

***R v O'Malley* [2019] QCA 130 (28 June 2019) – Queensland Court of Appeal**

‘Aboriginal and torres strait islander people’ – ‘Domestic violence offence’ – ‘Dysfunctional upbringing’ – ‘People with disability and impairment’ – ‘Physical violence and harm’

Charges: 1 x manslaughter

Case type: Appeal against sentence

Facts: The applicant pleaded guilty to manslaughter by unlawfully killing the deceased, with whom he was in a domestic relationship for some 18 months. The applicant was sentenced to 11 years’ imprisonment. The conviction was declared to be a domestic violence offence and a serious violent offence.

The applicant told ambulance officers that the deceased fell off the toilet shortly before he had called them, and that she had also fallen in the shower the night before ([11]). However, a post-mortem of the deceased’s body revealed that the most likely cause of death was multiple injuries, including multiple rib fractures and liver lacerations. Such injuries were inconsistent with a fall in a shower, and were most likely to have resulted from a ‘focused and severe force, such as kicking or stomping’ ([14]). Although the applicant disagreed with the pathology report ([21]), his mobile phone records demonstrated that he knew the deceased had broken ribs ([22]). The agreed statement of facts recorded that the applicant was to be sentenced on the basis that he (1) unlawfully assaulted the deceased causing the injuries which led to her death; (2) kneed her to the stomach and to the back; (3) caused head and facial injuries; and (4) assaulted her in the past as evidenced by the facial bruising previously observed by witnesses and the healing fractures, which demonstrate that this was not an isolated violent incident ([24]).

Issue: The applicant filed an application for leave to appeal against his sentence on the ground that it was manifestly excessive, and wished to add an additional ground of appeal, namely, ‘that the learned sentencing judge erred in finding that his post-offence conduct demonstrated a complete disregard for the deceased and did not demonstrate remorse or concern for the deceased’ ([48]).

Held: The applicant's antecedents and criminal history is discussed at [25]-[36]). The applicant has Aboriginal heritage. He also had a history of criminal offending, including convictions for breaking and entering, and property damage, and, most importantly, for offences against his former partner for property damage, common assault, contravention of a prohibition or restriction in an apprehended violence order, and use of a carriage service to menace, harass or offend. He claimed to have had a 'socially deprived upbringing' - his father was a 'professional and serial criminal' and his step-mother was emotionally abusive. His biological mother was not involved in his care due to very heavy alcohol dependency and abuse. He also claimed to have been sexually abused when he was 11 years old. Psychological testing suggested that the applicant's intellectual level likely fell in the intellectually disabled range. A psychologist observed that his dysfunctional and abusive upbringing likely significantly influenced his offending behaviour.

The Court distinguished the present case from DeSalvo, Murray, West and Heazlewood where the courts did not consider a domestic violence offence ([89]). The applicant had a relevant prior criminal history, including convictions for prior domestic violence episodes, which distinguished him from the offenders in Sebo, Baggott, Pringle and Hutchinson ([91]). Given the 'seriousness of the offending manifested by the brutality of the applicant's assault and the relative defencelessness of the deceased, the applicant's remorse after the assault, his timely plea of guilty, his antecedents, his deprived social upbringing, his intellectual disability and the state of his mental health, and bearing in mind the need for some personal deterrence due to his past domestic violence offences and his moderate risk of reoffending, the related need for community protection, and the importance of denunciation of domestic violence offences causing death', the sentence imposed by the trial judge was just in all the circumstances, and thus stood as 'the appropriate sentence for the offender and the offence' ([95]-[96]). Consequently, leave to appeal against sentence was dismissed on both grounds.