SUPREME COURT OF QUEENSLAND

CITATION:	*R v Walker* [2019] QCA 180
PARTIES:	**R** **v** **WALKER, David Colin** (applicant)
FILE NO/S:	CA No 292 of 2018 DC No 609 of 2018 DC No 613 of 2018 DC No 1955 of 2018 DC No 2001 of 2018 DC No 2007 of 2018 DC No 2355 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 17 October 2018 (Richards DCJ)
DELIVERED ON:	10 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2019
JUDGES:	Morrison and Philippides JJA and Applegarth J
ORDER:	**Application for leave to appeal against sentence 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 a plea of guilty – where the applicant seeks leave to appeal the sentences imposed for a series of violent robberies and assaults – where the applicant was convicted of crimes including: armed robbery in company and with personal violence, torture, burglary, assault occasioning bodily harm while armed and in company and assault causing bodily harm – where some of the sentences imposed were imposed with a declaration that the offences were a serious violent offence (SVO declaration) – where the central contention by the applicant is that there should have been no SVO declaration – where the applicant submitted that he should have received the same sentence, or at least no worse a sentence than his co-offender because the applicant was not the main offender – where the applicant submits that he was acting with restraint during the course of some of the offences where the outcome could have easily been much worse – whether the issue of parity arises – whether the sentence

imposed was manifestly excessive

R v Civcija [2018] QCA 83, cited
R v Crossley (1999) 106 A Crim R 80; [1999] QCA 223, cited
R v Dang [2018] QCA 331, cited
R v Randall [2019] QCA 25, cited

COUNSEL: The applicant appeared on his own behalf
M T Whitbread for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** The applicant seeks leave to appeal his sentences, imposed for a series of violent robberies and assaults.

[2] On 5 March 2017 the applicant committed an armed robbery when he intercepted a man walking to a shop to buy milk, forcing him back to his garage where the man was threatened with a metal pole and a crowbar. Around the applicant's neck was a chain inside clear plastic casing. The applicant stole a number of items including a laptop, credit cards and cash, mobile phones and the man's car. During the course of the robbery the man was threatened not only by the pole and crowbar, but also with the prospect that, as the applicant told him, the applicant would come back with some bikies.

[3] Ten days later the applicant, in the company of three others,[1] invaded the house of a 65 year old man, and over the course of three hours, tortured, assaulted and robbed that man. The applicant was carrying a chain in a plastic cover, similar to that worn by him when he committed the armed robbery ten days earlier.

[4] The violence inflicted by the applicant on the man included: hitting him with the chain; dragging him into a bedroom where he was punched or hit with the chain; forcing the man to bind his legs with tape; hitting; punching and kicking the man while he was restrained; threatening him with a paring knife; and forcing an object into his mouth as a measure to compel compliance. The applicant also poured superglue down the man's forehead and into his eyes in an attempt to glue his eyes shut. Violence committed by the other three, particularly Sting, in the applicant's presence included smashing a crystal glass over his head, hitting him repeatedly with a shifting spanner,[2] punching to the left eye, kicking to the head and stomach, and striking with a vacuum cleaner wand.

[5] While in prison on remand the applicant and another man violently attacked another inmate, injuring him.

[6] Out of those events the applicant was charged with armed robbery in respect of the first incident, and 10 counts in respect of the second incident, including torture, burglary, five counts of assault occasioning bodily harm, armed robbery in company with personal violence, and deprivation of liberty. The prison assault attracted a summary charge of assault causing bodily harm, while armed and in company.

[7] The applicant entered a plea of guilty on all counts as well as a significant number of other summary counts.

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1 Dench, Ngawhare and Sting.
2 10 times to the head, once to the left ear and once in the mouth.

[8] On 17 October 2018 the applicant was sentenced as follows:

Indictment 609/18

(a) count 1, armed robbery – four years' imprisonment, with a declaration that the offence was a serious violent offence (**SVO declaration**);

Indictment 613/18

(b) count 1, torture – nine and a-half years' imprisonment, with an SVO declaration;

(c) count 2, burglary – seven years' imprisonment;

(d) count 3, assault occasioning bodily harm, while armed and in company – seven years' imprisonment with an SVO declaration;

(e) count 4, armed robbery, in company and with personal violence – seven years' imprisonment and an SVO declaration;

(f) counts 5-9, convicted and not further punished; and

Summary charge for prison assault

(g) assault causing bodily harm, while armed and in company – 12 months' imprisonment, to be served cumulatively on the sentence of nine and a-half years for torture.

[9] Of the 17 other summary offences, the applicant was convicted with no further punishment.

[10] The applicant seeks leave to appeal against the sentences imposed on two grounds. The first is that the sentences were manifestly excessive "having regard to the cumulative effect of the Assault occasioning bodily harm while armed, in company sentence". That is a reference to the 12 month sentence to be served cumulatively with that applicable to the torture. The second ground was that the sentences were manifestly excessive, "having regard to parity with co-offender … Sting".

[11] The applicant had, by the time he was sentenced, served 579 days in custody. That time was declared as time served.

Circumstances of the offending

[12] Two agreed schedules of facts were tendered at the sentencing hearing. The first[3] relates to the first incident the subject of indictment 609/18.

First armed robbery – indictment 609/18

[13] At the time the applicant was 32 years of age, and the complainant was 39. Early in the morning of 5 March the complainant left his unit to purchase milk. He carried a bag with him containing his wallet (which contained $690 and bank cards), two mobile phones, a small knife, a power kit and medication. The bag also contained a small amount of methylamphetamine and a set of digital scales. While walking to the shop the applicant drove past him. The complainant crossed the road and saw the car driving back towards him. The applicant pulled up next to the complainant, asking him the name of the street. He then got out and asked what the complainant had in his bag. The applicant said he was a wanted criminal, driving a stolen car and "I don't give a fuck about anything". He then said "I've been getting fucked

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[3] Appeal Book (**AB**) 91.

around all night, I had to sleep behind the Maccas carpark", and "So I'm going to get something back and I'll start with you".

[14] The applicant told the complainant he had weapons in the car, and that he had a gun. He was wearing a big chain around his neck (about 60 centimetres long) inside a clear plastic casing. He told the complainant to show him what else he had. The complainant was worried about his wife and children and said that he had things in the garage. The applicant then pulled a metal pole, about 50 to 60 centimetres long, out of the front seat of the car and threatened the complainant.

[15] They walked to the garage where the applicant picked up a crowbar and waved it in the complainant's face. He asked about a computer tower and, having been told that it was broken, asked about a laptop. He told the complainant to find a bag and to put the laptop and charger inside. He then made the complainant empty his carry-bag and wallet onto the floor of the garage. The applicant took the credit cards and cash and told the complainant to write down his pin numbers for his bank accounts. He told the complainant to make sure he wrote down the correct numbers "or I'll be back with some bikies". He also took the complainant's driver's licence and both mobile phones, making the complainant give him the phone passwords. He repeated the threat about the bikies.

[16] The complainant had a number of guitars in the garage and the applicant said he would be back for those. He obtained the keys to the complainant's car and even though he was asked to leave it because the complainant's wife was pregnant and they needed it, he took the car.

[17] The complainant went upstairs to the house and told the wife that they had been robbed. They left the unit and went to stay elsewhere. Two days later the applicant returned and broke in to the garage, leaving a note telling the complainant to call him.

[18] About an hour after the robbery the applicant was stopped by police and a search of the vehicle revealed the complainant's property and the chain. He was arrested in relation to other matters and released on bail.

Second incident – torture, burglary and robbery

[19] The second schedule of facts related to the events 10 days later when the applicant and three others invaded a man's home and tortured him.[4]

[20] On 15 March 2017 the complainant responded to an advertisement which offered an exchange of sexual services for drugs. The complainant spoke to a person in relation to the advertisement and explained that he did not have any drugs but offered cash. Texts were exchanged and the complainant provided his address, after which arrangements were made for someone to come to his house.

[21] The applicant drove to the complainant's house in the company of a young man Sting (19 years old), and two women, Dench (42) and Ngawhare (26). Dench and Ngawhare walked up to the complainant's house. Dench was aware that Ngawhare was going to perform sexual favours in exchange for drugs. Dench asked the applicant what the plan was, and he said that Dench should let him and Sting into the house.

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4 AB 93.

[22] A neighbour observed the car and its occupants, and was concerned enough about the situation to take details of its number plate.

[23] Ngawhare knocked on the complainant's front door and was let in. While the complainant was getting her a drink she unlocked the door and Dench rushed in saying "You locked the door". The complainant heard banging on the back door and Dench went to it, letting the applicant and Sting in. The applicant was carrying a chain with a plastic cover over it, similar to that used to lock up bicycles. The applicant told the complainant, "You've made two mistakes, the first is you opened the door, the second, you locked the door".[5]

[24] The complainant asked what was going on and the applicant told him to sit down, hitting him across the shoulder with the chain. He told the complainant that they were in control, not him. He was made to get on his knees on the kitchen floor. Sting took a glass bowl from the kitchen and put it on the complainant's head, saying that if he moved they would smash him with the chain. After a few minutes the complainant tilted his head and the bowl fell on the floor. Sting and Dench walked to the front door, making sure it was locked, and turned the television's volume up. Sting took a shifting spanner that had been hanging up next to the door.[6]

[25] The applicant and Dench then dragged the complainant into the bedroom, demanding to know where his cash and valuables were. If the complainant did not answer he was punched or hit with the chain. This occurred 10 to 12 times. A crystal glass was smashed over the complainant's head.

[26] Walker and Dench went through the complainant's cupboards, telling the complainant that he would be flogged if he moved. When he tried to call out for help, he was struck. The music was turned up again.

[27] The applicant and Dench located a safe in a bedroom closet, and attempted to open it. The complainant's property, including 12 gold watches, gold chains, pendants and gold rings, was found by the applicant and Dench. They also stole a large amount of property including phones. Dench admitted going to a pawn broker at Lawnton later that day with Sting and Ngawhare where she "hocked" some of the jewellery and a camera. Ngawhare was found in possession of one of the stolen phones.[7]

[28] After dragging the complainant back to the lounge room, the applicant then gave the complainant black tape and told him to tape his own legs. The complainant complied, loosely binding his legs. Sting then took the tape and retaped the complainant's ankles and bound his hands.

[29] The applicant and the three others were at the complainant's house, detaining him, for approximately three hours.[8]

[30] The applicant, Dench and Ngawhare then went back into the bedroom, locating the complainant's money (between $2,100 and $2,200), and Dench went in and out a few times looking for tools. Ngawhare went from room to room and when she

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5 These events were the subject of count 2, burglary.
6 These events constituted count 3, assault occasioning bodily harm, whilst armed and in company.
7 These events constituted count 4, armed robbery, in company with personal violence.
8 This constituted count 5, deprivation of liberty.

found something to steal she would bring it into the lounge room. Sting was standing over the complainant with a spanner in his hand. When the complainant turned his head he would be hit with the spanner. The complainant was hit about 10 times to the head, once to the left ear with the side of the spanner, and once in the mouth. He was also struck on the left wrist.[9]

[31] Dench came out of the bedroom and said, "You're giving us the wrong answers", and punched the complainant in the left eye. Sting said that the complainant had "a head of concrete, the spanner keeps bouncing off his head". In response Dench told Sting to hit the complainant harder.[10]

[32] There was a knock at the door and the applicant and Dench answered, speaking to a person who had arrived. Ngawhare piled the bags containing the complainant's property by the door. The male who had knocked on the door then left, with the applicant and Ngawhare following, carrying the complainant's property.

[33] At that point the complainant grabbed the spanner, which was held by Sting. The complainant and Sting wrestled for the spanner and Sting called out to Dench who returned, kicking the complainant in the head and stomach. She then grabbed a vacuum cleaner wand and hit the complainant in the head.[11]

[34] The complainant let go of the spanner and Sting hit him in the head with it, causing his head to split open.[12]

[35] Sting and Dench ran out the door, at which point the complainant staggered to the veranda where a neighbour heard him calling for help. Police an ambulance arrived and the complainant was taken to hospital for treatment. At that time he still had tape around his ankles and a number of visible injuries to his face and body.

[36] The agreed facts recited those relied upon for count 1, torture. Over a period of two to three hours, Dench, Sting, the applicant and Ngawhare hit, punched and kicked the complainant, including with the chain and spanner, and while his legs and arms were restrained with tape. At one point the applicant threatened the complainant with a paring knife from the kitchen, threatening to throw it at the complainant and saying "Where do you want it, your head or your feet?".

[37] After the complainant was dragged to the lounge room, the applicant grabbed a tissue which had something wrapped inside it, and put it in the complainant's mouth. The object was golf ball sized and hard, and made the complainant's mouth dry. It had a chemical taste. The applicant said they would keep doing it until the complainant remembered where the stuff was.

[38] The applicant took some superglue from the kitchen, pouring it down the complainant's forehead and into his eyes, trying to glue the complainant's eyes shut. The applicant asked for money, drugs and the safe combination. The complainant told him there were no drugs in the house.

[39] The agreed particulars of the torture were that the applicant and the other three intentionally inflicted severe physical and/or mental and/or psychological and/or

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9 These assaults constituted count 6, assault occasioning bodily harm, whilst armed and in company.
10 These events constituted count 7, assault occasioning bodily harm, whilst armed and in company.
11 These assaults constituted count 8, assault occasioning bodily harm, whilst armed and in company.
12 This constituted count 9, assault occasioning bodily harm, whilst armed and in company.

emotional pain and/or suffering on the complainant through acts of violence and/or restraint and/or threats. The pain and/or suffering were temporary and/or permanent. The evidence relied on in establishing the torture included, but was not limited to, the acts comprising counts 3 through to 9. Further to those acts the torture was said to include any other acts, conduct or words which the jury considered relevant to establishing that the complainant had been tortured, including: (i) pouring superglue on his forehead in an attempt to superglue his eyes shut; (ii) putting a tissue with something wrapped inside it into the complainant's mouth; (iii) threatening violence; and (iv) threatening to throw a paring knife at his head or feet.

[40] Dench and Ngawhare, using the complainant's car keys, got in the complainant's car and drove away.[13] Sting and the applicant left in the car in which they had arrived at the complainant's residence. Dench and Ngawhare dumped the complainant's car where it was later located by police.

[41] The complainant's injuries included the following:

(a) pain in the head, neck, right chest and right upper abdomen;

(b) laceration to left temporal area; bruising;

(c) complex fracture through the left frontal bone with small subdural haematoma underlying it within the frontal lobe, with a second subdural haematoma overlying the left parietal lobe;

(d) fractures through the left jaw with a possible subluxation to the right; minimally displaced fracture through the left eye; and

(e) acute kidney injury.

[42] The complainant was discharged two days later, being prescribed antibiotics and analgesics, and had to attend further appointments.

[43] The applicant, Dench and Ngawhare participated in interviews with police. Dench co-operated with police, but "somewhat played down her involvement". She then provided a written statement with a more comprehensive account, making full admissions.

[44] Ngawhare participated in an interview, admitting being at the complainant's house for the purpose of providing sexual favours for drugs. She said she had texted the complainant. She minimised her involvement in the offending and would not name her co-accused. She said the complainant put the superglue in his own eyes, and that he was a paedophile.

[45] The applicant participated in an interview in which he admitted to being at the house. He indicated that the complainant deserved the violence as he was a "rock spider".

[46] Sting was not co-operative.

[47] There was no evidence supporting any allegations of paedophilia against the complainant.

Summary charge for the prison assault

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[13] This was the subject of count 10, unlawful use of a motor vehicle, applicable only to Ngawhare and Dench.

[48] The offence the subject of the summary charge which resulted in the cumulative 12 month sentence was distinct from the others. It occurred whilst the applicant was in prison. On 16 March 2018 the applicant and another prisoner (Manwarring), approached that complainant (another prisoner). The applicant had a table tennis racket in his clothing, and ran at the complainant, striking him a number of times. Manwarring also began punching the complainant, who fell to the ground. Whilst the complainant was on the ground both the applicant and Manwarring continued to hit and kick him. Another prisoner attempted to intervene twice, but the applicant and Manwarring continued to repeatedly strike the complainant, who remained on the ground covering his head. The applicant used the table tennis racket to administer the blows, and Manwarring was kicking. The assault ended when Manwarring stomped on the complainant's head, rendering him unconscious.

[49] The assault was captured on CCTV[14] and revealed that the complainant was hit at least 20 times by the applicant. The complainant sustained a compound laceration and fracture to the left little finger, an undisplaced fracture of the left ring finger and the right little finger and a fracture to the fibula. There were also left temporal lobe contusions and a subdural haemorrhage, bilateral fractures to the eyes and a non-displaced fracture on the right temporal area. He had concussion with post-traumatic amnesia that lasted for 11 days, leading to poor new memory formation, sensitivity to light and sound, nausea, double vision, reduced concentration and fatigue. He was in hospital for about two weeks.

Additional facts

[50] In the course of submissions at the sentencing hearing the applicant's Counsel advanced a number of matters, without objection, relating to his background and motivation for the events. It was said that the applicant, when a child, had been the subject of sexual abuse at the hands of an uncle and also a soccer coach. The reaction to that abuse, as well as learning of the abuse of his own sister at the hands of that uncle, had "contributed to a deep-seated hatred … of anybody who offers harm to children or to those who he sees as being a threat to children".[15] It was said that on the basis of communications before attending the house, the applicant had understood that the offer of sexual services had come from an underage person. Counsel made it plain that this was not being suggested as a matter of mitigation, but simply a matter of context.[16]

[51] The applicant was subjected to violent treatment by his father, apart from the sexual abuse to which he was subjected. In spite of that he had what was described as an "otherwise relatively unremarkable childhood", finishing schooling and then qualifying as a plasterer. However, he turned to illicit drugs at a young age, eventually moving to methylamphetamine by about age 18. The use of that drug had led to an increase in aggressive behaviour and ultimately a descent into violence in his relationships. That led to the Department of Child Safety removing his child from his and his partner's care. However, by the time of the sentencing he had had a new relationship, and a four year old daughter.

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14 Exhibit 8.
15 AB 65 line 45 to AB 66 line 1.
16 AB 66 line 14.

[52] His drug use was said to have resulted in the collapse of his business. Since being in custody he had participated in a drug offender intervention program, and had applied to do other courses.

Approach of the learned sentencing judge

[53] The learned sentencing judge referred generally to the nature of the charges, noting that the applicant was a mature man with a serious criminal history involving previous offences of violence. Her Honour also noted that when the initial armed robbery was committed the applicant was on bail.

[54] Her honour then reviewed the factual features of the offending noting that the house invasion and torture were the result of a planned attack. The same was said of the attack on the prisoner whilst in custody. In respect of that offence her honour described it as a cowardly attack which was persistent, and in which the applicant was an enthusiastic participant.

[55] The learned sentencing judge noted the plea of guilty, though it was not an early plea. Further, her honour noted that whilst there was a suggested motivation behind the attacks, related to the sexual abuse the applicant had suffered as a child, nonetheless the court could not condone the applicant's actions, regardless of whether the victims had themselves committed criminal offences. Her honour noted that the complainant in the torture offence was not suggested to have committed any criminal offences. As for the first armed robbery, there was no suggestion that the applicant knew that man at all.

[56] Her honour then noted that to some extent some of the sentencing that she was about to impose was "governed by other sentences that had been imposed", namely those on Sting and Manwarring. In respect of Sting, her honour noted that he was "the other person involved in the home invasion who meted out significant violence".[17] However, he was a much younger man (aged 19) and did not have a similar previous history for violence. The learned sentencing judge said:[18]

> "He received a sentence of seven years and I accept that even though you are an older man with more serious criminal history, because of your role, the appropriate sentence for the torture offending, if you are being sentenced for just that today, would be seven years. As I have already said before, the armed robbery, in my view, is particularly serious and a sentence of four years, were it being sentenced by itself, would be appropriate."

[57] Her honour then turned to the sentence on Manwarring for the assault carried out in the prison. Having noted that Manwarring was sentenced to two and a-half years' imprisonment, and that it was Manwarring who stomped on the complainant's head, nonetheless her Honour noted that the applicant was a very enthusiastic participant in that assault. Further, whilst Manwarring did have a previous criminal history of violence, her Honour noted that it seems the sentencing judge was not aware of that and he was therefore sentenced on the basis of having no previous criminal history for violence. Her Honour observed that if the applicant was being sentenced for

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17 AB 76 line 33.
18 AB 76 lines 40-45.

that offence alone, the appropriate sentence would be the same as that imposed on Manwarring.[19]

[58] The learned sentencing judge felt that the sentence for the prison assault should be cumulative because it was done in custody whilst the applicant was on remand for offences of violence.[20] However, because of the cumulative nature of the sentence, her honour decided that it should be reduced from two and a-half years to two years.

[59] The learned sentencing judge then noted that the submissions of both Counsel at the hearing was that he should take a global approach to the sentence, attaching it to the torture count but taking into account the armed robbery as well. On that basis her honour said:[21]

> "And because I am taking a global view of those sentences, the appropriate sentence for the armed robbery plus the home invasion, in my view, is one of nine and a-half years. And because, as I have already said, the assault occasioning bodily harm whilst armed in company will be cumulative, … and it will take it over a ten-year mark, I intend to reduce that sentence as well to take into account your plea of guilty."

[60] The result was, then, a sentence of nine and a-half years on the torture count and only 12 months' imprisonment on the prison assault, that being assault occasioning bodily harm whilst armed and in company. However, that period of 12 months was to run cumulatively on the nine and a-half years.

Discussion of the applicant's contentions

[61] At the centre of the applicant's contentions before this Court is the proposition that there should have been no SVO declaration, requiring him to serve 80 per cent of the sentence imposed prior to being eligible for parole. Secondly, it was said that a cumulative sentence should not have been imposed because that was not done in the sentence on the co-offender, Manwarring. Though various matters were raised in various forms, the essential features of the contentions made by the applicant are as follows:

(a) in relation to the first robbery[22] the victim claimed there was a gun, when that was not true;

(b) the second armed robbery, committed in the course of the house invasion, was not committed whilst on bail for the first armed robbery; this was a reference to a comment by the learned sentencing judge that the torture was committed whilst on bail for the first robbery;[23]

(c) the second armed robbery,[24] was not planned and the applicant did not take or steal any property;

(d) in relation to the entry of the house during the home invasion, the applicant's involvement was simply in dropping off the two female co-offenders (Dench

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19 AB 77 lines 1-8.
20 AB 77 line 8.
21 AB 77 lines 24-29.
22 The subject of indictment 609/18.
23 AB 74 line 22.
24 The subject of indictment 613/18.

and Ngawhare) and it was not until he was called upon by a co-offender for help that he entered to assist that co-offender who was "dragged inside by the victim";

(e) the assault in prison occurred because he had been threatened by the complainant in that case; and

(f) all of the victims had "in common abuse towards children".

[62] The applicant also submitted that he should have received the same sentence, or at least no worse a sentence, as Sting because he was not the main offender, the prosecutor accepted that he should be treated similarly to Sting, and an SVO declaration was not made in respect of Sting. Furthermore, he contended that an SVO declaration should not have been made as it would not have been imposed had he been sentenced by the same judge as sentenced his co-offenders, he had no prior armed robbery or SVO offences, and a cumulative sentence should not have been imposed for the prison assault because he was on remand at the time.

[63] In the course of oral submissions to this Court, the applicant advanced the same central points. They can be summarised as: (i) his criminal history lacked offences of violence that would justify an SVO declaration; (ii) Sting's sentence was not accompanied by an SVO declaration, and therefore his own sentence should not have attracted one; (iii) it was an error to make the sentence for the prison assault cumulative; and (iv) the circumstances of the home invasion and torture were such that he was not the main offender or the person inflicting the most violence.

[64] However, in the applicant's oral submissions, which were at times too frank to assist his cause, the applicant accepted that he was the ringleader of the home invasion and associated assaults, but said he was proud of what had occurred because he was punishing a person preying on young children. He contended that he was acting as a restraint on the other three during the course of the events in the complainant's home, and the outcome could easily have been much worse. Similarly, he was proud of the attack of the fellow prisoner, because that person had harmed his own child and deserved punishment. The applicant went so far as to say that Crown Counsel would have done the same in the same position.

[65] The applicant's oral submissions were replete with assertions of facts outside the agreed schedules. The applicant was told, early in the course of his submissions, that asserted facts outside the agreed schedules would not be taken into account.

[66] Insofar as the applicant now seeks to advance facts contrary to those in the agreed schedules tendered at the sentencing hearing, they should be disregarded. Those schedules were tendered as the basis upon which the applicant was to be sentenced, and nothing to the contrary was suggested during the course of submissions by the applicant's Counsel during the sentencing hearing. When the learned sentencing judge commenced her sentencing remarks, the applicant interrupted to suggest alternative facts. Her Honour reminded the applicant twice that the facts had been agreed. The point was not taken further. The suggestion in the applicant's written submissions that the house invasion was not planned and that the applicant only became involved, as it were, by accident, should be rejected. The agreed facts are quite the contrary. The applicant went with the three other offenders in the one vehicle, and Dench asked him what the plan was, to which he responded that she was to let him and Sting into the house. The applicant entered the house via the back door at which time he was carrying his chain with a plastic cover on it. His comment to the

complainant about making two mistakes and that they were in control indicate a premeditated or planned approach. In any event, during oral submissions the applicant accepted that he was the head or ringleader of those events.

[67] As for the first armed robbery, it is not the case that the victim claimed there was a gun, but rather that the applicant told the complainant that he had a gun. That is in the agreed schedule.[25]

[68] The assault in the prison was now said (in the written outline and oral submissions) to have been triggered by a threat from the victim in that attack. No such thing was said at the sentencing hearing, though there was ample opportunity to do so.

[69] Similarly the applicant submitted (in his written outline and orally) that all the victims had a common aspect, namely abuse towards children. Once again no such thing was said at the sentencing hearing, notwithstanding that there was ample opportunity to do so.

[70] It is true to say that the applicant was not on bail for the first armed robbery when he committed the offences in the second indictment. That was an error on the part of the learned sentencing judge, but in my view it is an error without significance. When the applicant committed the first armed robbery he was either on bail or had been served with a notice to appear for eight earlier offences, all of which had been charged by the time of the first robbery. Therefore whilst he was not on bail for the offence identified, he was on bail for other offences. Further, there were other aggravating factors affecting the consideration of the first armed robbery. The learned sentencing judge considered it to be prolonged and particularly serious and an offence which would have warranted a sentence of four years' imprisonment had it been considered alone.[26] There were the additional factors that the first armed robbery was only ten days prior to the second set of offences, which included armed robbery, multiple assaults and torture. Further, there was no early plea to the offences in the second indictment. In those circumstances I am unable to reach the conclusion that the error identified affected the sentence imposed.

[71] The applicant's contention that an SVO declaration should not have been made, for whatever reason, is misplaced. Nine of the offences with which the applicant was charged were offences within Schedule 1 of the *Penalties and Sentences Act* 1992 (Qld) and therefore serious violent offences for the purposes of s 161A(a) of the *Penalties and Sentences Act*. The only offences which were not serious violent offences were count 2 and count 5, each on indictment 613/18. The summary offence concerning the prison assault was also a serious violent offence for the purposes of s 161A(a).

[72] The effect of s 161A(a) is that where an offender is convicted of a serious violent offence identified in Schedule 1, the court must make a declaration that the conviction is a conviction of a serious violent offence. During the course of the sentencing it was identified that such a direction should be made under the *Penalties and Sentences Act*, and it was.[27]

[73] In the applicant's case the two relevant sentences, nine and a-half years for the torture and 12 months for the prison assault, were ordered to be served cumulatively. That means that the specified period of imprisonment was 10 and a-half

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25 AB 91 and paragraph [14] above.
26 AB 76 lines 40-45.
27 AB 78 lines 1-12.

years: s 161C(1)(a) and (2)(b) of the *Penalties and Sentences Act*. Because the sentence was more than 10 years the offence is a serious violent offence under s 161A(a). This was not a case where there was any discretion that could be imposed, once the periods of nine and a-half years and 12 months respectively were selected as the appropriate sentence, and ordered to be served cumulatively.[28]

[74] The fact that no SVO declaration was made in respect of Sting is not to the point. In my view, there is no parity issue raised. First, the fact that a declaration is appropriately made for one offender but not the other is a matter which should be put aside.[29] Secondly, the agreed facts in respect of those offences reveals significant differences between the applicant on the one hand and Sting on the other. On those facts, the applicant was the main organiser and the one who was consulted as to what the plan was. The applicant was the only one armed when the house was entered, Sting arming himself once inside. Whilst Sting assaulted the victim with a shifting spanner, inflicting considerable injuries, the applicant not only participated in those assaults, but committed his own in the form of trying to superglue the victim's eyes shut, putting an object in his mouth as a form of coercion, and threatening the victim with a paring knife.

[75] Other distinctions between the applicant and Sting include the great disparity in their age, and the applicant's far more serious criminal history. Unlike the applicant, Sting had no previous offences of violence. For those offences which were common as between Sting and the applicant, the learned sentencing judge observed that had they been the only sentences applicable to the applicant, the same sentence would have been appropriate.[30] However, there were the additional offences of the first armed robbery, and the assault whilst in prison, to be taken into consideration.

[76] As was said by this Court in *R v Dang*,[31] the parity principle applies as an element of the wider principle that there should be consistency in the punishment of offences, which is "a reflection of the notion of equal justice" and "is a fundamental element in any rational and fair system of criminal justice".[32] This Court relevantly summarised its application in *R v Civcija*, in these terms:[33]

> "[13] The starting point when sentencing such co-offenders is that like should be treated alike. Allowances must be made for any differences in the circumstances pertaining to co-offenders but any difference between the sentences imposed upon co-offenders for the same or similar offence ought not be such as to give rise to a "justifiable sense of grievance on the part of offender with the heavier sentence or to give the appearance that justice has not been done".

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28 *R v Randall* [2019] QCA 25 at [31].

29 *R v Crossley* (1999) 106 A Crim R 80 at [14]; see also *R v Cowie* [2005] 2 Qd R 533 at [15], and *R v Mikaele* [2008] QCA 261 at [36].

30 AB 76 lines 40-45.

31 [2018] QCA 331 at [38] per McMurdo JA (Gotterson and Morrison JJA concurring).

32 *Dang* at [38] referring to *Lowe v The Queen* (1984) 154 CLR 606 at 610; [1984] HCA 46; cited in *Green v The Queen* (2011) 244 CLR 462 at 473 [28].

33 [2018] QCA 83 at [13]-[14]; internal citations omitted.

> [14] The circumstances in which an appellate court will interfere on the ground of lack of parity are limited. As Dawson J put it in *Lowe v The Queen*:
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> "... the interference of a court of appeal is not warranted unless the disparity is such that the sentence under appeal cannot be allowed to stand without it appearing that justice has not been done. The difference between the sentences must be *manifestly excessive* and called for the intervention of an appellate court in the interests of justice." (emphasis added)"

[77] Dealing with differences between sentences based on the presence of an SVO declaration in one but not the other, this Court said in *Dang*:[34]

> "As the Court said in *Cowie* and in the cases referred to in that judgment, it must be accepted that the inevitable declaration of a serious violent offence is relevant in the consideration of what sentence is just in all the circumstances. Although that consideration is relevant, a court should not impose a sentence below the range for that offending in order to avoid having to make a declaration. But the operation of s 161A and s 161B according to those principles would not be inconsistent with the operation of the parity principle which permits a sentence to be reduced to a level which, had there been no disparity, would be below the range. As I have said, the practical application of the parity principle can be affected by these provisions; but it is another thing to say that they were intended to so substantially compromise the application of the principle."

[78] In my view, no issue of parity arises in the true sense, as no justifiable sense of grievance could be felt at the disparity. This is not a case of comparing like with like. The differences between the offending of Sting and the applicant are substantial, especially when it is remembered that the applicant's sentence incorporated the first armed robbery and the prison assault. To reduce the applicant's sentence on the basis that Sting did not have an SVO imposed would be an error.

[79] The applicant's contention concerning the fact that he was on remand at the time he committed the prison assault, does not advance matters. That simply means that an order making the terms cumulative was not mandatory. However, there remained a discretion to impose cumulative sentences. That course was foreshadowed by the learned sentencing judge and not opposed by Counsel appearing for the applicant at the sentencing hearing.[35]

[80] Finally, the learned sentencing judge recognised the impact of the cumulative aspect, reducing the proposed sentence from two and a-half years to 12 months in respect of the prison assault. That was a significant reduction and one which cannot be the subject of valid criticism.

[81] For these reasons I am unpersuaded that it can be demonstrated that the sentences imposed upon the applicant were manifestly excessive.

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34 *Dang* at [39].
35 AB 70 lines 2-4.

[82] I would refuse the application for leave to appeal against sentence.

[83] **PHILIPPIDES JA:** I agree that the application for leave to appeal against sentence should be refused for the reasons given by Morrison JA.

[84] **APPLEGARTH J:** I agree with the reasons of Morrison JA and with the order proposed by his Honour.