SUPREME COURT OF QUEENSLAND

CITATION:	*R v Collard* [2019] QCA 105
PARTIES:	**R** **v** **COLLARD, Clayton Shaun** (applicant)
FILE NO/S:	CA No 146 of 2018 DC No 161 of 2018 DC No 162 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 18 May 2018 (Long SC DCJ)
DELIVERED ON:	31 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2019
JUDGES:	Gotterson and McMurdo JJA and Bradley J
ORDER:	**The application is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own guilty pleas of eight indictable offences and 11 summary offences committed in a single night, and 10 further summary offences committed in the preceding two months – where the learned primary judge directed that terms of imprisonment for two of the indictable offences be served cumulatively upon the sentences imposed on all other counts and charges – where the effect of the accumulation was the imposition of an aggregate sentence of six years and nine months imprisonment, with parole eligibility after serving two years and three months – whether it was appropriate to impose cumulative sentences in circumstances where all the indictable offences were committed in the same "spree" of offending – whether the sentence imposed was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant's counsel at first instance submitted that the applicant's offending conduct may have

been at least partly caused by the applicant's schizophrenia – where it is alleged that the learned primary judge failed to apply settled principles about the relevance of an offender's mental illness in sentencing the applicant – whether the learned primary judge erred in the consideration given to the applicant's diagnosis of schizophrenia in sentencing the applicant

R v Ahmetaj (2015) 256 A Crim R 203; [2015] QCA 248, cited
R v Hawdon [2011] QCA 219, considered
R v Hyatt [2011] QCA 55, considered
R v Macklin [2016] QCA 244, considered
R v Miller [2015] QCA 94, considered
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, cited
R v Yarwood (2011) 220 A Crim R 497; [2011] QCA 367, cited

COUNSEL: S Robb for the applicant
C W Wallis for the respondent

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

[1] **GOTTERSON JA:** I agree with the order proposed by Bradley J and with the reasons given by his Honour.

[2] **McMURDO JA:** The facts of the applicant's offending are detailed in the judgment of Bradley J, and need not be repeated here. I have reached a different view about the disposition of this application for leave to appeal.

[3] In *R v Verdins*,[1] the Victorian Court of Appeal (Maxwell P, Buchanan and Vincent JJA) said this:

> "Impaired mental functioning at the time of the offending may reduce the offender's moral culpability if it had the effect of:
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> (a) impairing the offender's ability to exercise appropriate judgment;
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> (b) impairing the offender's ability to make calm and rational choices, or to think clearly;
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> (c) making the offender disinhibited;
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> (d) impairing the offender's ability to appreciate the wrongfulness of the conduct;
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> (e) obscuring the intent to commit the office; or
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> (f) contributing (causally) to the commission of the offence.
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> As we have said, this is not to be taken as an exhaustive list."[2]

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1 [2007] VSCA 102; (2007) 16 VR 269.
2 [2007] VSCA 102 at [26]; (2007) 16 VR 269 at 275 [26].

[4] The sentencing judge had relatively little evidence about the applicant's mental state at the time of the offending which was charged on the indictment. There was a short report from probation and parole officers that, in August 2017, the applicant had identified "[h]igh needs … in the areas of Substance misuse, Mental health and Domestic violence". The report noted that the applicant was to attend his GP to obtain a mental health care plan but had failed to do so.

[5] In the course of his submissions to the sentencing judge, the applicant's counsel said that the applicant had been diagnosed with schizophrenia in his twenties and that he "has paranoia, hears voices, has visual hallucinations and suicidal ideations."

[6] Counsel went further, submitting that the offending on 4 December 2017 was affected by the applicant's schizophrenia, compounded by intoxication by methylamphetamine. Counsel addressed the sentencing judge as follows:

> "On the night in question when that offending spree went on, he was under the belief that he was being chased by two groups of men in cars. And he was hiding and running from house – houses to houses. And the first house where the old lady lived, he instructs that his friend who he knew from judo, lived there. And he was trying to escape these men who were chasing him. And he went into that house.
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> …
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> And again, he did go to another house, who he knew the – it was his ex-partner's house. And again, he was trying to escape from the people he believed were chasing him. And he – obviously heavily intoxicated and possibly suffering from mental health at the time."

[7] Notwithstanding the equivocal nature of that last comment by counsel, the effect of this submission was that the applicant's conduct was partly the result of his schizophrenia, in that he acted under the belief that he was being chased by groups of men in cars, which no one suggested was the case.

[8] The prosecutor did not contest those facts. The sentencing judge was not obliged to accept them, but his Honour was obliged to consider whether he should do so, and to provide reasons for not doing so if that was his decision. Instead, his Honour did not deal with the question and thereby made an error in the exercise of the sentencing discretion.

[9] For that reason I would grant leave to appeal, allow the appeal and resentence the applicant.

[10] In my view this was not an appropriate case for the accumulation of sentences for the offences which occurred within a period of no more than two hours and which involved conduct of substantially the same kind. On the other hand, the applicant's conduct overall warranted a longer period of imprisonment than four years and six months, which were the terms imposed for counts 3 and 4. Rather than increase those terms, I would vary the sentences on counts 7 and 8 from two years and three months to one year, resulting in a period of imprisonment of five and a half years, and vary the parole eligibility date to the point at which 22 months has been served.

[11] **BRADLEY J:** On 27 April 2018, on his own guilty pleas, the applicant was convicted of eight indictable offences and 11 summary offences committed on 4 December 2017

and of a further 10 summary offences committed on dates between 6 October and 29 November 2017.

The sentence

[12] On 18 May 2018, the applicant was sentenced. Given the number of offences, the sentence had some complexity. The applicant was sentenced to terms of imprisonment from four months to four years and six months for the indictable offences and to terms of imprisonment up to 12 months on a number of the summary offences.

[13] The learned primary judge directed that the terms of two years and three months imprisonment for the dangerous driving and the final burglary offence were to start from the end of the period of imprisonment the applicant had been sentenced to serve on all the other counts and charges. The cumulative head sentence for all the offences is six years and nine months.

[14] The learned primary judge took into account 165 days of pre-sentence custody from 4 December 2017 as time already served. His Honour fixed a parole eligibility date of 4 March 2020. The effect of these orders is that the applicant must serve a total period of two years and three months in custody before he is eligible to apply for parole. This period is one third of the cumulative head sentence.

[15] At the time the applicant committed the offences, he was under a suspended three month sentence imposed by the Kingaroy Magistrates Court.[3] The learned primary judge ordered that the applicant serve the suspended sentence in custody. Given the parole eligibility date fixed by his Honour, it appears the reactivation of the suspended sentence, of itself, did not increase the period of imprisonment the applicant must serve before he is eligible for parole.

Proposed grounds of appeal

[16] There are two proposed grounds of appeal. Firstly, that the sentence is manifestly excessive. The second proposed ground, added by leave, is that the learned primary judge failed to apply settled principles about the relevance of an offender's mental illness in sentencing the applicant.

Proposed ground 1 - manifestly excessive

[17] The applicant's written submissions correctly identified the primary consideration as whether the effective aggregate sentence imposed is appropriate, and not harsh or crushing, considering the totality of the applicant's criminality. If it is unreasonable or plainly unjust, then the Court may be driven to conclude there has been a failure to properly exercise the sentencing discretion.[4]

[18] The learned primary judge was alert to the totality principle. His Honour noted:

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3 On 31 August 2017, the applicant was sentenced to three months imprisonment, wholly suspended for an operational period of 15 months, for a contravention of a domestic violence order. The operational period was extended by one month, after the applicant committed a public nuisance offence in September 2017.

4 *R v Sheppard* [2001] 1 Qd R 504 at 505 [2].

> "it will be necessary to ensure that the overall or total sentence is appropriate to the level of overall criminality involved and where necessary to moderate the individual sentences to be combined to achieve that outcome."

[19] The applicant submitted that the learned primary judge ought to have allowed the applicant to serve concurrently all the sentences imposed for the same "spree" of offending on 4 December 2017.

[20] Requiring the applicant to serve the sentence for two counts after the end of the period of imprisonment for the other offences, is but one of the approaches the learned primary judge might have taken. His Honour might have set the head sentence for the most serious burglary and armed robbery offences so as to take account of the aggravating factor that they were committed in the course of an offending spree in which a total of eight separate indictable offences and 11 summary offences were committed. The head sentences for those offences might have reflected the totality of the applicant's criminality and each of the (lesser) sentences imposed for the other counts and charges could have been served concurrently with them.

[21] Of itself, the course adopted by his Honour does not alter the matters this Court must consider to determine whether leave should be granted and, if so, whether the appeal should be allowed on the first proposed ground of appeal.

[22] The question is whether the sentences properly reflect the outcome of consideration of the course of the applicant's criminal conduct or "whether it was too much."[5] This requires an assessment of the gravity of the applicant's offending, compared to the worst possible offending that might attract the maximum penalties for the offences, and a consideration of any relevant circumstances particular to the applicant.[6]

Gravity of the offending conduct

[23] At about 4.15 am, the applicant entered the home of Ms Nelson through an unlocked rear door. Aged 82, Ms Nelson was recovering from surgery. She did not know the applicant. Ms Nelson awoke to find him in her bedroom. He grabbed her by the wrist, told her to be quiet and not to call the police. He then forcibly removed her from her bed and restrained her while he searched for things to steal. When she called out for help, he left the house, taking with him her handbag containing her purse. For this conduct the applicant was convicted of burglary by break in the night (count 1) and robbery with personal violence (count 2) and sentenced to four years imprisonment on each count.

[24] After leaving Ms Nelson's home, the applicant went to an unoccupied house, where he rummaged through the stolen purse. He then entered the yard of another house. For this, he was convicted and not further punished on two summary charges of trespass.

[25] At about 5.30 am, he entered the home of his ex-partner, Ms D. There was a current Domestic and Family Violence Protection Order in place prohibiting the applicant from approaching within 100 metres of Ms D. She was woken by the applicant coming into

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5 *Reg v Faulkner* (1972) 56 Cr App R 594 at 596, cited with approval in *Mill v The Queen* (1988) 166 CLR 59 at 63.

6 *Munda v Western Australia* (2013) 249 CLR 600 at 613 [33].

her bedroom. He swore at her, told her not to call the police, and said he was going to take her car. He started going through her purse. She called out, asking her partner to call the police and asking her brother to help her. The applicant assaulted the partner, who was trying to call the police on his mobile telephone. When Ms D came to her partner's aid, the applicant produced a screwdriver, forced her onto the bed and held it to her neck, threatening her life. He told her he was going to kill her and that it was her fault. Ms D's brother pulled the applicant away from her. The applicant pushed her brother into a wall. He took Ms D's car keys and purse and left. As he did so, he deliberately smashed a window with his knee. Outside, he threatened Ms D's brother with a rock and then drove off in her car. He was disqualified from holding a licence at the time. The threats made to Ms D's life significantly elevate that offending. They were also domestic violence offences.

[26] For this conduct, the applicant was convicted of burglary by break in the night as a domestic violence offence (count 3) and armed robbery as a domestic violence offence (count 4) and sentenced to four years and six months imprisonment on each count. He was also convicted of unlawfully using a motor vehicle to facilitate the commission of an offence as a domestic violence offence (count 5) and sentenced to 12 months imprisonment; and convicted of contravention of a domestic violence order (count 6) for which he was sentenced to four months imprisonment. He was also convicted on summary charges for common assaults on Ms D's partner and brother, for wilful damage for breaking the window and for driving while disqualified.

[27] The burglaries, the robbery with violence and the armed robbery with domestic violence were relatively brief, so that the distress they no doubt caused was not for an extended period. They were not committed in company.

[28] At 6.07 am, police attempted to intercept the car driven by the applicant. He accelerated and swerved to the incorrect side of the road to evade the police. Shortly afterwards, driving erratically, the applicant rammed a vehicle on the Bunya Highway, pushing it into the path of another vehicle. The applicant's dangerous driving was intentional, not inadvertent. All three vehicles were significantly damaged and unable to be driven from the scene. It was fortuitous that no one was killed or seriously injured. Deliberateness puts the applicant's conduct beyond mere reckless driving. He was also intoxicated.

[29] The applicant fled the scene and entered a nearby house, taking off his trousers and soiling a pile of clothes in which he hid. When police arrived, the applicant brandished a large knife, saying he would not go back to prison. The police used a Taser to subdue him. The applicant was convicted of dangerous operation of a motor vehicle while adversely affected by an intoxicating substance (count 7) and burglary (count 8) and sentenced to two years and three months imprisonment on each count.

[30] He was arrested and taken to hospital for treatment of his injuries from the crash. He tested positive for methylamphetamine. A clip seal bag containing that drug and a syringe and needle were found in his trouser pocket. He was convicted on the summary charges: failing to stop when the police directed him to do so; wilful damage of property in the house where he hid; serious assault of a police officer; possessing a dangerous drug; and failing to dispose of a needle and syringe. He was disqualified from holding or obtaining a driver's licence for five years.

Maximum penalties

[31] The seriousness of the applicant's offences is indicated by the maximum penalty of life imprisonment for each of the two burglaries by break at night, the robbery with violence and the armed robbery offences. For unlawful use of a motor vehicle to facilitate commission of an indictable offence, the maximum penalty is 10 years imprisonment; for contravention of a domestic violence order and for dangerous operation of a vehicle while adversely affected by an intoxicating substance, it is five years imprisonment; and for the daylight burglary count, it is 14 years imprisonment.

The applicant's personal circumstances

[32] The applicant pleaded guilty at an early stage and cooperated with the authorities to conclude the criminal process without undue delay or public expense.

[33] The applicant has had a very difficult upbringing. From a young age, he was exposed to criminal activity and illicit drugs. He was sexually molested by an older relative. At 14 or 15, he first used methylamphetamine. He lost his mother at age 15, and his father moved the family away from their home, his friends and support. At about that time, he left school. In his mid-20's he was diagnosed with a mental health condition, which is considered in more detail in the second proposed ground of appeal. Notwithstanding these challenges, he had a good employment record and no criminal history until age 27.

[34] The applicant had a limited, but relevant, criminal history, primarily over the two years before this offending. His descent into more significant criminal conduct was very recent. It coincided with the breakdown of his relationship with Ms D, the tragic loss of his young daughter, and his increased use of methylamphetamine.

[35] Each of the present offences was a breach of his suspended sentence for the aggravated offence of contravening a domestic violence order and also a breach of a probation order for unlawful stalking of Ms D, assault or obstruct police and public nuisance.

Comparable cases

[36] The circumstances of each offender's criminal conduct is somewhat unique. For the applicant, it was not contended that a comparison should be made with any particular decision of this Court. However, reference was made to three decisions considered in *R v Hill* [2017] QCA 177 at [28] to [32], to provide some guidance about the appropriate sentence for offenders on a crime spree shortly after release from prison, and involving dangerous driving.

[37] In *R v Paton* [2011] QCA 34, the youthful offender, aged 21, was already a recidivist. Concurrent three year sentences, cumulative on a revived suspended sentence of two and a half years, were found not to be manifestly excessive. The sentences of six and a half years, with parole eligibility after three years, in *R v Hyatt* [2011] QCA 55 and of six years, with no parole eligibility date, in *R v Hawdon* [2011] QCA 219 were found not to be manifestly excessive.

[38] For the respondent, the decisions in *R v Miller* [2015] QCA 94 and *R v Macklin* [2016] QCA 244 were identified for comparison. *Miller* involved a sentence of five and half years for imprisonment for the burglary and robbery in company with personal violence

and a further six months imprisonment, to be served cumulatively, for failure to appear in answer to bail. This Court found there was no basis to conclude the cumulative sentence was manifestly excessive.

[39] In *Macklin* this Court accepted that the learned primary judge was right to consider imprisonment for eight and a half years as a "starting point" for the burglary and robbery offences. However, the Court concluded that the sentencing court's reduction of 18 months (to seven years imprisonment) failed to take sufficient account of the offender's guilty pleas and his 11 months non-declarable pre-sentence custody. In re-exercising the discretion, this Court reduced the head sentence to six years imprisonment, and left the parole eligibility date unchanged at three and a half years. Taking account of his 11 month detention before sentence, Mr Macklin had almost a seven year head sentence and had to serve four years and five months in custody before being eligible for parole.

Consideration of proposed ground 1

[40] The decision in *Paton* is of little use as a comparison, given the applicant's very different age and very limited criminal history.

[41] The offender in each of *Hyatt* and *Hawdon* had less favourable antecedents and more serious offending conduct than the applicant. In deciding those sentences were not manifestly excessive, the Court did not purport to mark six or six and a half years as any limit or boundary for the maximum appropriate sentence that might be imposed for the offending in each case.

[42] The applicant has more favourable antecedents, and his offending spree in the houses was of lesser gravity, than those in *Miller* and in *Macklin*. However, the addition of the applicant's dangerous driving offence and the proper characterisation of his conduct in Ms D's house as domestic violence offences, are aggravating factors that were not present in those other cases. As well, all of the applicant's pre-sentence custody was declared, unlike in *Macklin*.

[43] At the applicant's sentencing hearing, the learned primary judge sought submissions on how the sentence should be structured and what the total effect of it should be. The applicant's counsel responded by asking his Honour to moderate and set the parole eligibility date as early as possible.

[44] The applicant was given a parole eligibility date after two years and three months in custody. This was nine months earlier than the offender in *Hyatt*. The effect of not assigning a date in *Hawdon* was that the prisoner could not apply for parole until after serving half of his head sentence, which was also nine months later than the applicant's eligibility date. The offender in *Macklin* received a parole eligibility date three and half years into the six year head sentence. So the applicant's date was 15 months earlier in his sentence, or 26 months earlier if account is taken of Mr Macklin's undeclared pre-sentence custody.

[45] Consideration of these four decisions does not lead to the conclusion that the learned primary judge's sentencing discretion is markedly and inexplicably at odds with the sentences in each of them.

[46] Having regard to the gravity of the applicant's offending, compared to the worst possible offending that attracts a life imprisonment and compared to the offending in the referenced decisions, and to the applicant's particular relevant circumstances, I am not driven to the conclusion that the sentence was manifestly excessive.

Proposed ground 2 – consideration of the applicant's mental illness

[47] The second proposed ground of appeal is that in sentencing the applicant, the learned primary judge erred in his consideration of the applicant's mental illness and in emphasising the relevance of deterrence rather than finding it mitigated.

[48] When there is evidence before the Court that an offender was affected by a mental disorder or impairment at the time of the offending, it may reduce moral culpability so as to affect the punishment that is just in all the circumstances; denunciation of the offending conduct may be a less relevant sentencing objective; and general deterrence may be moderated or even eliminated as a sentencing consideration depending upon the nature and severity of the offender's symptoms. The effects of mental health conditions at the time of sentence may also have a bearing on the sentence that would be just, and the extent to which specific and general deterrence can be achieved.[7]

[49] As his counsel Ms Robb put it frankly, the difficulty for the applicant is that there was very little before the sentencing court, or for that matter this Court, with respect to the nature and severity of the symptoms of the applicant's condition.

Material before the learned primary judge on the applicant's mental health

[50] At the sentencing hearing, the learned primary judge was told by the applicant's then counsel that the applicant was diagnosed with schizophrenia in his mid-twenties. The learned primary judge was told the applicant has paranoia, hears voices, and has visual hallucinations and suicidal ideations. These are accepted symptoms of psychosis associated with schizophrenia. Other symptoms, such as muddled, disrupted thought and speech, movement disorders, and unusual, inappropriate or extreme actions, were not raised before the sentencing court.

[51] As his Honour noted, the applicant had no criminal history before October 2010, when at age 27 he was fined with no conviction recorded for disorderly conduct. His next offence was public nuisance in June 2015, when he was 32. In 2016 and 2017, he committed a number of offences including public nuisance, assault or obstruct a police officer, failing to properly dispose of a needle and syringe, stealing, and unlawful possession of a controlled drug. This period was also marked by a series of domestic violence contraventions, including unlawful stalking, followed by a breach of the probation order imposed for the unlawful stalking and contraventions of domestic violence orders on five separate occasions, one an aggravated offence. These appear to follow the end of his relationship with Ms D.

[52] A court report prepared by the senior case manager from the Probation and Parole Kingaroy District Office, dated 26 April 2018, identified that the issues for the applicant were "substance matters, mental health and domestic violence."

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[7] This is a very brief summary of the propositions in *R v Tsiaras* [1996] 1 VR 398 at 400, *R v Verdins* (2007) 16 VR 269 at 271 [5], 276 [32] and *R v Goodger* [2009] QCA 377 at [21], adopted in *R v Yarwood* (2011) 220 A Crim R 497 at 506-507 [23]-[26].

[53] At the time of this offending, the applicant was affected by methylamphetamine. His counsel told the learned primary judge that he was using "vast amounts" of that dangerous drug. The use had increased when he became extremely depressed after the 2015 death of his two year old daughter in a freak accident.

[54] The sentencing court was told that on the night in question the applicant believed he was being chased by two groups of men in cars. The applicant's counsel told the court, "He was trying to escape from the people he believed were chasing him" and he was "obviously heavily intoxicated and possibly suffering from mental health at the time."

[55] On disturbing the sleeping residents in their houses, the applicant's first words were instructions and threats about not calling the police. When the applicant threatened the life of his ex-partner, he told her, "You've pushed me to this." When the police tried to stop the stolen car he was driving, the applicant swerved and accelerated away. When the police located him in another house after the crash, he threatened them with a knife, announcing he would not go "back to prison." There is nothing in the agreed schedule of facts that indicates the applicant thought or expressed concern he might be being chased by anyone other than by the police, at the time the offending was underway.

Consideration of proposed ground 2

[56] Courts act on evidence, and not on common prejudices about mental health. It would be wrong for this Court to proceed on some uninformed presumption, for example, that violent behaviour is a symptom of schizophrenia or that all persons with the illness are less able to appreciate the wrongfulness of their actions.

[57] It could not be said that there was before the court any compelling material that the applicant had reduced moral culpability by reason of a medical condition diagnosed about ten years before the offending. There was no professional evidence about the applicant's mental health or indeed about the effect of any medical condition on the behaviour or understanding of a person in the position of the applicant.

[58] In the absence of any professional evidence of the applicant's condition and of any effect on his moral compass or control of his actions, there was no sound basis for the learned primary judge to conclude that the applicant's conduct, in a significant part, was to be explained by his suffering an untreated mental illness. It could not be concluded that the applicant's historic diagnosis of schizophrenia stripped specific and general deterrence of utility and relevance in the exercise of sentencing discretion.[8]

[59] Of course, the general state of the applicant's mental health (as it appeared from the limited material before the learned primary judge) was a relevant factor in mitigation of penalty. It was raised by the applicant's counsel at the sentencing hearing for that purpose. In such a case, the sentencing court should have regard to it as a factor that operates in the offender's favour.[9]

[60] The learned primary judge considered the applicant's past diagnosis of mental health issues, as well as the other mitigating factors of his early guilty pleas, his good employment history, the absence of any criminal history before 2010, his very recent descent into significant criminal offending following the breakdown of a lengthy

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8 *R v Ahmetaj* [2015] QCA 248 at [52]-[53].

9 *Zreika v The Queen* (2012) 223 A Crim R 460 at 478 [82].

relationship and the tragic death of his young child, and his very difficult upbringing. His Honour considered all these factors relevant to the individual sentences and to fixing a parole eligibility date. The weight attributed to each cannot be discerned or measured, but dealing with them in this way was not an error. They are properly matters for the first instance judge.[10]

[61] His Honour gave weight to the need for deterrence and denunciation of the offending conduct by imposing the cumulative head sentences. And, in accordance with the entreaty of the applicant's counsel, the applicant's mental health was among the many ameliorating factors that led the learned primary judge to set a parole eligibility date sooner than one year and ten months after the date of sentencing and at one third of the cumulative head sentences.

[62] In the circumstances, I do not find that the learned primary judge erred in the consideration given to the applicant's diagnosis of schizophrenia in sentencing the applicant.

Conclusion

[63] It follows that I would refuse the application for leave to appeal.

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10 *R v Baker* [2000] NSWCCA 85 at [11].