of imprisonment: ten years for attempted murder; two years for dangerous operation of a motor vehicle; three years for common assault; and three years for going armed in public so as to cause fear.[1] All terms of imprisonment were ordered to be served concurrently and a period of 719 days spent in pre-sentence custody was deemed to be time already served under them. Because a sentence of ten years imprisonment was imposed, it followed that the applicant's conviction for attempted murder was a conviction for a serious violent offence (**SVO**) and, as such, he will be required to serve at least eight years of that sentence before becoming eligible to apply for parole.[2]

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[1] In addition, and as a consequence of his conviction for dangerous operation of a motor vehicle, the applicant was disqualified from holding or obtaining a drivers licence for a period of 12 months. That conviction as well as the applicant's conviction for attempted murder were also recorded as convictions for a domestic violence offence pursuant to s 12A of the *Penalties and Sentences Act*.

[2] That being the combined effect of ss 161A(a)(i), (ii) and 161B(1), (2) of the *Penalties and Sentences*

The application for leave

[8] The applicant seeks leave to appeal against the sentence imposed for attempted murder on two grounds,[3] but each relies on the same proposition. It is that, when determining the factual basis for that sentence, the primary judge wrongly found that the applicant held an intention to kill for a much longer period than was in fact the case. If that proposition is accepted, the applicant contends that the sentence of ten years was manifestly excessive. If not, it was conceded that the sentence was within range and, for that reason, unimpeachable.[4]

The circumstances of the offences

[9] The applicant was 51 years of age at the time of the offences and 53 at the time of sentence. He had no criminal history.

[10] He was born into poverty in rural Somalia and did not receive much in the way of an education. After completing what schooling he did receive, the applicant worked as a farm labourer for some time before establishing a small farm where he lived with his wife, son and daughter. During the civil war in that country, they were forcibly dispossessed of the farm by rebel soldiers and, in the process, the applicant was physically attacked, his wife sexually assaulted and they lost all contact with their son. The applicant and his wife managed to flee with their daughter to a refugee camp in Eritrea[5] where they remained for many years and had five more children. Then, in 2008, they immigrated with refugee status to Australia and settled in Townsville.

[11] The applicant separated from his wife in about 2012. He subsequently met the complainant on counts 1 to 4 shortly after she arrived in Australia with her five children. They formed a friendship and, over time, developed a relationship. In late 2012, they moved to Brisbane and, although never living together, the applicant was a frequent visitor to the complainant's home. At some time in July 2015, the applicant ended their relationship but, after a break of a month or so, he had a change of heart. In an attempt to rekindle the relationship, he made numerous telephone calls to the complainant, but she was not interested in having anything more to do with him.

[12] At about 7.40 am on the morning in question (10 September 2015), the complainant drove two of her children to a nearby railway station so that they could travel to

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Act and ss 180(1) and 182(2)(a) of the *Corrective Services Act* 2006 (Qld).

3 The grounds stated in the application for leave to appeal are that: (1) "[t]he sentence imposed for attempted murder was manifestly excessive"; and (2) "[t]here was an error by the sentencing judge with regard to the time the intent to kill was held".

4 Submissions on behalf of the Applicant, par 26.

5 In reliance on the submissions made in the court below, the sentencing remarks record that the refugee camp was situated in Ethiopia. However, it is clear from the other material tendered on sentence that the camp was situated in Eritrea. See, e.g., the letters of support provided by the applicant's friend, Mr Ibrahim, and daughter, Ms Samow, which from part of exhibit 8 as well as the histories contained in the reports prepared by Dr Butler, psychiatrist (exhibit 6) and Assoc Prof Freeman, psychologist (exhibit 7).

school. This was in accordance with her usual, school day routine.[6] On her return journey, the complainant turned into her street and immediately noticed the applicant driving a vehicle on the wrong side of the road and accelerating towards her. She swerved her vehicle to the side of the road and came to a halt, but the applicant drove on, ramming the complainant's vehicle head-on, and with sufficient force to cause the safety airbags in her vehicle to inflate.

[13] The complainant jumped from her vehicle and ran to the other side of the street. She was shouting for help. The applicant retrieved a machete from the boot of his vehicle and pursued the complainant on foot before cornering her near a fence. At first, she tried to struggle with the applicant, grabbing hold of the machete, but she injured her hand. She then tried to run behind the applicant but he struck her between five and seven times to the head and shoulders with the machete, after which she fell to the ground. At about this point, the complainant's neighbours intervened and managed to protect her from any further assault but, in the process, the applicant swung the machete at one of them (the complainant on count 5) who only avoided being struck by moving out of the way. The police were summoned.

[14] The complainant was conveyed by ambulance to the Princess Alexandra Hospital where she was treated for a six centimetre laceration to the right parietal area of her head and a superficial fracture on the cortex of her skull. She also had a number of superficial abrasions with associated bruising on both sides of her back and her upper shoulders along with abrasions on the fingers of her right hand and the toes of her left foot.

[15] To close the wound to the complainant's head, six staples were required. The medical evidence at trial was to the effect that this injury was caused by a blunt, linear object, consistent with the use of the machete. At least a moderate amount of force would have been required. The machete was tendered at the trial. Its blade was 40 centimetres in length, blunt on one side and sharp on the other.

The factual contest

[16] By s 132C(3) of the *Evidence Act* 1977 (Qld), if an allegation of fact is in contest on sentence, the sentencing judge may act on the allegation if the judge is satisfied on the balance of probabilities that the allegation is true. The degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true: s 132C(4). It is of course not open to a judge to sentence on a factual basis that is inconsistent with the jury's verdict.[7]

[17] Here, the period of time during which the applicant had an intention to kill was put in issue at the sentencing hearing and, so, the primary judge was required to make a finding of fact about that matter. Because the applicant did not give or call evidence, there was no direct evidence of his state of mind but the period during which he held an intention to kill was something that might be inferred from the proven circumstances.

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6 Sentence Transcript, 1-4 (AR 15).

7 *Cheung v The Queen* (2001) 209 CLR 1, [14], [17].

[18] The making of such a finding was rightly regarded by the primary judge as an "important aspect of the offending"[8] because it bore on the applicant's overall culpability for the offence and, accordingly, the degree of satisfaction required was high. There is, however, nothing to suggest that her Honour considered the proof of this issue to any lesser standard; rather, the complaint is that her Honour came to the wrong conclusion.

[19] In the court below, written outlines were exchanged which, in part, went to this issue and these were supplemented by oral submissions. For the applicant, it was submitted that it could only be inferred that he held an intention to kill for "a very brief period of time"[9] and that the "only time at which there is any basis for a finding that the requisite intention was present"[10] was when, after the complainant was cornered, she was struck by the applicant as she attempted to run behind him in order to get away. It was argued that, after this moment in time, the applicant could have struck the complainant to the head or used the machete in other ways designed to kill, but he refrained from doing so. As to the period leading up to that event, it was submitted that the applicant's conduct was "ambiguous"[11] and that the most that could be said was, in effect, that his initial intention was only to confront the complainant. It was accordingly contended that the intention to kill was momentary and that any finding that the applicant held such an intention for any longer period would be "inconsistent with the evidence".[12] The Crown submitted that it could be inferred that the applicant held an intention to kill from when he operated his vehicle dangerously in the complainant's street until her neighbours intervened to stop the attack on her. The points were made that no explanation was advanced by the applicant for the machete being in the boot of his vehicle or for his presence on the complainant's street at the time when she was returning home from her school run. It was submitted to be open to the primary judge to infer "some aspect of premeditation"[13] from those facts.

[20] After summarising the relevant evidence as well as the competing submissions, the primary judge made these findings:

> "I have considered the evidence and the submissions made. I am satisfied to the requisite standard consistent with the evidence and the jury's verdict that you held the intention to kill at all times, from the time you drove down the street where she lived and ran into her car, to when you hit her with the final blow. She only escaped that fate because she was able to run away and to defend herself and then was saved by the intervention of others at the point where you were

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8 Sentencing Remarks, 4 (AR 43).

9 Outline of Submissions on Sentence, par 4 (AR 62). And see Transcript, 1-13 (AR 24).

10 Ibid.

11 Sentence Transcript, 1-13 (AR 24).

12 Outline of Submissions on Sentence, par 5 (AR 63).

13 Sentence Transcript, 1-4 (AR 15).

about to put your intention to kill her into effect."[14]

[21] It will be appreciated that the argument put on behalf of the applicant in the court below was that his initial intent was only to confront the complainant, that this changed to an intention to kill when he struck the complainant as she tried to run behind him but that, thereafter, he did not hold any murderous intent. However, on the hearing of this application, it was conceded that the evidence, when taken with the verdict of the jury, supported a finding to the requisite standard that the applicant held an intention to kill from the time when he alighted from his vehicle to retrieve the machete until the complainant's neighbours intervened to stop the attack. Thus, it was no longer contended that the intention to kill was momentary. Instead, what was argued was that the primary judge erred in finding that the applicant held an intention to kill prior to alighting from his vehicle.

[22] Although a further concession was made on behalf of the applicant to the effect that he "deliberately collided"[15] with the complainant's vehicle, it was submitted that the evidence fell short of supporting an inference that, over the period when he drove down the applicant's street and rammed her vehicle, he had an intention to kill the complainant. In support of this argument, reference was made to the evidence of one of the witnesses at the trial who said that he observed the two vehicles "mirroring each other, like they were trying to avoid each other"[16] followed by a "very slow speed collision".[17] Although the complainant maintained when giving evidence that she saw the applicant "from a very short distance … driving towards [her] and accelerating"[18] and denied that the applicant was travelling at a very slow speed,[19] it was argued for the applicant that the other witness' account left open a number of rational inferences including that "he intended to confront her, or harm her, but not to kill her".[20]

[23] The primary judge was entitled to form her own view of the facts at sentence, consistent with the evidence at trial and the jury's verdict. Her Honour plainly accepted the evidence which the complainant gave as to what she observed about the manner in which the applicant was driving towards her in preference to the evidence of the other witness on the same topic. Not only was it necessary to resolve that conflict but it may be said that her Honour's reliance on the complainant's account was well-justified by the uncontested fact that the force of the collision was sufficient to cause the airbags in the complainant's vehicle to inflate. Once her account in this respect was accepted, it was open to her Honour to infer to the high degree necessary that the applicant held an intention to kill from the moment he drove into the complainant's street. After all, the applicant drove

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14 Sentencing Remarks, 5 (AR 44).

15 Submissions on behalf of the Applicant, par 23.

16 Trial Transcript, 1-41.

17 Trial Transcript, 1-47.

18 Trial Transcript, 1-30.

19 Trial Transcript, 1-34.

20 Submissions on behalf of the Applicant, par 23.

down the complainant's side of the street and, after she swerved off the road to avoid him, he continued on, deliberately accelerating into her stationary vehicle. Furthermore, the applicant must be taken to have done all of that with the knowledge that he had a machete in the boot of his vehicle which, of course, he immediately retrieved before chasing after the complainant and using it on her. The proposition that the applicant had some lesser intent until he alighted from his vehicle is a most improbable one in the face of those circumstances. The primary judge was, in my respectful view, right to reject it. Not only were the challenged findings of fact open as a logical and rational inference from the evidence at trial that her Honour accepted, it would be surprising if any different conclusion was reached.

[24] For these reasons, it cannot be said that there is any substance in the proposition underlying the proposed grounds of appeal.

The sentence otherwise

[25] As earlier stated (at [8]), it was accepted on behalf of the applicant that it could not be said that the sentence imposed for attempted murder was manifestly excessive unless his challenge to the findings of fact was upheld[21] and, for the following reasons, that must be so.

[26] In the court below, the Crown submitted that the features of this case including its protracted nature and the use of a weapon placed it at the upper end of what was described as a broad range for offending of this type of between 10 and 14 years. In support of that submission, reference was made to the decisions of this Court in *R v Mallie; ex parte A-G (Qld)*[22] (10 years after a plea of guilty to attempted murder of his former partner who was repeatedly stabbed and punched but with no lasting injury and where there was no premeditation), *R v Williams*[23] (15 years after a trial for attempting to kill his former wife after breaking into her home and plunging a knife into her chest as she slept in a bedroom) and *R v Hicks*[24] (12 years after a trial for the attempted hanging of a neighbour in order to conceal a fraud he had perpetrated on her), each of which attracted an automatic SVO declaration. The defence submitted that a sentence of nine years without an SVO declaration was appropriate. Reliance was placed on *R v Sauvao*[25](nine years without an SVO declaration on a plea of guilty for an unpremeditated attempt on the life of his de facto wife by stabbing her with a knife that broke on impact before punching, kicking and slamming her head into a chair and a pole until bystanders intervened), *R v Jurcik*[26] (nine years without an SVO declaration after a trial for the attempted murder of a prostitute whom he stabbed multiple times to the body and hand before

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21 Submissions on behalf of the Applicant, par 26.

22 [2009] QCA 109.

23 [2015] QCA 276.

24 [2017] QCA 14.

25 [2006] QCA 331.

26 [2001] QCA 390.

she escaped) and *R v Seijbel-Chocmingkwan*[27] (10 years with an SVO declaration after pleading guilty to the attempted murder of the new partner of her estranged husband by stabbing her a number of times before attempting to strangle her). Mention should also be made of *R v Rochester; ex parte A-G (Qld)*[28] which, although not referred to in the court below, resulted in a sentence of 10 years imprisonment with an automatic SVO declaration after a trial (after making threats to kill his wife, and in defiance of a Domestic Violence Order, the appellant went to her place of work and stabbed her in the chest and abdomen causing life-threatening injuries).

[27] This Court has observed on a number of previous occasions that the appropriate range for the crime of attempted murder is generally between 10 and 17 years[29] but, when assessing the objective seriousness of any such offence, much will depend on a range of factors such as the nature of the attack, its duration, the degree of any planning, whether the assailant voluntarily desisted,[30] whether a weapon was used and the severity of the physical and/or psychological injuries caused to the victim. That is why sentences for this crime of intention vary greatly depending on the extent to which the intention to kill was put into effect by the offender's acts.[31] It follows that sentences above and below that general range may be called for in appropriate cases.

[28] It is also to be kept in mind that, quite apart from the folly of attempting to grade criminality in a case at hand through a comparison of aggravating and mitigating factors in other cases as if there could only ever be a single correct sentence,[32] any sentence of 10 years or more will carry with it an SVO declaration requiring the offender to serve at least 80% of that sentence. For that reason, the sentence will often be reduced to take into account factors in mitigation because that is the only way of reflecting those factors so as to arrive at a sentence that is just in all of the circumstances.

[29] Indeed, that is what happened here. When proper regard is had to the circumstances of the offence, involving as they did a prolonged attack on a defenceless woman involving multiple blows with a formidable weapon and in retaliation to her rejection of him, a sentence considerably in excess of ten years was called for, but it was clearly reduced by the primary judge to take account of the factors personal to the applicant. They included an absence of any previous criminal convictions, his cooperation in the proceeding, including the entry of the pleas of guilty to counts 1,

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27 [2014] QCA 119.

28 [2003] QCA 326.

29 *R v Reeves* [2001] QCA 91, p 5; *R v Rochester; ex parte A-G (Qld)* [2003] QCA 326, [31]; *R v Sauvao* [2006] QCA 331, p 4.

30 As to which, see s 538 of the *Criminal Code* (Qld) which has the effect of reducing the maximum penalty for this offence from life imprisonment to 14 years if it is proved that "the person desisted of the person's own motion from the further prosecution of the person's intention, without its fulfilment being prevented by circumstances independent of the person's will", which provision is discussed and explained in *R v Witchard & Ors; ex parte A-G (Qld)* [2005] 1 Qd R 428; [2004] QCA 429.

31 To paraphrase what was said by the Court in *R v Tevita* [2006] QCA 131, [10].

32 *R v Dwyer* [2008] QCA 117, [37] per Keane JA.

5 and 6, the presence of a mental health disorder at the time of the offence which impaired to some extent his capacity to control his behaviour and the significant communication and other difficulties he had experienced, and would continue to experience, in custody.

[30] In all of the relevant circumstances pertaining to this case, the sentence imposed for attempted murder of 10 years imprisonment was not manifestly excessive.

[31] There was, however, an error in the sentence imposed for count 6 (going armed in public so as to cause fear). During the course of argument on this application, counsel for the Crown (who did not appear in the court below) pointed out that the maximum penalty prescribed by the *Criminal Code* (Qld) for that offence is two years imprisonment: s 69(1). The sentence of three years imprisonment which was imposed cannot stand. Leave to appeal should be granted to correct that mistake and a sentence of two years imprisonment substituted.[33]

Disposition

[32] The orders I propose are these:

1. Grant leave to appeal;
2. The appeal be allowed in part;
3. Set aside the sentence imposed for the offence of going armed in public so as to cause fear and substitute a sentence of two years imprisonment;
4. The sentences and orders otherwise made at first instance remain unaffected.

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[33] On the hearing of the appeal, counsel for the applicant agreed with the submission made by counsel for the Crown that a sentence of two years imprisonment should be substituted.