

SUPREME COURT OF QUEENSLAND

CITATION: *R v Small* [2026] QCA 158

PARTIES: **R**
v
SMALL, Michael Bradley
(applicant)

FILE NO/S: CA No 197 of 2024
SC No 867 of 2022

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 4 September 2024 (Callaghan J)

DELIVERED ON: 28 August 2026

DELIVERED AT: Brisbane

HEARING DATE: 7 November 2025

JUDGES: Mullins P, Bond JA, Boddice JA

ORDERS: **1. Application for leave to appeal granted.**
2. Appeal dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was tried before a jury for murder but convicted of manslaughter – where the applicant was sentenced to 14 years’ imprisonment with parole eligibility after serving 80 per cent of the head sentence – where the applicant was sentenced on the basis that he caused the deceased’s death and was also liable as a party for the co-offender’s role in the assault of the deceased – where the applicant failed to show that the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant was tried before a jury for murder but convicted of manslaughter – where the applicant was sentenced to 14 years’ imprisonment with parole eligibility after serving 80 per cent of the head sentence – where the co-offender pleaded guilty to manslaughter and was sentenced to five years’ imprisonment wholly suspended for an operational period of five years – where the applicant was sentenced on the basis that he played the dominant role in assaulting the deceased – where the co-

offender's plea was made in circumstances where the prosecution may not have been able to prove his guilt of the offence of manslaughter – where the co-offender undertook to give evidence against the applicant – where the co-offender's sentence was also reduced for totality considerations – where the co-offender's evidence at trial differed from the co-offender's statement on which he was sentenced – where the co-offender's evidence at trial cast the conduct of both the applicant and the co-offender in a worse light than the co-offender's statement on which his guilty plea was based – where there was no error in the application of the parity principle by the sentencing judge

CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCE – ROLE OF GUILTY PLEA OR DEPOSITIONS – where the applicant was tried before a jury for murder but convicted of manslaughter and the conviction declared a conviction for a serious violent offence – where the applicant offered to cooperate with authorities and plead guilty to manslaughter in conjunction with giving an induced interview – where the prosecution declined to take a statement from the applicant based on the induced interview – where the applicant subsequently instructed his trial counsel to enquire whether the prosecution would entertain an offer to plead guilty to manslaughter – where the applicant's trial counsel prior to the 2023 trial listing and the 2024 trial made two informal approaches to the prosecution to explore the possibility of whether the prosecution would consider an offer from the applicant to plead guilty to manslaughter and the prosecution rejected these informal approaches – where the applicant's trial counsel later made a formal offer to plead guilty during the trial – where the offer made at the time of the induced interview and the two informal approaches were not brought to the attention of the sentencing judge – where the applicant's trial counsel made a considered decision not to refer to the applicant's induced interview in the sentencing submissions because it minimised the applicant's role in the offending – where there was no allegation of incompetence of counsel – where the two informal approaches cannot be characterised as formal offers to plead guilty – where there was no misleading of the sentencing judge by not providing information about the applicant's induced interview or the informal approaches to sound out the prosecution of a possible guilty plea to manslaughter

Cameron v The Queen (2002) 209 CLR 339; [2002] HCA 6, cited

Green v The Queen (2011) 244 CLR 462; [2011] HCA 49, cited
R v Bates; *R v Baker* [2002] QCA 174, considered
R v Beacham (2006) 163 A Crim R 348; [2006] QCA 268, considered

R v Gordon (2024) 18 QR 1; [\[2024\] QCA 16](#), cited
R v Lyon [\[2006\] QCA 146](#), cited
R v Smith (2022) 10 QR 725; [\[2022\] QCA 89](#), considered
R v West [\[2011\] QCA 76](#), considered
Western Australia v Auckram (2013) 229 A Crim R 397;
 [2013] WASCA 256, considered

COUNSEL: A E Cappellano, with H J Rafter, for the applicant
 C N Marco for the respondent

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

[1] **MULLINS P:** The applicant was tried before a jury for one count that, on 30 August 2020, he murdered Mr Stephens (the deceased). He was acquitted of murder and convicted of manslaughter. He was sentenced to imprisonment for a period of 14 years. The conviction was declared a conviction for a serious violence offence. A declaration was made that 1,458 days spent in pre-sentence custody between 7 September 2020 and 3 September 2024 was imprisonment already served under the sentence. He applies for leave to appeal against the sentence.

[2] The grounds for the application are:

1. The sentence is manifestly excessive.
2. The sentencing judge erred in the application of the parity principle as the sentence of 14 years' imprisonment, with parole eligibility after serving 11.2 years, is disproportionately higher than the co-offender's "but for" sentence of seven years' imprisonment, with parole eligibility after serving 20 months, such as to give rise to a justifiable sense of grievance.
3. The sentence proceeded on a misapprehension of the true state of affairs existing at the time of the sentence. The sentencing judge proceeded on the basis the applicant offered to plead guilty to manslaughter only during his trial and was unaware that the applicant had expressed a willingness to cooperate with authorities and plead guilty to manslaughter on previous occasions. One of the occasions was a formal offer to plead guilty to the charge of manslaughter and provide a s 13A undertaking to give evidence against his co-offender and his subsequent participation in an induced interview prior to the matter reaching the Supreme Court.

History of the proceeding

[3] The applicant was arrested and charged with murder on 7 September 2020 immediately after his second interview with police.

[4] The applicant was represented by Legal Aid Queensland (LAQ) when his solicitor on 31 January 2022 emailed the prosecutor that the applicant was interested in providing an induced statement to police for consideration by the prosecution for a s 13A benefit on a plea to manslaughter. Instructions to that effect were confirmed by LAQ with the prosecutor by email on 17 March 2022. LAQ was in possession of written

instructions from the applicant dated 16 March 2022 that noted that the committal hearing was currently part-heard and was to resume on 23 March 2022.

- [5] The applicant participated in the induced interview with police on 12 May 2022. LAQ was advised by the prosecution by letter dated 4 July 2022 that the prosecution would not be relying on the interview and would not be taking a formal statement from the applicant.
- [6] The indictment against the applicant and co-offender was presented in the Supreme Court on 15 July 2022 when the applicant was represented by LAQ.
- [7] Around October 2022 RMO Law took over the applicant's matter and Mr Minnery of counsel was briefed.
- [8] The applicant has exhibited emails and file notes from RMO Law's file. There is a solicitor's handwritten note of a conference with the client and Mr Minnery on 24 March 2023 that, in relation to the murder charge, they "will discuss plea to manslaughter after pre-trial".
- [9] On 8 June 2023, the prosecution entered a *nolle prosequi* in respect of the co-offender. The co-offender had undertaken to cooperate with law enforcement agencies and to give evidence against the applicant. On 8 June 2023, a new indictment was presented against the co-offender for manslaughter to which he pleaded guilty and was sentenced by Ryan J to five years' imprisonment suspended on the date of sentence for an operational period of five years and in respect of which a pre-sentence custody declaration was made that 238 days spent in pre-sentence custody between 13 October 2022 and 7 June 2023 was time already served under the sentence. But for the undertaking to give evidence at the applicant's trial, the co-offender would have been sentenced to seven years' imprisonment with eligibility after serving 20 months' imprisonment with the same pre-sentence custody deduction.
- [10] There are notes dated September 2023 on RMO Law's file that record "Crown has started talking a bit about clients interest in plea to manslaughter" but there is also the note that "Not something he had to decide now". The note suggests that the applicant was being kept "informed" and that "Can offer manslaughter on a particular basis any time or say no he wants a trial".
- [11] The trial was set down to commence on 25 October 2023 with the pre-trial hearing listed for 23 October 2023, but both were adjourned as the prosecution had advised that a large amount of material had been downloaded from the applicant's phone and also to enable a *Basha* hearing in respect of the co-offender's evidence to take place which it did on 8 May 2024. Mr Minnery passed away shortly after the *Basha* hearing.
- [12] Mr Bonasia of counsel was retained to appear on behalf of the applicant at the trial. The trial took place between 15 and 30 August 2024. The applicant did not plead guilty to manslaughter when arraigned at the commencement of the trial.
- [13] After the co-offender had given evidence at the trial, the applicant was advised by his lawyers that the prosecution might accept a plea of guilty to manslaughter and the applicant instructed them to advise the prosecution that he would plead guilty to manslaughter. This offer was rejected and the trial continued.
- [14] The applicant did not give or call evidence at the trial.

Pre-existing relationships involving the applicant, the co-offender and the deceased

- [15] The co-offender and the deceased had been in a sexual relationship before the co-offender met the applicant when they were both residents at a drug rehabilitation centre in 2019. The applicant had an alcohol problem and the co-offender was addicted to methylamphetamine. The co-offender was sentenced on 14 October 2019 to three years' imprisonment with immediate release on parole for possessing dangerous drugs. After the co-offender was released on parole, he and the applicant returned to abusing alcohol and methylamphetamine. The deceased was obsessed with the co-offender. The co-offender stayed with the deceased on the night on 26 August 2020 when they both consumed methylamphetamine. There was tension between the co-offender and the applicant about the co-offender's stay overnight with the deceased.

Sentencing hearing

- [16] Even though the sentencing took place after trial, there was a dispute between the prosecution and the applicant as to the factual basis on which the applicant should be sentenced. The prosecution submitted that the co-offender's evidence should be accepted on material matters as his evidence was supported in significant ways from other evidence. It was contended for the applicant that the co-offender was an unimpressive witness and his evidence was not supported by the forensic evidence, as the forensic pathologist Dr Milne would have expected to see more significant injuries, including fractures and bruising, if the deceased had been assaulted in the manner described by the co-offender. The applicant's submission that he should be sentenced on the basis that he had neither kicked at, nor stomped on, the deceased's head was unsuccessful. There is no challenge to the factual findings made by the sentencing judge for the purpose of the sentencing.

Sentencing remarks

- [17] The sentencing remarks about the circumstances of the offending included the following.
- [18] The offence was committed against the background of the applicant's "dissolute lifestyle, drug use, sexual obsession and dysfunctional relationships" and the applicant's burning antipathy towards the deceased which "grew to an irrational and fanatical level". The applicant and the co-offender went to the deceased's residence with an intention to harm him. The purpose of the visit was not to kill (or cause grievous bodily harm to) the deceased. The applicant wanted to hurt him "in a way that he would find unforgettable". This intention was fuelled by paranoia and anticipation of violence commonly associated with excessive use of amphetamines. It was not possible to make any specific finding about the connection between the applicant's drug use and the crime. The applicant made a callous decision to leave the deceased in the degraded state to which the applicant had reduced him and then lock the doors to his residence. The deceased's body was left to decompose with the result that much remained uncertain about the cause of his death.
- [19] The co-offender's actions during and after the offence were reprehensible. The sentencing judge found that he could proceed safely on those parts of the co-offender's evidence where he was unchallenged, where he was supported by other

evidence, and where there was no basis on which to conclude that he was fabricating. That was especially so where the co-offender's evidence "cast ... both ... [the applicant and him] in a worse light than did [the co-offender's] original statement". The co-offender may have had reason to downplay his involvement and his knowledge of the applicant's acts when giving his original statement but that was not the case when the co-offender testified.

- [20] The offence was preceded by planning and an element of deception. There was not, at the outset, an intention to burglar the deceased. The attack on the deceased did not begin at once, as the applicant and the co-offender found the deceased in an unexpectedly vulnerable condition. His medical conditions heightened the risks of mortality during the attack and those conditions were exacerbated by his drug use. The deceased's drug use in the period immediately before his death meant that he was, at first, oblivious to the threat posed to him by the applicant. This was in part because the applicant exploited the deceased's relationship with the co-offender in order to gain access and start the attack, as only the co-offender was at the door when the deceased opened it. It was cowardly for the applicant and the co-offender to combine in an attack against such a vulnerable man.
- [21] The fact that the co-offender's role may have been greater than that which he originally volunteered when he offered to cooperate with authorities had an unintended benefit for the applicant in creating doubts about issues on which the jury had to be satisfied beyond reasonable doubt before they could convict of murder. Another consequence was that the sentence imposed on the co-offender, whilst relevant, could not be regarded "as some sort of anchor point" for the purpose of sentencing the applicant. The "but for" sentence for the co-offender was calibrated on a version of events that did not involve, for example, the co-offender striking the deceased's head at the same time the applicant was kicking the deceased.
- [22] The following remarks then explained why the sentencing judge considered that there could not be parity between the sentence imposed on the applicant and the sentence imposed on the co-offender:

"Given the way in which the Crown case was particularised, you must bear responsibility for your own acts. But you cannot escape liability for those things done by [the co-offender]. And in that way, a conviction for manslaughter was, it seems to me, absolutely inevitable. You will receive a significantly more severe sentence than that which was imposed on [the co-offender].

I am of the view that you will not be entitled to any sense of grievance about the differences in the sentences themselves. They must necessarily be different, given the fact of his plea, the basis of his plea and the fact that you went to trial. Your grievance, if you have one, may well be with the process that allowed him to negotiate the system in the way that he did. Especially is that so because of what I have said was the reprehensible and detestable nature of his conduct.

In my view, however, your grievance about the process is of a different kind from any grievance you may feel about the sentence. It is not just a question of [the co-offender's] involvement being greater; but also of considering the total combination of force that was applied. And in that regard, there is a sinister dimension to any attack that is committed by two individuals against one other."

- [23] The sentencing judge could not find that the death was caused by “extreme violence” but did find that the applicant and the co-offender “were complicit in a depraved and concerted joint effort to demean and humiliate a man who was not in a position to resist”. The sentencing judge accepted that the co-offender was telling the truth when he described the way the applicant used very strong force to kick at, and stomp on, the head of the deceased.
- [24] The sentencing judge noted three points. The first was the candour of the co-offender’s evidence about the force with which the applicant kicked the deceased’s head and stomped on it combined with the co-offender’s admission of his involvement in that part of the attack. The second point was the acceptance by the sentencing judge of the evidence of Mr Morris as to what he overheard the applicant say to his brother about what the applicant had done to the deceased during which the head stomping was re-enacted. The third was that the applicant had disposed of his shoes that he had been wearing when he kicked at, and stomped on, the deceased.
- [25] The sentencing judge further noted that the attack was calculated to degrade and humiliate the deceased. This included taping the deceased’s mouth to gag him and the applicant attempted to urinate on the deceased (consistent with what he had articulated in a text message). The applicant who believed he had HIV also used a syringe (into which he had attempted to draw blood from himself) to inject the deceased. The sentencing judge was unable to reach any conclusion about the precise manner in which the applicant used the dildo that was found at the scene, but the sentencing judge accepted “that it was presented during the course of the assault and brandished by [the applicant] in some way”.
- [26] The sentencing judge described the applicant’s conduct after the offence as “cold, callous and dishonest”. He lied during the three hours he was interviewed by the police. It was apparent from the manner in which the trial was conducted on the applicant’s behalf that the applicant gave instructions that the deceased was not kicked when the evidence was to the effect that the applicant kicked the deceased. It was not possible to find that the applicant had at any stage exhibited genuine remorse.
- [27] The sentencing judge took some guidance from observations made in cases which shared some of the features of the applicant’s offending and circumstances such as *R v Beacham* [2006] QCA 268, particularly at [29].
- [28] The sentencing judge took into account in the applicant’s favour his offer during the trial to plead guilty to manslaughter as that was an attempt to create a utilitarian benefit and that the trial was run in “a most responsible fashion” with admissions made by the applicant resulting in the course of evidence being shortened in a way that was of benefit to all.
- [29] The sentencing judge also referred to the applicant’s antecedents. The applicant was 33 years old at the date of the offence. There was nothing in his background and his lack of criminal history that suggested the applicant would commit “an offence of such savagery”. Even though the applicant had no prior criminal history, he was on bail at the time of the killing for offending detected on 24 March 2020 when he was outside a house which he believed was connected to the deceased. Whilst in prison the applicant had done what he could to address his addiction to alcohol and drugs. The applicant had family support.

Did the sentencing proceed on a misapprehension as to the applicant's willingness prior to the trial to cooperate by pleading guilty to manslaughter?

- [30] The applicant's counsel commenced submissions at the hearing of the application with the third ground. In addressing this ground, the applicant relied on his affidavit filed on 10 October 2025. The respondent relied on Mr Bonasia's affidavit filed on 24 October 2025 and the affidavit of Ms Adler, a senior legal officer employed by the respondent, also filed on 24 October 2025. There was no cross-examination of the deponents at the hearing of the application.
- [31] The applicant in his affidavit set out the chronology in relation to the induced interview and two other approaches which he instructed to be made on his behalf of his willingness to plead guilty to manslaughter. One approach was before the 2023 trial listing. The applicant deposed to Mr Minnery speaking to him at a conference at the prison about putting in a submission to the prosecution offering to plead guilty to manslaughter and that Mr Minnery later advised him that the prosecution did not accept the submission and the matter would proceed to trial. Ms Adler's affidavit discloses that her search of the electronic and physical prosecution files and her enquiries of the former legal officers who had carriage of the file do not reveal any record or recollection of a submission from Mr Minnery. The respondent on the hearing of this application conceded appropriately that the application should be conducted on the basis that an approach by Mr Minnery had been made to the prosecution to explore the possibility of whether the prosecution would entertain an offer to plead guilty to manslaughter from the applicant and that was refused.
- [32] The applicant deposed to being advised by Mr Bonasia leading up to the 2024 trial that Mr Bonasia had a conversation with the Crown, as the applicant had instructed him to do, about whether pleading guilty to manslaughter was on the table and that Mr Bonasia advised the applicant that the response from the prosecution was "no way" and that if the applicant pleaded guilty to murder before the trial, the prosecution would not seek a non-parole period of more than 20 years, but would do so if the applicant were convicted of murder after trial. Mr Bonasia recalled (at paragraphs 22-23 of his affidavit) having a conversation with the prosecutor, Mr Wallis, to that effect after one of the review mentions and that it was a conversation of an informal nature, as routinely occurs between counsel in the practice of crime to sound out the Crown as to a possible resolution. Mr Bonasia also stated (at paragraph 22) that "Given the informal nature of the conversation, there was no specific factual basis discussed." Mr Bonasia noted (at paragraph 24) that he did not recall the applicant instructing him to approach the Crown but was prepared to accept that the applicant did instruct him to make the enquiries to see whether the Crown would entertain a plea of guilty to manslaughter.
- [33] Mr Bonasia deposed (at paragraph 14 of his affidavit) to having perused the transcripts in his brief of the conversations that the applicant had with police which were recorded, including the induced interview. Mr Bonasia explained his reasoning in relation to the sentencing (at paragraphs 18-20 of his affidavit):
- "18. Once he was convicted of manslaughter, it was apparent to me that it would be necessary for Callaghan J to make factual findings on the sentence. It was decided that the applicant would not give evidence at the sentence.

19. I recall forming the view that it would be unhelpful to the applicant for me to refer to his early offer to plead and give a section 13A statement because of some of the factual matters in that induced version. I formed the view that if I referred to this offer, then the Crown would likely tender the transcript and emphasise the factual matters which would create a more serious assessment of the facts that would likely result in a higher penalty.
20. I was not instructed to refer to this early offer as part of my submissions on sentence.”

- [34] There is therefore no allegation by the applicant of incompetence on the part of Mr Bonasia in not referring to the induced interview in sentencing submissions as it was a considered decision by counsel not to do so and the applicant did not instruct otherwise.
- [35] Ground 3 is pursued by the applicant because the submissions made on sentence by both the prosecutor and Mr Bonasia had the result of the sentencing judge finding that there was only one attempt by the applicant to offer to plead guilty to manslaughter which was the offer that was made during the trial. The applicant submits that, as that did not represent the true state of affairs, the sentencing judge was inadvertently misled by the submissions that had been made. The assumption implicit in this submission is that there is an obligation on the parties appearing on the sentencing hearing to inform the sentencing judge fully of any matter that may be relevant to the sentencing. Putting the duties of the prosecutor to one side, that assumption does not take account of the adversarial aspect of the hearing and that there is scope for counsel for a defendant to exercise judgment and discretion over the matters placed before the sentencing judge.
- [36] For the purpose of sentencing, the relevance of a prior offer to plead guilty to the offence of which the offender is ultimately found guilty after trial is that the prior offer to plead guilty can be characterised in an appropriate case as consistent with an expression of remorse, acceptance of responsibility for the offending, or at least cooperation with the administration of justice: see *Cameron v The Queen* (2002) 209 CLR 339 at [22]. Whether that is applicable in a particular case can be affected by the course of the proceeding after the prior offer to plead guilty and a defendant’s approach to the trial. This was explained in *R v Lyon* [2006] QCA 146 at [27]-[28] and *R v Gordon* (2024) 18 QR 1 at [23]-[28].
- [37] The primary matters to which the sentencing judge was required to have regard are those set out in s 9(3) of the *Penalties and Sentences Act 1992* (Qld) (Act). That did not preclude consideration of the other sentencing factors in s 9(2) of the Act (apart from s 9(2)(a)). Section 9(2)(i) permits the Court to take into account how much assistance the offender gave to law enforcement agencies in the investigation of the offence. It is explicable why the applicant’s induced interview was not referred to in the prosecutor’s submissions on sentence, as the prosecution had not relied on that interview and did not take a statement from the applicant. There were good reasons why the offer to plead in conjunction with the induced interview in 2022 were not put before the sentencing judge by Mr Bonasia, as the version of events disclosed in that interview minimised the applicant’s involvement in the assault of the deceased. It is implicit in Mr Bonasia’s reasons for not referring to the induced interview that he

concluded that the offer to plead guilty in those circumstances was neither indicative of remorse nor consistent with cooperating in the administration of justice as the offer was based on a version not ultimately reflected in the evidence adduced at the trial. The interview could therefore not be characterised as assistance given to the law enforcement agencies. The reasonable course taken by Mr Bonasia in not referring to the offer to plead guilty in conjunction with the induced interview (in respect of which the applicant did not instruct otherwise) means that it cannot be concluded that the sentencing judge was “misled”. Ground 3 cannot succeed to the extent that it is based on the 2022 offer to plead guilty.

[38] Prior to the applicant’s trial in 2024, the only written instructions that he provided to his lawyers that he would plead guilty to manslaughter were those dated 16 March 2022 before the induced interview. Despite the applicant referring in his affidavit to both Mr Minnery and Mr Bonasia making a “submission” to the prosecution on his behalf that he would plead guilty to manslaughter, it is apparent from the lack of documentation in relation either to those instructions or to a record of the making of a submission in either the applicant’s solicitor’s file or the file of the prosecution that, at most, there was an informal approach by the applicant’s then counsel to the prosecutor on two occasions to explore whether the prosecution would entertain an offer from the applicant to plead guilty to manslaughter that was rejected by the prosecutor.

[39] Such an informal approach was described as an “overture” or “sounding out” in *Western Australia v Auckram* (2013) 229 A Crim R 397 at [96] and [176]. There was a hung jury in Mr Auckram’s first murder trial. Six days before the second trial his trial counsel sent to the prosecution an email that comprised one sentence “I inquire whether the DPP would consider accepting a plea to manslaughter on this matter at this time?”. Evidence was adduced on the appeal from Mr Auckram’s solicitor that the email was intended to be an unconditional offer by Mr Auckram to plead guilty to manslaughter. Buss JA (with whose reasons Hall J generally agreed) observed at [96]:

“An offer to plead guilty is to be distinguished from a mere ‘overture’ or ‘sounding out’ by an offender’s legal representatives, either with or without instructions.”

[40] Despite not treating the email as an offer to plead guilty, Buss JA (at [108]) considered that, in the circumstances where Mr Auckram’s lawyers had intended the email to be an unconditional offer to plead guilty to manslaughter, it should not be discarded as irrelevant to the sentencing decision and given no weight. In contrast, Mazza JA considered (at [171]) that the email could not reasonably be understood as conveying an offer and therefore had no mitigating effect. Ultimately the difference in the approach to that email made no difference to the outcome of the State’s appeal which was successful. The difference in approach can be attributed to Buss and Hall JJA giving some effect to the evidence of the lawyers’ intention, whereas Mazza JA assessed the email on its terms. *Auckram* is authoritative for the proposition that an “overture” to, or an informal approach to sound out, the prosecution does not equate with an offer to plead guilty.

[41] The two informal approaches prior to the trial made to the prosecutor respectively by Mr Minnery and Mr Bonasia had minimal, if any, relevance to the sentencing, even if they had been brought to the sentencing judge’s attention. They could not be

characterised as offers to plead guilty. When the approaches were rejected by the prosecution, they were followed neither by a formal offer to plead guilty to manslaughter nor by pleading guilty to manslaughter at the commencement of the trial. As was his right, the applicant opted to keep open the possibility of a complete acquittal. It would not have been appropriate in those circumstances to submit that the prior approaches of the applicant's counsel to convey to the prosecution that the applicant may be willing to plead guilty to manslaughter indicated remorse or cooperation with the administration of justice. As noted by the sentencing judge, the applicant made admissions which shortened the trial which was treated by the sentencing judge in the applicant's favour as relevant cooperation together with the unconditional offer to plead guilty during the trial. In the circumstances of the applicant's trial, there was no misleading of the sentencing judge by not informing him of the two informal approaches made to the prosecution prior to the trial that did not progress in any way.

- [42] The applicant fails on ground 3.

Was the sentence manifestly excessive?

- [43] Critical to the applicant's submissions on the first ground is that the applicant was sentenced on the basis that he caused the deceased's death, as a result of his actions and was also liable as a party for the co-offender's attack, but he was not sentenced on the basis that his kicking or stomping on the deceased's head caused any injury to the deceased or his death. The sentencing judge was satisfied that the assaults by the applicant and the co-offender involved violence towards a vulnerable victim but not extreme violence. Those findings were relevant to the consideration of the comparable authorities.
- [44] The authorities relied upon by the prosecution before the sentencing judge were *R v Bates*; *R v Baker* [2002] QCA 174, *R v Beacham* [2006] QCA 268 and *R v West* [2011] QCA 76.
- [45] In *Bates*, the offender in company with Ms Baker and others broke into the deceased's home and struck and kicked the first complainant who was 14 years old about the head and body before inflicting a vicious battering on the deceased involving kicking and punching him in the head on multiple occasions in a prolonged assault and where the deceased died as a direct result of head injuries. Ms Baker also delivered a forceful kick to the deceased's head. The offender pleaded guilty to manslaughter and assault occasioning bodily harm at the start of his second murder trial. He was sentenced to life imprisonment for the manslaughter. He was 20 years old, had a criminal history for assault occasioning bodily harm for which he was given 18 months' probation about 11 months prior to the offending. He was successful in appealing against the life sentence and, in lieu, a sentence of 18 years' imprisonment was imposed. Because the death of the deceased in *Bates* arose directly from the extreme violence inflicted on him and the offence of assault occasioning bodily harm was committed against the first complainant in the same incident, the offending was in a more serious category than the applicant's offending.
- [46] The offender in *Beacham* pleaded guilty to manslaughter after the Mental Health Court concluded that the defence of diminished responsibility applied to the charge of murder. He killed the deceased who was his supplier of cannabis and whom he believed was a paedophile. He took a co-offender with him to the deceased's building

for the purpose of assaulting and robbing the deceased. The co-offender waited downstairs. The offender entered the unit and complained to the deceased about the quality of some cannabis and, as he inspected it, the offender punched the deceased knocking him to the ground. He then stood on the deceased's arm and injected him with Temazepam which caused him to lose consciousness. The offender then tied the deceased's hands and feet tightly together, with his hands tied behind him, and kicked the deceased in the head and throat area some seven or eight times. He was left tied up, face down, on the floor and was found some 15 to 16 hours later in the same position and dead. The cause of death was asphyxiation. The offender also pleaded guilty to raping and robbing the deceased. His guilty pleas were early. He was 32 years old when he offended and had a substantial criminal history. On the basis the manslaughter resulted from the offender's deliberately creating the incapacitating condition in a planned and brutal robbery, the sentence imposed on the appeal by majority for the manslaughter was 12 years' imprisonment.

- [47] After trial, the offender in *West* was acquitted of murder but found guilty of manslaughter. The offender was 32 years old when he offended and had a minor criminal history. He killed his uncle whom he believed was a paedophile. He was heavily intoxicated with alcohol and admitted he had injected amphetamine two days before the incident and had not slept for those two days. The offender had used a flywheel to attack his uncle with at least seven blows of severe force to the top of his head and blows to other parts of his body. The attack continued when the offender jumped and down on his uncle's chest while he was disabled on the ground. On appeal, the sentence of 15 years for manslaughter was reduced to 13 years. There was no planning or premeditation and the offender acted alone in the attack. The offender demonstrated no remorse, as he did not plead guilty to manslaughter. The killing was described by the sentencing judge as "an act of great savagery".
- [48] There were similarities between the applicant's offending and that in *Beacham* but the feature in *Beacham* that explains the sentence of 12 years' imprisonment for manslaughter was the early guilty plea in the context of the diminished responsibility finding. Unlike the applicant's offending, the offender in *West* had not planned the assault on the deceased. Treating the question of parity with the sentence imposed on the co-offender as a separate ground of appeal, but taking into account that the applicant caused the deceased's death in circumstances where the assault that preceded his death involved the applicant acting in conjunction with the co-offender in the planned assault of the deceased who was in a vulnerable state that was intended to degrade and humiliate him and the sentence for manslaughter was imposed after trial, the comparable authorities of *Beacham* and *West* do not support a conclusion that the sentence of 14 years' imprisonment imposed on the applicant was manifestly excessive. The applicant therefore cannot succeed on ground 1.

Was there an error in the application of the parity principle?

- [49] The rationale for the parity principle and its application in an appeal by an offender against the severity of the sentence imposed on the offender compared to the sentence imposed on a co-offender was explained by French CJ and Crennan and Kiefel JJ in *Green v The Queen* (2011) 244 CLR 462 at [28]-[33].
- [50] The co-offender is the same age as the applicant. The factual basis on which he was sentenced was that the applicant had the dominant role in assaulting the deceased and that the co-offender was the applicant's assistant or encouraging bystander, as the

applicant's purpose escalated. He was not sentenced on the basis of the greater involvement in the attack that he admitted to in the evidence he gave at the applicant's trial, including that he was punching the deceased when the applicant was kicking the deceased's head.

- [51] In considering the application of the parity principle, the extent of the co-offender's acts must be taken from the facts put before Ryan J and not the co-offender's evidence at the applicant's trial. Paragraph 22 of the agreed statement of facts before Ryan J (which was exhibit 91 on the applicant's sentencing) stated:

“Whilst the defendant was standing at the side of the couch, Small, who was wearing adidas sneakers, kicked the deceased in the head. Small climbed on top of the couch and stomped on the back of the deceased's head about ten times. The deceased's head was hitting the wooden base of the couch hard because the couch was old and the foam was thin. The deceased groaned and was moving his head and arms as he was being kicked in the head by Small.”

- [52] Ryan J noted that the co-offender's plea of guilty was early and had a special significance in ensuring his conviction for manslaughter which was otherwise not certain, because of the difficulty for the prosecution in proving that the acts done by the applicant were a substantial cause of the deceased's death, given the decomposition on the deceased's body. Ryan J therefore recorded that the sentence which would have otherwise been imposed on the co-offender was reduced to “a meaningful extent” because of this special significance in his plea of guilty.

- [53] At the time of the killing, the co-offender was an intravenous drug user. His prior criminal history reflected his drug use. He was fined in the Magistrates Court on 8 September 2016 and no conviction was recorded for possessing dangerous drugs before the sentence for possessing dangerous drugs was imposed on 14 October 2019. As the killing of the deceased was committed whilst the co-offender was on parole for the 2019 sentence, the parole was suspended and the co-offender returned to custody on 7 September 2020. Most of the time served in custody before his sentencing for manslaughter was attributable to the 2019 sentence but 238 days were able to be declared as time already served under the sentence imposed for the killing of the deceased. Ryan J expressly acknowledged in the sentencing of the co-offender that the sentence imposed for manslaughter had to be moderated as it was, in effect, imposed cumulatively on the 2019 sentence.

- [54] The applicant submits that there is a marked disparity between the sentence imposed on the applicant of 14 years' imprisonment with parole eligibility after 11.2 years compared to the “but for” sentence imposed on the co-offender of seven years' imprisonment with parole eligibility after 20 months that gives rise to a justifiable sense of grievance on the applicant's part. The applicant relies on the orthodox sentencing practice that where a sentencing judge is contemplating a sentence of 10 years' imprisonment or more for an offence to which the serious violent offence regime under the Act applies that the sentencing judge must take into account the consequences of the mandatory minimum non-parole period of 80 per cent of the head sentence which will apply: see *R v Smith* (2022) 10 QR 725 at [12]-[13] per Bond JA with whom Morrison JA agreed. As Bond JA explained in *Smith* at [16] where the parity principle applies but the sentence is being imposed for a relevant offence to which the serious violent offence regime applies, “the parity principle remains

a sentencing principle which a sentencing judge must take into account but without attempting to subvert the intention of the statutory regime”.

[55] As the passage from the sentencing judge’s sentencing remarks set out at [22] above reveals, the sentencing judge was alert to the different circumstances that applied to the sentencing of the co-offender by Ryan J with the consequences that had for the application of the parity principle when it came to sentencing the applicant.

[56] Not only was the co-offender sentenced after pleading guilty, he was given a reduction in his sentence to “a meaningful extent” because without his plea of guilty the prosecution may not have been able to prove that he was guilty of manslaughter and there was also a reduction to that sentence because of totality considerations, but the significant difference between the sentencing respectively of the co-offender and the applicant was that the co-offender’s evidence at the applicant’s trial cast both the applicant and the co-offender in a worse light than the co-offender’s original statement. The marked disparity in the sentences is explicable by reference to these unusual circumstances and the mandatory application of the serious violent offence regime and, as the sentencing judge indicated, could not result in a beneficial application of the parity principle in favour of the applicant. There was no error in the application of the parity principle by the sentencing judge.

[57] The applicant also fails on ground 2.

Order

[58] As the application was based on unusual facts and raised issues that required detailed consideration, it is appropriate to grant leave to appeal, even though the appeal does not succeed. The orders which should be made are:

1. Application for leave to appeal granted.
2. Appeal dismissed.

[59] **BOND JA:** I agree with the reasons for judgment of Mullins P and with the orders proposed by her Honour.

[60] **BODDICE JA:** I agree with Mullins P.