SUPREME COURT OF QUEENSLAND

CITATION:	*R v Duong, Nguyen, Bui and Quoc* [2002] QCA 151
PARTIES:	**R** **v** **DUONG, Dien Cuong** **NGUYEN, Dung Ngoc** **BUI, Lam Thanh** **QUOC, Dung Lam** (applicants)
FILE NO/S:	CA No 343 of 2001 CA No 338 of 2001 CA No 336 of 2001 CA No 344 of 2001 SC No 272 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 April 2002
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2002
JUDGES:	Williams JA, Fryberg and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. In Application number 343 of 2001: Application dismissed;** **2. In Application number 338 of 2001: Application dismissed;** **3. In Application number 336 of 2001: Application dismissed;** **4. In Application number 344 of 2001: Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MANSLAUGHTER – PRACTICE AND PROCEDURE – where deceased terrorised and subjected to extreme violence planned by gang in order to effect retribution – where two applicants directly involved in the assault and two applicants aided aggressors by encouragement – where aggressors received 12 year sentences with serious violent offence

declarations and those who aided them received sentences of 9 years with serious violent offence declarations

JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – FACTUAL BASIS FOR SENTENCE – PARTICULAR CASES – where applicants made late plea of guilty to manslaughter - whether sentences of 12 years were manifestly excessive –*R v Laycock & Stokes*, *R v Schuurs* and *R v Cowburn* discussed – effect of *Penalty & Sentences Act* 1992 discussed – applications dismissed

JUDGMENT AND PUNISHMENT – SENTENCE – NON-PAROLE PERIOD OR MINIMUM TERM – QUEENSLAND – whether the learned sentencing judge erred in making serious violent offence declarations where sentences of 9 years imposed on those who aided or whether including the declarations as part of the sentences made the overall sentences manifestly excessive – whether parity with the sentences imposed on aggressors would be lost if declarations removed – applications dismissed

Juvenile Justice Act 1992 (Qld) s 132
Penalties and Sentences Act 1992 (Qld) s 13A

R v Cowburn CA No 135 of 1993, 4 August 1993, discussed
R v De Salvo [2002] QCA 63; CA No 284 of 2001, 15 March 2002, discussed
R v Laycock & Stokes [1999] QCA 307; CA No 465 of 1998, 6 August 1999, discussed
R v Moodie [1999] QCA 125; CA No 439 of 1998, 14 April 1999, discussed

COUNSEL: M J Byrne QC for the applicants Duong and Nguyen
T Ryan for the applicant Bui
N Weston for the applicant Quoc
D Meredith for the respondent

SOLICITORS: Legal Aid Queensland for the applicants
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** On the evening of 5 July 1999 Luan Minh Nguyen, a youth aged 19, was so severely assaulted that he died. The assault took place on a cliff above a flooded coal mine at Collingwood Park near Ipswich. The following night the police retrieved his body.

[2] The four applicants now before this Court, Lam Thanh Bui, Dung Ngoc Nguyen, Dien Cong Duong and Dung Lam Quoc, and two other persons, Vinh Chi Pham and Tam Chi Ngo, faced committal proceedings in connection with the death of the deceased. As a result of those proceedings Nguyen, Duong, Pham and Ngo were committed for trial on a charge of murder but the others (Bui and Quoc) were

discharged. An indictment was duly presented charging each of the four so committed with murder. When the trial commenced in November 2000 Nguyen and Duong pleaded not guilty. At that time Ngo indicated willingness to plead guilty to being an accessory after the fact to murder. That plea was accepted by the prosecution, and he was then sentenced to 6 years imprisonment with a recommendation that he be eligible to apply for parole after serving 2 ½ years. On the same date Pham, who was aged 13 ½ at the date of the offence and then aged 14, pleaded guilty to a charge of unlawfully assaulting the deceased and doing him bodily harm whilst in company with other persons. Again that plea was accepted by the prosecution and Pham was ordered to be released under the supervision of an authorised officer of the Department of Families, Youth and Community Care Queensland for a period of 2 years and ordered to comply with the requirements of s 132 of the *Juvenile Justice Act* 1992.

[3] The trial with respect to Duong and Nguyen was then adjourned. Thereafter the committal proceeding with respect to Bui and Quoc was reopened and further evidence presented from Pham and Ngo. That resulted in Bui and Quoc being committed for trial on murder charges.

[4] When the trial of each of the four applicants commenced on 11 October 2001 each pleaded not guilty to the charge of murder. But on the following day, at the request of their counsel, each was re-arraigned and pleaded guilty to manslaughter. That was accepted by the prosecution in full discharge of the indictment.

[5] In due course the following sentences were imposed:

Duong	-	12 years imprisonment with the automatic declaration that it was a conviction of a serious violent offence
Nguyen	-	12 years imprisonment with the automatic declaration that it was a conviction of a serious violent offence
Bui	-	9 years imprisonment with a declaration that it was a conviction of a serious violent offence
Quoc	-	9 years imprisonment with a declaration that it was a conviction of a serious violent offence.

In each case a declaration was made with respect to the period each applicant had spent in pre-sentence custody.

[6] Each of the four has now sought leave to appeal against sentence. Counsel for both Duong and Nguyen submitted that a sentence of 12 years imprisonment was manifestly excessive, being outside the range established by a consideration of comparable cases. Counsel for Bui and Quoc each submitted that, whilst a head sentence of 9 years imprisonment was not manifestly excessive, coupling that sentence with a serious violent offence declaration made the overall sentence manifestly excessive.

[7] The deceased and each of the six young men implicated in his death were members of the Vietnamese community centred on the outer Brisbane suburb of Darra. All of the seven apparently knew of each other before the date in question and many had associated together previously. The background to the assault was that it was believed that the deceased had stolen certain property (a mobile phone, a playstation, and money totalling $400-$450) from members of the group of six.

[8] On the day in question the group of six (though not all were present at all times) set about trying to locate the deceased. Initially they were unsuccessful. Having received some information as to the possible location of the deceased the six drove in a car to that address. During that sequence of events the six started to plan what would be done with the deceased. There was some discussion about threatening him to see what he would say. Duong said that if the deceased did steal the property they would hit him. It was decided that they should get some sticks and pieces of wood to scare the deceased. Duong had some electric cord. Nguyen got a rolling pin and some knives and the group then continued looking for the deceased. Each of the six was aware that objects had been obtained to be used to threaten or assault the deceased. They ultimately located the deceased at a house at Inala. Duong persuaded him to come out by inviting him to come and play some billiards. The six then drove off with the deceased in the car to the area at Collingwood Park where the assault took place. By the time they arrived at the scene of the crime it was late at night.

[9] The deceased was eventually persuaded to get out of the car and go to the top of the embankment which overlooked a steep drop into the water. There was then some discussion about the alleged stolen property. According to the material placed before the sentencing judge Duong was armed with a piece of cord and Nguyen with a rolling pin. Thereafter the assault resulting in the death of the deceased occurred. Duong put the cord around the deceased's neck, strangling him, but not sufficient to cause death. Nguyen also assisted with the use of the cord. Both Duong and Nguyen kicked and punched the deceased about the head and body. Other statements made indicated that some wood or bats were used to strike the deceased. Nguyen admitted to striking one blow with the rolling pin. The deceased's body was then rolled down the cliff to the water.

[10] The pathologist who performed the post-mortem expressed the opinion that the deceased did not drown because there was no water in the lungs. The doctor did find a number of significant injuries on the body of the deceased including severe bruising to the scalp and over the back of the head and neck, severe fractures to the back and base of the skull, severe acute brain damage, severe bruising to the soft tissues of the face, a ligature mark around the neck, and bruising, lacerations and abrasions to most other parts of the body. The extent and pattern of those injuries was said to be consistent with repeated blows with a blunt instrument or instruments to the head, trunk and limbs. When the body was recovered by the police there was a piece of electrical cord across the face and passing over the shoulders and another piece of electrical cord wound around the neck and tied in a knot. The doctor was of the view that the ligature was not sufficient to cause death by strangulation, though it may have affected blood flow to the brain and thus contributed to death. The cause of death was traumatic head injuries and the autopsy findings suggested that the deceased survived for a period of at least a few minutes after the infliction of those head injuries.

[11] So far as the applicant Bui was concerned the basis on which he was to be sentenced was that he was present with the others during the planning stage, was present at the top of the cliff when the deceased was assaulted but did not actively participate in the assault. It was said that he was offered the rolling pin by one of the other participants but declined to use it. By his presence at the scene he encouraged the others and aided them in the commission of the offence. He did not

discourage the others and he took no steps to disassociate himself from the attack. It was also accepted that he shared an intention with the others at the top of the cliff to be a member of the group responsible for scaring and threatening the deceased and that a probable consequence of such a purpose was that the deceased would be assaulted resulting in his death.

[12] Similarly the applicant Quoc admitted that he was present in the motor vehicle when discussions were had by the others in relation to assaulting or threatening the deceased. He admitted he was present in the motor vehicle when the others obtained weapons in furtherance of that plan and he admits that he was in the car when it travelled to the remote location. He admits he was with the others at the time of the assault and that he remained there for the duration of the assault and did not discourage the others or take steps to disassociate himself from that conduct. By his presence he aided the others at the time of the assault. He did not actively participate in the assault. A probable consequence of his involvement was that the deceased would be assaulted and die.

[13] On the following day, 6 July 1999, Duong spoke to a man with whom he shared a common religious background. He admitted to that person that he had killed somebody and after some discussion the person to whom that statement was made took Duong to the Goodna Police Station where he spoke to police. That was the first the police knew of the death. In the course of that initial discussion with police officers Duong said he saw a man killed – bashed to death. He also said words to the effect, "I have strangled a fellow and he was dumped at Collingwood Park . . . others bashed him with baseball bats. They threw the body off the cliff into the water." He took the police to the location and was present when the police found the body. In the course of conversation with the police officers Duong gave conflicting stories as to his involvement and as to precisely what happened on the night in question. But apparently he did identify others who were involved in the incident.

[14] It appears that Nguyen, Duong and Quoc were regular users of heroin if not addicted to that drug. Counsel for each of those three before the sentencing judge submitted that part of the explanation for the conduct on the night in question was the fact that each was under the influence of drugs. It was specifically said that Nguyen was under the influence of heroin at the time. Whilst no such submission was made with respect to Bui he does have a conviction (after the date of this offence) for possession of dangerous drugs.

[15] The learned sentencing judge observed that the deceased "died a horrible death". There can be no doubting the accuracy of that statement. He went on to point out, accurately, that Duong and Nguyen had to be sentenced on a separate basis from Bui and Quoc. The first two directly attacked the deceased; the other two were parties to the plan to threaten the deceased and aided the attackers by their encouragement at the time of the assault. In consequence the conduct of Bui and Quoc attracted "lesser penalties".

[16] But there are certain features of the events of the night in question which cannot be ignored when one is considering the appropriateness of the sentences imposed on each of the four applicants. It was a callous attack by a gang upon a comparatively defenceless young man. The motivation for the attack was a belief (perhaps true)

that the deceased had stolen some property not of great value. In essence the gang meted out their own form of justice. The deceased was lured from the safety of a residence by a false pretence. He was taken to a remote place where there was no possibility of obtaining outside assistance. He was terrorised and subjected to extreme violence. At least two people were directly involved in delivering blows with weapons, fists and feet. The others who were parties to the plan encouraged continuation of the assault by their presence, did nothing to prevent it, and did nothing to call on the attackers to desist even when it must have been obvious that serious harm was being inflicted on the deceased. All showed a callous disregard for the deceased. The body was dumped in a location where it would be difficult to find.

[17] Those considerations apply equally to each of the applicants.

[18] It is now necessary to refer to the relevant personal circumstances of each of the applicants.

[19] Duong was born on 11 November 1977, making him aged 21 at the time of the offence. In July 1998 he had been convicted of stealing a vehicle and unlawfully using a vehicle; he was ordered to perform community service. He was still subject to the community service order at the time of the commission of this offence. He had no other criminal history. He was born in Vietnam and arrived in Australia when aged about 5. His home life has been unstable because of an unsatisfactory relationship with his stepfather. He was educated to Year 12 at Runcorn High School. After leaving school he had various jobs but was unemployed at the time of the commission of the offence. He had drifted into drug abuse and was addicted to heroin, marihuana and valium.

[20] It was submitted on Duong's behalf that his voluntarily going to the police demonstrated remorse. The force of that submission must be tempered by the fact that in statements to the police he played down his role in the assault and at no stage prior to re-arraignment offered to plead guilty to manslaughter. The fact that he identified the others who were involved in the commission of the offence is tempered by the fact that he did not cooperate in the administration of justice at the initial committal stage which resulted in Bui and Quoc then being discharged.

[21] Duong played a significant role in the lead up to the attack. He actively persuaded the deceased to get into the car, he was the one who brought the cord to the scene, he was the first person to assault the deceased, and he was a major participant in the brutal assault.

[22] Nguyen was born on 29 November 1971 in Vietnam. Apparently he was separated from his family there for a period but then made his way to Australia. He has not been reconciled with his family. He does not speak English well. He has become dependent on drugs, particularly heroin. He moved from Victoria to Queensland allegedly in an endeavour to break that habit. But apparently he drifted into a situation where drug use was acceptable and continued using heroin. A report was placed before the sentencing judge from Dr Sue McCulloch, a psychologist. It deals extensively with his substance abuse.

[23] Nguyen does have a criminal history. He had an extensive history in Victoria commencing in 1990 and extending up until 1998. There were some three counts of trafficking in heroin which were dealt with in the Magistrates Court, and other drug related charges including a number for possessing heroin and amphetamines. It is not necessary to detail that interstate history further. He had only one prior conviction in Queensland; he was dealt with in the Inala Magistrates Court on 6 April 1999 for possession of dangerous drugs.

[24] He was heavily involved in the assault and used the rolling pin. He was significantly older than the others.

[25] Bui was born in Vietnam on 29 January 1980; thus he was aged 19 at the time of the offence and 21 when sentenced. At the time of the offence he was single and unemployed and had no prior convictions. However, he was convicted in the Inala Magistrates Court on 18 April 2001 for possession of dangerous drugs. Whilst Bui had known of the deceased prior to the date of the offence he only actually met him that day.

[26] It was also put to the learned sentencing judge that Bui had had a disrupted family life in Vietnam prior to his migration to Australia in 1997. He attended Chelmer State School for a year and undertook TAFE courses. Apparently he did not complete any course because his grasp of English was poor. After his father remarried he and some of his siblings were basically left to fend for themselves. Bui's involvement for purposes of sentencing is as set out above.

[27] Quoc was also born in Vietnam on 21 June 1980; he was thus of similar age to Bui. He came to Australia during 1998 and it appears that his comprehension of and use of English is only limited. He has no previous convictions. A report from the psychologist, Dr Sue McCulloch, was tendered on sentence. It highlighted his problems of adjusting to a new environment. Quoc's involvement for purposes of sentencing is as set out above.

[28] It is against that background that the applications for leave to appeal against sentence should be assessed.

[29] It has often been said that the offence of manslaughter covers a wide variety of circumstances in which a person has been unlawfully killed. Because of that it is difficult to speak of a range of punishment applicable to the offence, and it explains why it is sometimes difficult to reconcile one sentence for manslaughter with another. Many crimes of manslaughter involve what could be described as a one on one situation. In many such instances there are complicating features such as provocation, excessive self-defence, and a single blow (with or without a weapon) delivered in a highly emotional situation. Such cases can readily be distinguished from a planned gang attack on a relatively defenceless person in a remote locality. There is an even greater abhorrence generally in society when such an attack is carried out with retribution as its main object. Civilised society cannot permit gangs to flout the normal criminal justice system by taking it upon themselves to mete out punishment to those who have allegedly wronged gang members or their associates. The offence here has many of the abhorrent features associated with a planned attack by a gang in order to effect retribution.

[30] There are few decisions, particularly of an appellate court in Queensland, dealing with a similar factual situation. Probably the closest factual situation is that which was considered by the court in *Queen v Laycock & Stokes* CA 465 and 487 of 1998. The assault in that case, which ultimately resulted in the death of a young man, involved a number of members of a motorcycle club. Ultimately after a trial Laycock was convicted of murder and Stokes of manslaughter. The assault there involved a number of male persons some armed with objects (possibly an iron bar or aluminium baseball bat). Laycock could be described as the primary aggressor. Stokes was involved to a lesser extent; he was at least the driver of a car involved in a very material way in the commission of the offence. In essence it was alleged that he aided or assisted in the unlawful killing.

[31] Stokes sought leave to appeal against his sentence of 10 years imprisonment with a recommendation for parole eligibility after 3 years. The court noted that another person involved in the relevant events (Cranney) was sentenced to 9 years imprisonment with a recommendation for parole eligibility after 2 ½ years for the offence of committing grievous bodily harm with intent; he pleaded guilty and was sentenced under s 13A of the *Penalties & Sentences Act* 1992. But for the s 13A undertaking his sentence would have been 12 years imprisonment. The court also noted that another person involved in the attack (Nelson) pleaded guilty to manslaughter and was sentenced to 9 years imprisonment with a recommendation for parole eligibility after 2 ½ years. Again he was sentenced under s 13A and would have received a sentence of 12 years imprisonment but for that.

[32] Against that background the court considered that the penalty imposed on Stokes, given his lesser involvement, was not manifestly excessive.

[33] However, for present purposes it is significant to note that the sentencing judge recognised that but for the s 13A considerations the sentences on Cranney and Nelson would have been 12 years imprisonment.

[34] It should also be noted that those sentences were imposed before the amendments to the *Penalties & Sentences Act* 1992 which came into force 1 July 1997. Those provisions generally indicated that more severe sentences for serious violent offences were called for.

[35] The other case referred to extensively in the course of argument was that of *Schuurs* [2000] QCA 278. Three people (Schuurs, Semyraha and Mitchell) went to the house of the deceased to collect a debt of $1,500 arising out of drug dealing. Schuurs supplied a car which he drove to the scene and a .22 calibre rifle and ammunition with which it was intended to shoot the deceased in the leg if he did not pay. In the upshot Semyraha fired the rifle and the deceased was killed. The woman Mitchell pleaded guilty to manslaughter and was sentenced to 9 years imprisonment with a recommendation for eligibility for parole after 4 years. Her role was significantly less than that of the others. Semyraha and Schuurs were tried for murder, but the jury returned a verdict of manslaughter with respect to Schuurs. He was sentenced to 10 years imprisonment which carried the automatic consequence of the conviction being one for a serious violent offence. His appeal against sentence was dismissed. One of the points Schuurs raised was want of parity between the sentence imposed on him and that imposed on Mitchell. The court considered he was fortunate he was not convicted of murder.

[36] Counsel for the respondent in this Court referred to *Queen v Cowburn* CA No 135 of 1993, judgment 4 August 1993. In that case the deceased was savagely beaten about the head by the applicant and one Fulford, the assault beginning at a time when he was lying in bed and apparently asleep. The two assailants were tried for murder but convicted of manslaughter. Cowburn was sentenced to imprisonment for 12 years with a recommendation that he be considered for parole after 8 years. He appealed contending that it was manifestly excessive. The court noted that Fulford was sentenced to 10 years imprisonment with a recommendation that he be considered for parole after 6 years. The court did not interfere with the sentence.

[37] It is interesting to note that, given that the conviction of Duong and Nguyen is automatically for a serious violent offence, each of them would have to spend approximately 9.6 years in custody before being eligible to apply for parole which is broadly consistent with the 8 years Cowburn would have to spend in custody before being so eligible.

[38] It is true that both Duong and Nguyen ultimately pleaded guilty and they must receive some benefit for that. But in neither case could it be said that the plea was an early one; there was no offer at an early stage to plead guilty to manslaughter. By the time they faced trial the case against each was overwhelming. It could not be said that there was a great deal of remorse shown by either, whether evidenced by the plea or otherwise. Duong did show some remorse in voluntarily going to the police shortly after the commission of the crime, but, as already noted, his subsequent conduct could not be said to evidence willingness to facilitate the course of justice.

[39] Given the cases I have referred to I am not persuaded that in all the circumstances (taking into account the pleas and the personal factors relevant to each of Duong and Nguyen) a sentence of 12 years was manifestly excessive.

[40] It was submitted that there should be some differentiation between Duong and Nguyen if only because the former made the initial disclosure to the police. That is certainly a factor in his favour, but against that he played a more significant role as an instigator in the planning of the attack on the deceased. He also struck the first blow. Further he was still subject to a community based order at the time. After considering all relevant matters I am not persuaded that the learned sentencing judge erred in not differentiating between the two.

[41] I turn now to consider the position of Bui and Quoc. As noted above each contends that the head sentence imposed should remain, but that the serious violent offence declaration should be removed.

[42] There are a number of cases (*R v Moodie* CA 439 of 1998, judgment 14 April 1999 and *R v De Salvo* [2002] QCA 63 are sufficient examples) wherein it has been said that the sentencing judge should articulate reasons justifying the making of a serious violent offence declaration. The sentencing remarks here implicitly detail the reasons why it was considered that such a declaration was called for on the facts of this case.

[43] Each of Bui and Quoc pleaded guilty to the offence of manslaughter involving on the facts here:

(i) the luring of the deceased to an isolated place;
(ii) a prearranged plan to use violence evidenced by the obtaining of weapons and taking them to the scene;
(iii) a planned intention to intimidate or terrorise the deceased;
(iv) the overall involvement of six in the attack and its aftermath;
(v) the use of extreme violence by more than one person;
(vi) dumping the body of the deceased in a callous way and in circumstances where it would be difficult to find.

[44] Given those features of this offence of manslaughter I am not persuaded that the learned sentencing judge erred in making the declaration or that including the declaration as part of the sentence made the overall sentence manifestly excessive. The role played by each of Bui and Quoc was not insignificant, though not as serious as that as Duong and Nguyen, and parity with the sentences imposed on Duong and Nguyen (which automatically carried the consequence of a serious violent offence declaration) would be lost if such declaration was removed from the sentenced imposed on Bui and Quoc.

[45] This was an horrendous crime calling for severe punishment. In all of the circumstances I am not persuaded that the sentence on any of the four applicants was manifestly excessive.

[46] Each application should be dismissed.

[47] **FRYBERG J:** I agree with the orders proposed by Williams JA and with the reasons for those orders.

[48] **MULLINS J:** I agree with the reasons of Williams JA and that each application must be dismissed.