SUPREME COURT OF QUEENSLAND

CITATION:	*R v Free; Ex parte Attorney-General (Qld)* [2020] QCA 58
PARTIES:	**R** **v** **FREE, Sterling Mervyn** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 285 of 2019 DC No 1632 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 11 October 2019 (Dick SC DCJ)
DELIVERED ON:	31 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2020
JUDGES:	Philippides JA and Bowskill and Callaghan JJ
ORDERS:	**1. The appeal be allowed.** **2. The sentence imposed at first instance be varied by varying the sentence imposed on count 1 to a sentence of imprisonment of eight years.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent was convicted, on his own pleas of guilty, of taking a child under 12 years for an immoral purpose (count 1), deprivation of liberty (count 2) and indecent treatment of a child under 12 (count 3) – where the respondent was sentenced to eight years' imprisonment with eligibility for parole after two years and eight months on count 1, and two years' imprisonment on each of counts 2 and 3, all to be served concurrently – where the seven year old child victim was shopping with her mother in K-mart – where the respondent was found to have followed the child in the shop for about 20 minutes, before luring her away – where the respondent's conduct was found to be predatory and to have involved some premeditation – where the respondent then drove the child for about 30 minutes to a secluded area of bushland, sexually abused her, and kept the child for almost an hour and a half before returning her to the

shopping centre – where the respondent was identified, but then made extensive admissions to the police about the offending – where the respondent admitted to a psychological trigger for the offending, saying that he knew what he was doing was wrong, but "the urges just kicked in" and were overwhelming – where the respondent disclosed long-standing paedophilic ideation to a forensic psychologist – where the offending has had a severely traumatising effect on the child – where the respondent indicated he would plead guilty at a very early stage, including before DNA evidence was available – whether the sentence imposed was manifestly inadequate – whether the sentencing judge erred in failing to make a serious violent offence declaration in respect of count 1 as part of the sentence, because of a focus on the need for there to be factors which take the offending "outside the norm" for the type of offence, rather than a broader focus on whether the case presented features which required the delay of the offender's parole eligibility to protect the public from the risk of future offending – whether the sentencing judge erred in making a recommendation for the respondent's eligibility for parole after the "conventional" one-third for a plea of guilty – whether the starting point for the sentence, essentially agreed between the prosecution and the defence at first instance by reference to a 2004 decision, was too low

Criminal Code (Qld), s 201, s 219, s 669A(1)
Penalties and Sentences Act 1992 (Qld), s 9(1), s 9(2), s 9(4), s 9(5), s 9(6), s 159A, s 161A, s 161B, s 184

Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, followed
Callanan v Attendee X [2013] QSC 340, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v Bojovic [2000] 2 Qd R 183; [1999] QCA 206, cited
R v Cogdale [2004] QCA 129, doubted
R v Collins [2000] 1 Qd R 45; [1998] QCA 280, cited
R v Cowie [2005] 2 Qd R 533; [2005] QCA 223, cited
R v D [2003] QCA 88, considered
R v DeSalvo (2002) 127 A Crim R 229; [2002] QCA 63, cited
R v Eveleigh [2003] 1 Qd R 398; [2002] QCA 219, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Muirhead; R v Muirhead; Ex parte Attorney-General (Qld) [2019] QCA 244, followed
R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld) [2019] QCA 300, cited
R v Stoian [2012] QCA 41, considered
R v Thorburn [2017] QCA 278, cited

COUNSEL: C W Heaton QC for the appellant
A J Edwards for the respondent (pro bono)

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Moloney MacCallum Abdelshahied for the respondent

[1] **THE COURT:** The Attorney-General appeals against the sentence imposed on the respondent on 11 October 2019, of eight years' imprisonment with eligibility for parole after two years and eight months, on his conviction of the offence of taking a child under 12 years for an immoral purpose (count 1). He was convicted of that offence on his plea of guilty, as well as of two further offences, deprivation of liberty (count 2) and indecent treatment of a child under 12 (count 3), for each of which he was sentenced to two years' imprisonment, all to be served concurrently.

[2] The Attorney-General contends the sentence imposed on count 1 is manifestly inadequate (ground 1) and that the learned sentencing judge erred in failing to declare the offence in count 1 a serious violent offence (ground 2). The two grounds are intertwined. The essence of the Attorney-General's complaint on this appeal is that the sentence imposed on count 1 is manifestly inadequate because of the order for parole eligibility after serving one-third of the sentence. The Attorney-General makes no challenge to the head sentence, but contends the learned sentencing judge ought to have made a serious violent offence declaration, which would require the respondent to serve 80 per cent of the sentence.[1] The Attorney-General's alternative position is that her Honour erred in making a recommendation for the respondent's eligibility for parole after, in effect, one-third of his sentence, and should have made no recommendation for early release on parole, leaving the respondent eligible for parole after serving half the period of imprisonment.[2]

Factual circumstances of the offending

[3] The offences were committed on Saturday, 8 December 2018. The respondent was aged 26 at the time; the child victim was aged seven. She was shopping with her mother in the toy section of Kmart, looking for something to buy with her pocket money. The child was selecting toys to show her mother, walking a little away from her mother as she did this. When on one occasion the child did not return for a few minutes, her mother began to search for her, and then alerted staff to assist her. Security staff and police then became involved.

[4] CCTV footage showed the child following the respondent out of Kmart at about 1.00 pm. The defendant is said to have looked back at the child a number of times, and appeared to speak to her, before they exited the shopping centre. They are seen to walk through the car park, and then move out of camera range.

[5] At 2.23 pm on that day, a security officer observed the child on CCTV footage re-entering the shopping centre alone, via the same entrance. She was soon reunited with her mother. She had been missing for 1 hour and 23 minutes. Upon being reunited with her mother, the child was observed to have two long scratches running down her back, but refused to let her mother look at them or tell her how she got them.

[6] The child has been reluctant, or unable, to provide any real details about what occurred in the time she was missing. At times, when police tried to speak to her, she would avoid eye contact, curl herself up into the foetal position; hide or revert to

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1 See s 182 of the *Corrective Services Act* 2006.
2 See s 184 of the *Corrective Services Act* 2006.

speaking in baby talk and sounds. What she was able to tell the police was that the respondent approached her in Kmart and told her to come with him. He told her his name, and she told him her name. She went with the respondent, and got into his car. They talked about Christmas and drove past tall trees. When they got out of the car, there were lots of bushes and trees around. He told the child to follow him into the bush. She recalls lying down on the ground, but claimed she did not know whether she took off her clothes. She said she was unable to see the respondent, but said he was wearing his clothes. She said nothing about any sexual offending. She said they did not talk while they were in the bush, until the respondent told her to go back to the car. The respondent drove her back to the shopping centre, and then stood near his car while the child walked back to the shops.

[7] A few days after the incident, the child told her mother she knew she should not have gone with the respondent, but he had told her he was a good friend of her mum's and that she had said it was ok for the child to go with him.

[8] CCTV footage obtained from the shopping centre showed the respondent was there from about 9.00 am. He entered various shops, but did not appear to purchase anything. He went into Kmart three times: at 9.03 am, 10.32 am and 12.39 pm.

[9] According to the schedule of facts it is agreed that the footage depicts the following sequence. At 10.10 am the respondent appears to be looking at young girls and possibly takes a photograph. At 12.29 pm, the respondent exits one shop and appears to follow a mother and her young daughter towards another shop. He leaves that shop at 12.37 pm and enters Kmart at 12.39 pm.

[10] At 12.41 pm the respondent walks past the child victim and her mother in Kmart. He walks around the store going in and out of camera range. Both the respondent and the child are off camera for approximately 1 minute before the respondent reappears on camera at 1.00 pm. He winds through the aisles with the child following, and they exit Kmart at 1.01 pm. They are last seen on CCTV footage from the shopping centre at 1.07 pm, leaving the carpark on foot. As the respondent's car was parked outside the shopping centre, police were unable to obtain its registration number.

[11] The learned sentencing judge referred, in her sentencing remarks, to viewing the CCTV footage. It was apparent to her Honour that the respondent walked in and around the toy section of the shop for about 20 minutes before he left with the child. Her Honour said she found the video footage "chilling", warranting the description "opportunistic and predatory". There is some ambiguity in the juxtaposition of those two words.[3] However, it is clear that her Honour, having viewed the footage, accepted the Crown's submission that the conduct was predatory.[4] Her Honour also found the incident "clearly involved some premeditation".[5]

[12] On the evening of 8 December 2018 a photograph of the respondent, taken from the CCTV footage, was disseminated to all police officers in Queensland. Two days later, on 10 December, an officer recognised the respondent as a previous employee of his parents' business, and a search of the police database confirmed that the respondent was the person depicted in the CCTV footage. Police executed a search

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3 Which had been used by defence counsel in his submissions: AR 46 line 21-22.
4 AR 23 line 45.
5 AR 60 line 20.

of his home at 5.00 pm on 10 December 2018, and seized clothing and jewellery similar to that which the respondent was wearing in the footage. The respondent was also subsequently identified by a previous employer who had seen him whilst he was in the car park, holding the hand of a young girl. The child's mother also recognised the defendant, from the CCTV footage, as a person she had accidentally bumped into with her trolley in Kmart, prior to the child going missing.

[13] Later on the evening of 10 December 2018, the respondent participated in a formal interview with police. He made extensive admissions, and then took the police to the place he had taken the child. On the following day he participated in a recorded re-enactment of his movements on 8 December 2018.

[14] The respondent told police that he was shopping for Christmas presents when he saw the child alone in Kmart. He said "the urges just kicked in". He asked her to come with him and, to his surprise, she began to follow. Part of his conscience was telling him "don't do this" and "freaking out"; but the "urge" was telling him he needed to do it. He admitted he had always had sexual thoughts and fantasies about young girls, but had never acted upon it until this day.

[15] The respondent led the child to his car and they began driving. He headed towards the highway, and once they were on the highway said "the dark urge had taken over" and he made the decision to take the child to a secluded area of bushland. The drive took about 30 minutes. They walked into the scrub, far enough to ensure they could not be seen from the road, but could still find their way out.

[16] The respondent made admissions to laying the child on her back on the ground, and removing her playsuit and boots; he admitted touching and rubbing the child's vagina over the top of her underpants, and then moving her underpants to the side and rubbing on the bare skin of her vagina. He said he became physically aroused, and ejaculated, but remained fully clothed throughout. He described the child as looking confused and scared. Afterwards, he told the child to get dressed, then picked her up and carried her back to the car. After putting her in the car, he smoked a cigarette before driving back to the shopping centre. Once there, he parked outside the carpark, then helped her cross the road and walked her to the path leading to the shopping centre, leaving her to go in alone.

[17] The respondent told the police his actions made him feel sick and disgusting. He knew it was wrong but the arousal was overwhelming and "he had a demon inside that he couldn't control".

[18] DNA analysis was undertaken of samples from the child's playsuit and underpants. According to the agreed schedule of facts: "The respondent's admissions do not account for the presence of spermatozoa, seminal fluid and saliva, and corresponding DNA matching that of the respondent, on the inside of the child's underpants and playsuit. These results clearly indicate that the respondent's ejaculate came into contact with multiple areas on the inside of the child's clothing, as did his saliva."

[19] The sentencing judge was invited, in the Crown's written submissions, to make findings of fact consistent with the DNA evidence – namely, that the child's underpants were removed or at least partially removed during the offending; that the mouth of the respondent came into contact with areas of the child's body including

her groin/genital area; and that the defendant's penis did not remain inside his clothing throughout. Her Honour declined to do so. An exchange in the course of submissions[6] records that the respondent gave instructions as to how the semen and saliva could have come to be in the places it was found: he said that after ejaculating he had reached in and adjusted himself and therefore had semen on his fingers; that he helped dress her, and carried her back to the car; and he also had a cold at the time. The Crown did not press the point with any vigour. In the face of that, her Honour referred to the admissions by the respondent that he took the child's clothes off, and that he ejaculated, and said "I'll take it that far".

[20] Her Honour recorded that the respondent had already entered his pleas of guilty, before the DNA evidence was available.

[21] The child's behaviour changed significantly after this incident. She became clingy, anxious and easily upset. She was also often angry and aggressive, particularly towards her mother. The material before the sentencing judge indicated the child appears to have blocked this incident from her mind, and refuses to discuss it. The incident has plainly, and unsurprisingly, had a severely traumatising impact on her; that impact is likely to be long-lasting. The impact on her mother is also substantial; and it has also affected wider family and friends. As described by the learned sentencing judge, the offending is every parent's nightmare; it is a nightmare for any child as well.

The respondent's personal circumstances

[22] The respondent had a relatively minor criminal history prior to this, comprising mostly property offences, but no prior convictions for sex offences. He has been in a relationship with his partner for about six years, and they have young twin daughters.

[23] He had been in custody for 306 days prior to the sentence. This was able to be declared as time already served under s 159A of the *Penalties and Sentences Act* 1992. Five months of that time was spent in isolation, in the detention unit. In the sentencing remarks, the learned sentencing judge referred to the decision of Applegarth J in *Callanan v Attendee X* [2013] QSC 340, as support for the proposition that in the exercise of the sentencing discretion, substantial allowance should be made for the harshness of the regime of solitary confinement to which the offender has been or will be subjected (unless it is caused by the offender).[7]

[24] The appropriateness of considering this as a factor in the exercise of the sentencing discretion was confirmed by the Court of Appeal in *R v Thorburn* [2017] QCA 278 at [41].[8] However, in *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300 at [156] there is a reminder that the mitigatory effect of being held in a protected part of a prison depends upon proof that incarceration in such a place is, for particular reasons, more onerous than being kept in the general population of a prison.[9]

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6 AR 21-22.

7 *Callanan v Attendee X* [2013] QSC 340 at [26]-[27], [34]-[45], [54].

8 In that case, the offender had been on remand for almost a year prior to sentence, and for all but a few days of that period he was housed in the detention unit pursuant to safety orders. That was specifically reflected in a reduction of the head sentence by six months, which the Court of Appeal said was well within a proper exercise of the sentencing discretion.

9 Referring to *R v Males* [2007] VSCA 302.

[25] The learned sentencing judge in this case did not articulate any specific reduction in penalty, as a result of the respondent's time spent in the detention unit. It was not necessary to do so, particularly as there was no evidence before the Court about what that involved, or that it meant his time on remand had been more onerous. Nevertheless, it may be inferred it was one of a number of factors taken into account by her Honour in arriving at the appropriate penalty.

[26] In addition to his pleas of guilty, and admissions, other mitigating factors relied upon at the sentence were that the respondent was said to be remorseful and ashamed of his actions; and had been the victim of sexual abuse himself as a child. The learned sentencing judge referred to research that has demonstrated that child victims of sexual abuse are at an increased risk of committing adult sex offences.

[27] Both of these matters were addressed in a report from a psychologist, Associate Professor Freeman, which was relied upon at the sentence. In so far as the assertions of his own abuse as a child are concerned, the report records that the respondent told the psychologist he believed the present offending stemmed from his own sexual abuse in childhood (being raped by his father on one occasion when aged seven), an incident which he had repressed until about two weeks before the offences were committed. But he also told the psychologist he had struggled with paedophilic ideation since the age of 15.

[28] The psychologist identified the respondent as having a long standing history of struggling with impulse control; and having an increased vulnerability to engage in impulsive and reckless behaviours, with little consideration for the consequences. The respondent is described as having a pornography addiction, and likely to have a paedophilic disorder. The psychologist said that "[g]iven the unique nature of the offences, it is difficult to ascertain (with a high level of psychological certainty) the risk of recidivism". However, some protective features able to be identified were a lack of psychopathic tendencies and the absence of criminal versatility, personality disorders, previous violence-based convictions or extensive drug dependency treatment needs. It was regarded as encouraging that the respondent remained extremely remorseful and ashamed of his behaviour and eager to engage in interventions (treatment). The psychologist also said the respondent's incarceration may, for him, have a deterrent effect, also reducing the risk of recidivism. He recommended treatment programs for the respondent, and the respondent has said he will participate in these.

[29] Inconsistently with the finding made by the learned sentencing judge, the psychologist described the offending as spontaneous. For example, he said that the respondent "appears to have increasingly viewed paedophilic imagery or struggled with such ideation prior to the offences before spontaneously acting on impulsive ideation. While the offences have a predatory element, they primarily appear to be representative of engagement in spontaneous ideation (with a complete disregard for the consequences [at time])". It is difficult to reconcile that comment with the agreed statement of facts, and the finding referred to at [11] above that the 20 minutes of CCTV footage of the respondent watching the child before luring her away was "chilling".

The sentencing remarks

[30] The learned sentencing judge observed that the parties were "not far apart" on the appropriate head sentence. In fact they were *ad idem* (of the same mind). Although the Crown had initially submitted the appropriate sentence may be somewhere between eight and ten years, ultimately, there was no real argument as between the Crown and the defence counsel about the appropriate sentence being eight years. The Crown submitted, however, that the Court should exercise its discretion to make a declaration of conviction of a serious violent offence, as part of the sentence.

[31] Before addressing that matter, the learned sentencing judge said, in the sentencing remarks, that:

> "Any punishment I impose must reflect public denunciation for such behaviour. It must also be a just punishment and provide a personal deterrence to you. Professor Freeman says that, given the unique nature of the offences, it is difficult to ascertain with a high degree of psychological certainty the risk of recidivism. He considers the fact that you have now been incarcerated as a significant deterrent against recidivism. I say so because your prospects of rehabilitation are another matter I have to take into account in assessing the appropriate penalty."[10]

[32] Those four things – punishment, denunciation, personal deterrence and rehabilitation – are amongst the purposes for which a sentence may be imposed, under s 9(1) of the *Penalties and Sentences Act*. Two further purposes, referred to in s 9(1) but not mentioned in the sentencing remarks, are: deterring others from committing the same or similar offences (general deterrence) and community protection. As will appear, on this appeal the Attorney-General emphasised community protection as a significant factor in the sentencing of the respondent.

[33] As to the making of a serious violent offence declaration, the learned sentencing judge said:

> "The considerations which may be taken into account in the exercise of the discretion to impose such a declaration are the same as those which may be taken into account in relation to other aspects of sentencing. As was said in the case of McDougall:
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> > *The law strongly favours transparency and accessible reasoning, and, accordingly, sentencing Courts should give reasons for making a declaration and only after giving the defendant an opportunity to be heard on the point. Further, the reasons for the reasons to show that such a declaration is warranted in the circumstances, it will usually be necessary for the declarations to be reserved for more serious offences that, and by their nature warrant them. Where the circumstances of the offence do not take it out of the norm for that type of offence and where the sentencing Judge does not identify matters otherwise justifying the exercise of the discretion, it is likely the overall result will be a sentence which is manifestly excessive. In that way, the exercise of the*

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10 AR 60 (underlining added).

> *discretion will usually reflect an appreciation of the sentencing Judge that the offence is more than usually serious example of the type of offence.*
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> First, I have to acknowledge that the offence of taking a child away for immoral purposes is in itself an abhorrent offence. I need then to consider whether there are factors in your case which take it outside the norm for that appalling offence. The Prosecution say these factors should be taken into account: the age and vulnerability of a child; that she was taken from a public place in a predatory manner; that you lured her and preyed on her. You took her from the protection of her mother for a period of over an hour, and she was isolated and helpless, and the offence of indecent treatment was for sexual gratification. Many, if not all, those factors are present in all cases of abduction of a minor for immoral purposes.
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> Your defence counsel mitigates those arguments by pointing out your cooperation, your admissions before the DNA evidence was available, the fact that your admissions form the basis of the charge of indecent treatment, that you assisted the law enforcement authorities by the enactment, by showing them where the event had taken place. The event itself, of indecent treatment, he says, lasted only minutes. It was not penetrative. You returned her and ensured her safety by walking her across the road, and he says you have demonstrated your remorse by your ex officio request and in your early plea of guilty. As appalling as the offence is, I cannot be satisfied that it is so far outside the norm for that type of offence that I should make the declaration."[11]

[34] The learned sentencing judge then moved directly to impose a sentence of eight years' imprisonment on count 1 (and two years on each of counts 2 and 3) and, after declaring the time already served, said:

> "… in recognition of the early plea of guilty and that the child has not been required to give evidence, I recommend that you be eligible to be considered for parole on [date]… That is a third of the sentence. That is a conventional marking of your plea of guilty."

The appeal – grounds 1 and 2 intertwined

[35] The relevant principles, for an appeal against sentence, were summarised recently in *R v Muirhead; R v Muirhead; Ex parte Attorney-General (Qld)* [2019] QCA 244 at [63]-[65] (Buss AJA, Fraser and McMurdo JJA agreeing):

> "[63] It is necessary, in determining whether a sentence is manifestly excessive or manifestly inadequate, to examine it from the perspective of the maximum penalty for the offence, the standards of sentencing customarily observed with respect to the offence, the place which the offender's criminal conduct occupies on the scale of seriousness of offences of the kind in question, and the offender's personal circumstances and antecedents.

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11 AR 61-62. Underlining added.

> [64] Except where a mandatory sentence is prescribed, a sentencing judge exercises a discretionary judgment which is subject to applicable statutory provisions and judge-made law. See *Barbaro v The Queen*.[12] In the present case, the sentencing judge was obliged to sentence the applicant in accordance with the governing principles set out in Part 2 of the *Penalties and Sentences Act* 1992 (Qld). This Court can intervene if the appellant demonstrates either an express or an implied material error. Express error includes acting on a wrong principle (for example, mistaking the law or the facts or taking into account an irrelevant consideration). Implied error arises where the sentencing outcome is so unreasonable or unjust that this Court must conclude that a substantial wrong has occurred. The discretion conferred on sentencing judges is, of course, of fundamental importance and this Court may not substitute its opinion as to sentencing for that of the sentencing judge merely because it would have exercised the discretion differently. See *Lowndes v The Queen*[13] and *Lacey v Attorney-General (Qld)*.[14]
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> [65] A sentencing range for comparable cases is merely one of the factors to be taken into account in deciding whether a sentence is manifestly excessive or manifestly inadequate. A range of sentences customarily imposed is a yardstick for the purpose of ensuring broad consistency in the sentencing of offenders in broadly comparable cases. Consistency in sentencing means that like cases must be treated alike and different cases must be treated differently. See *R v Pham*.[15] However, the scope for material differences in each case in relation to relevant sentencing factors, and the weight to be given to them, must be borne in mind. The limits of the guidance afforded by comparable cases are therefore flexible rather than rigid."[16]

[36] It is appropriate to consider grounds 1 and 2 of the Attorney-General's appeal together, because the failure to exercise the discretion to declare the offence in count 1 a conviction of a serious violent offence (ground 2) is the basis on which it is contended the sentence is manifestly inadequate (ground 1); and because the exercise of the discretion under s 161B(3) is something which is required to be undertaken as part of the integrated process of arriving at a just sentence, not separately from it.[17]

[37] The Attorney-General contends an express error has been made in the exercise of the sentencing discretion, by the application of the wrong principle in relation to the

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12 [2014] HCA 2; (2014) 253 CLR 58 [25] (French CJ, Hayne, Kiefel & Bell JJ).

13 [1999] HCA 29; (1999) 195 CLR 665 [15] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

14 [2011] HCA 10; (2011) 242 CLR 573 [62] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

15 [2015] HCA 39; (2015) 256 CLR 550 [28] (French CJ, Keane & Nettle JJ).

16 Underlining added.

17 *Markarian v The Queen* (2005) 228 CLR 357 at [37]; *Barbaro v The Queen* (2014) 253 CLR 58 at [34]; *Director of Public Prosecutions v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 at [4]-[7]; *R v McDougall and Collas* [2007] 2 Qd R 87 at [17] and [19].

exercise of the discretion to make a serious violent offence declaration and, in addition, by failing to take into account, in the exercise of that discretion, the risk of future offending and the need to protect the public from that risk. As to the former, the Attorney-General submits the error was to focus on the need for there to be factors which take the offending "outside the norm". Whilst accepting that is one consideration relevant to the making of the discretionary declaration, the Attorney-General submits it is not the only one, and that as a consequence of this sole focus, the sentencing judge overlooked the need to properly consider "whether the case presented features which required the delay of the respondent's eligibility for release on parole in order to protect the public from the risk of future offending which arose in the circumstances of the case".

[38] The Attorney-General also contends implied error, on the basis that the sentence imposed, providing for eligibility for parole after two years and eight months, was unreasonable or plainly unjust, as it does not reflect the seriousness of the offence and fails to give proper weight to deterrence, denunciation and protection of the community. Again, the arguments are intertwined, for it is submitted that by moving directly from a decision not to make a serious violent offence declaration, to a conclusion that eligibility for release after the "conventional" one-third, the learned sentencing judge has failed to take into account whether features of the offending, including the psychological triggers admitted by the respondent, warranted a longer period in custody. It is submitted the learned sentencing judge has given too much weight to mitigating factors and insufficient weight to the need to protect the community, punish and deter.

The serious violent offence discretion

[39] The discretion to declare the respondent to have been convicted of a serious violent offence, as part of the sentence, arises under s 161B(3) of the *Penalties and Sentences Act*.

[40] Section 161A provides that an offender is convicted of a serious violent offence in the two circumstances. First, where the offender is convicted of an offence against a provision mentioned in schedule 1 (or of counselling or procuring etc the commission of such an offence) and sentenced to 10 or more years, an automatic declaration follows (s 161A(a) and s 161B(1)). Secondly, where the offender is convicted on indictment and the court exercises its discretion to declare the offender to be convicted of a serious violent offence (s 161A(b) and ss 161B(3) or (4)).

[41] Section 161B provides:

> "(1) If an offender is convicted of a serious violent offence under section 161A(a), the sentencing court must declare the conviction to be a conviction of a serious violent offence as part of the sentence.
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> (2) However, the failure of the sentencing court to make a declaration as required under subsection (1) does not affect the fact that the offender has been convicted of a serious violent offence.
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> (3) If an offender is—
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> (a) convicted on indictment of an offence—

(i) against a provision mentioned in schedule 1; or

(ii) of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1; and

(b) sentenced to 5 or more, but less than 10, years imprisonment for the offence, calculated under section 161C;

the sentencing court may declare the offender to be convicted of a serious violent offence as part of the sentence.

(4) Also, if an offender is—

(a) convicted on indictment of an offence—

(i) that involved the use, counselling or procuring the use, or conspiring or attempting to use, serious violence against another person; or

(ii) that resulted in serious harm to another person; and

(b) sentenced to a term of imprisonment for the offence;

the sentencing court may declare the offender to be convicted of a serious violent offence as part of the sentence.

(5) For subsections (3) and (4), if an offender is convicted on indictment of an offence—

(a) that involved the use, counselling or procuring the use, or conspiring or attempting to use, violence against a child under 12 years; or

(b) that caused the death of a child under 12 years;

the sentencing court must treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence."[18]

[42] The offences listed in schedule 1 include taking a child for immoral purposes (s 219 of the *Criminal Code*) and indecent treatment of a child under 16 (s 201 of the *Criminal Code*).

[43] In *R v McDougall and Collas* [2007] 2 Qd R 87 the Court referred to a number of previous decisions in which the principles applicable to the making of a discretionary declaration had been considered (at [15]), observing that differences of view and emphasis have emerged in those decisions, principally as to whether the discretion to declare that an offender has been convicted of a serious violent offence can arise when the circumstances do not take it beyond the "norm" for offences of that type (at [16]).

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18 Underlining added.

[44] As far as we are able to discern, the reference to a "norm" first appeared in the reasons of Williams JA in *R v DeSalvo* (2002) 127 A Crim R 229; [2002] QCA 63 at [15]. In that case, McPherson JA at [6] referred to the need to be able to identify "the circumstances that lifted this particular offence outside the general range of manslaughter cases", before exercising the discretion to make a serious violent offence declaration. Williams JA agreed, finding that since the Court had been given an express discretionary power to declare an offence to be a conviction for a serious violent offence, "[t]hat must mean that there is something about the circumstances of the offence in question which takes it beyond the norm and justifies the making of the declaration".

[45] In *R v Eveleigh* [2003] 1 Qd R 398 Fryberg J considered a number of decisions in which the principles relevant to the discretion had been considered, noting the "considerable variety, indeed inconsistency" in the interpretations of the relevant legislation in those decisions (at [99]). But in relation to this point, Fryberg J (at [109]) expressed his disagreement with the proposition that merely because the Act confers a discretionary power to make the declaration, "there must be something about the circumstances of the offence in question which takes it beyond the norm", observing that the decision in relation to a declaration is part of the integrated sentencing process, not an additional punishment, and what is involved is a determination of whether making a declaration is conducive to the fulfilment of the purposes for which sentences may be imposed and is warranted by relevant considerations manifest in the particular case, including the circumstances of the offence and the offender (at [108] and [109]).

[46] The correctness of that approach – that is, of the discretion falling to be exercised as part of the integrated process of arriving at a just sentence, and not necessarily limited to cases falling outside a so-called "norm" for a particular offence – was confirmed by the Court in *R v McDougall and Collas*[19] by reference to the High Court's decision in *Markarian v The Queen* (2005) 228 CLR 357*,* as well as earlier Court of Appeal decisions in *R v Bojovic* [2000] 2 Qd R 183 and *R v Cowie* [2005] 2 Qd R 533.

[47] Where the making of a declaration is discretionary, the Court in *McDougall and Collas* identified (at [19]) "[t]he following observations [which] may assist sentencing courts:

- the discretionary powers granted by s 161B(3) and (4) are to be exercised judicially and so with regard to the consequences of making a declaration;
- a critical matter is whether the offence has features warranting a sentence requiring the offender to serve 80 per cent of the head sentence before being able to apply for parole. By definition, some of the offences in the Schedule to the Act will not necessarily – but may – involve violence as a feature, such as trafficking in a dangerous drugs or maintaining a sexual relationship with a child;
- the discrete discretion granted by s 161B(3)(4) requires the existence of factors which warrant its exercise, but the overall

[19] See at [16], [17] and [19]-[21].

amount of imprisonment to be imposed should be arrived at having regard to the making of any declaration, or not doing so;

- the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing;
- the law strongly favours transparency and accessible reasoning, and accordingly sentencing courts should give reasons for making a declaration, and only after giving the defendant an opportunity to be heard on the point;
- for the reasons to show that the declaration is fully warranted in the circumstances it will usually be necessary that declarations be reserved for the more serious offences that, by their nature, warrant them;
- without that last feature, it may be difficult for the reasons to show that the declaration was warranted;
- where a discretionary declaration is made, the critical question will be whether the sentence with that declaration is manifestly excessive in the circumstances; accordingly the just sentence which is the result of a balancing exercise may well require that the sentence imposed for that declared serious violent offence be toward the lower end of the otherwise available range of sentences;
- where the circumstances of the offence do not take it out of the "norm" for that type, and where the sentencing judge does not identify matters otherwise justifying the exercise of the discretion, it is likely that the overall result will be a sentence which is manifestly excessive, and in which the sentencing discretion has miscarried; probably because of an incorrect exercise of the declaration discretion."[20]

[48] Further, at [20] and [21], the Court said:

> "[20] The considerations which may lead a sentencing judge to conclude that there is good reason to make a recommendation apt to bring forward the offender's eligibility for parole will usually be concerned with the offender's personal circumstances which provide an encouraging view of the offender's prospects of rehabilitation, as well as due recognition of the offender's co-operation with the administration of justice.
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> [21] The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate

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20 Underlining added.

> punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside "the norm" for that type of offence."[21]

[49] In our respectful view, having regard to the analysis in *McDougall and Collas*, the submission of the Attorney-General should be accepted. The exercise of the sentencing discretion in the present case was affected by error, in particular in relation to the exercise of the discretion whether to make a serious violent offence declaration, by focussing on a perceived need to find factors which take the case outside the norm for the type of offence; rather than considering more broadly whether there are circumstances of the case which aggravate the offence in a way which suggests the protection of the public or adequate punishment required a longer period in actual custody before eligibility for parole than would otherwise be required.

[50] We hasten to add that we apprehend the approach taken by the learned sentencing judge in this case is likely to have been the approach regularly taken by sentencing courts, when considering the exercise of the discretion to make a serious violent offence declaration. That is, to focus on whether there are factors in the particular case which take it outside "the norm" for the type of offence. That is a short-hand expression frequently invoked as a means of conveying the "test" to be applied. It is the analysis invited on this appeal that has drawn our attention to the fact, and persuaded us, that such focus is too narrow.

[51] We also observe that, for a sentencing judge, it can be uncomfortable, to say the least, to be describing a "norm" for an appalling offence – the present case is an obvious example; but there are many others. There is nothing normal or normative about this offending. It is shocking, and to speak of a "norm" is justifiably jarring, for victims of the offending, and also for the broader community, let alone for the sentencing judge.

[52] As identified in *R v Collins* [2000] 1 Qd R 45 at 51 [20] and 52 [29], having regard to extrinsic materials, it appears the paramount consideration of the legislature in enacting the legislation by which s 161A and s 161B were included in the *Penalties and Sentences Act*[22] was protection of the community from offenders who pose an ongoing risk to the community.

[53] Where a case calls for consideration of whether to exercise the discretion to make a serious violent offence declaration, as part of the integrated process, what the sentencing court is required to do is consider all relevant circumstances, including in a case such as this the matters in ss 9(1), 9(2) and, primarily, 9(6) of the *Penalties and Sentences Act*, to determine whether there are circumstances which aggravate the offence in a way which suggests that the protection of the public, or adequate punishment, requires the offender to serve 80 per cent of the head sentence before being able to apply for parole.

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21 Underlining added.

22 *Penalties and Sentences (Serious Violent Offences) Amendment Act* 1997 (Act No. 4 of 1997).

[54] The learned sentencing judge's focus on whether there were factors in the respondent's commission of the offence of taking a child for an immoral purpose "which take it outside the norm for that appalling offence", obscured the need to also consider, as part of the integrated process, whether there were other factors, including factors relevant to community protection or adequate punishment, which warranted an order requiring the respondent to serve 80 per cent, as part of a just penalty. As submitted by the Attorney-General, an important consideration in this case was the need to protect the community from the risk of future offending by the respondent.

[55] We are also persuaded that the sentencing discretion was affected by a second error, which arose because the learned sentencing judge moved directly from the conclusion about the serious violent offender declaration, to a conclusion that parole eligibility after the "conventional" one-third was appropriate, without considering the overall effect of that conclusion, and whether there were factors (including punishment, denunciation, deterrence and community protection) favouring a later release date.[23] The discretion to fix a parole eligibility date is unfettered; and there can be no mathematical approach to fixing that date, including on the basis of convention.[24]

[56] However, another reason why we think the sentence was affected by error is that we consider the starting point of eight years imprisonment was too low, for reasons discussed below. Consequently, in our view, the penalty of eight years' imprisonment already factored into account, to a substantial degree, the respondent's plea of guilty and cooperation; requiring consideration of whether further leniency, in terms of an earlier parole eligibility date, was warranted.[25]

[57] This error was effected by the manner in which the submissions were made, particularly by the Crown, before the learned sentencing judge. There was almost no argument about what the head sentence should be. Both the Crown and the defence (the latter, unsurprisingly) relied upon the 2004 decision of *R v Cogdale*, in submitting the appropriate head sentence was eight years' imprisonment. The court is of course entitled to receive a sentencing submission from either party to the proceedings.[26] As the High Court in *Barbaro v The Queen* (2014) 253 CLR 58 affirmed, it is for the sentencing judge alone to decide what sentence should be passed on the offender. But the practical reality is that, where there is no argument between the prosecution and defence, it is difficult for a sentencing judge to form a different view from that which is put forward in the sentencing submissions; perhaps especially in a case such as this, which is (mercifully) not of a kind with which the court deals on a regular basis. This Court, with the benefit of time for a more detailed consideration of the case, and as an intermediate appellate court,[27] is in a different position.

[58] A third matter emphasised by the Attorney-General is the absence from the sentencing remarks of express reference indicating the Court had taken into account as a relevant factor the need to protect the community from the risk of the respondent offending in the future. This is an omission; but as it is really a thread

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23 *R v Williams; ex parte Attorney-General (Qld)* [2014] QCA 346 at [57]-[58] and [112].

24 *R v Randall* [2019] QCA 25 at [43], referring to *R v Amato* [2013] QCA 158 at [20].

25 See, for example, *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22 at [40]-[41].

26 See s 15(1) of the *Penalties and Sentences Act* 1992.

27 See *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300 at [68].

running through the two matters already discussed, it is unnecessary to reach a conclusion that it resulted in any separate error.

[59] As we are satisfied error on the part of the sentencing judge has been demonstrated, the Court's unfettered discretion to vary the sentence, under s 669A(1) of the *Criminal Code*, is enlivened.[28] The Attorney-General did not, on this appeal, challenge the head sentence of eight years' imprisonment. But it is necessary to review the reasoning that might underpin that submission.

[60] As already observed, in their submissions before the learned sentencing judge, both the Crown and the defence relied in particular on *R v Cogdale* [2004] QCA 129 as a comparable authority. The maximum penalty at that time, for the offence of taking a child for immoral purposes, was also 14 years, as it is now. The victim child in that case was eight. She lived with her parents and younger brother On the night in question, she was asleep in her bed in her home when the offender removed a flyscreen from the bedroom window, lifted the child from the bed, carried her down the street and through a car park to where his car was located. He then drove the child to an isolated spot some distance away. After stopping the car, he got into the back seat with the child and masturbated himself until he ejaculated on his leg. That was witnessed by the child. The offender invited the child to touch his penis, but she declined. After that, the offender drove the child back to the vicinity of her house, let her out of the car, and she ran away. The offender was identified and located when police investigations in the area led to police being given the registration number of a car that had been seen acting suspiciously in the area over some days. That was the offender's car. When first interviewed by police, the offender denied everything; but the next day voluntarily returned and made full admissions.

[61] *Cogdale* pleaded guilty to an *ex officio* indictment. He was 36 at the time of the offence, and had a minor criminal history, but nothing similar. He had a good work history, including serving in the army for 17 years. It was accepted the offence involved some preplanning, with the Court of Appeal observing the "element of premeditation" made this an even more serious offence.

[62] He was sentenced to five years, with no recommendation for early parole (as a result of which he would have served half before being eligible for parole). He appealed the sentence, making no complaint about the five years, but on the basis that the sentence was manifestly excessive in the absence of any earlier recommendation, or suspension.

[63] The Court of Appeal found that "[g]iven the maximum penalties[29] to which this applicant was exposed, a sentence of eight years' imprisonment would be within range prior to considering mitigating and discounting factors".[30] Giving the offender credit for his plea of guilty to an ex officio indictment, which resulted in the child not having to give evidence at committal or trial, and evidence of genuine remorse, the Court found a sentence of five years imprisonment "adequately takes

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28 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [62].

29 This may be taken as a reference to the maximum penalty for the offence of taking a child for immoral purposes (14 years) as well as the maximum penalty for the other charges against the offender, burglary (which is life imprisonment) and exposure of a child to an indecent act (then, 10 years).

30 Underlining added.

into account and reflects all of the mitigating factors to which the [offender] was entitled". His application for leave to appeal was refused.

[64] The fairness of the criminal justice system involves, among other things, reasonable consistency in sentencing: that like cases should be treated in a like manner.[31] This is an aspect of the rule of law. But the consistency that is sought is consistency in the application of relevant principles, not numerical equivalence;[32] and the application of the legal principle of consistency does not require adherence to previous sentences that are demonstrably contrary to principle.[33]

[65] Simply having regard to the factual circumstances in each of *Cogdale* and the present case, may lead to the conclusion that they are broadly comparable. On one view, taking a child who is asleep in their bed is objectively worse than taking them from a public place like a shopping centre – although it is a difficult comparison between two appalling and horrifying circumstances. On the other hand, the indecent treatment in the present case was far more serious than the indecent exposure in *Cogdale*.

[66] However, in our respectful view, what that bare comparison does not address is the legislative changes which have taken place since *Cogdale*, mirrored by changing attitudes within the community, and a greater understanding by courts of the impact of child sexual abuse. All of this supports the view that what might have been regarded as an appropriate penalty for this kind of offending in 2004 is not necessarily what should be considered appropriate now. We say this without question in relation to the head sentence ultimately imposed of *Cogdale*, of five years imprisonment, which in our respectful view would be regarded as an affront to the community if imposed today. But even the "starting point", that is, the notional penalty that might be imposed after a trial, of eight years' imprisonment, is in our view simply too low.

[67] In relation to legislative changes: in 2003 what is now s 9(4)(a) [that the principle in s 9(2)(a), of a sentence of imprisonment being a last resort, does not apply when sentencing an offender for an offence of a sexual nature in relation to a child under 16] and s 9(6) [the factors primarily to be taken into account in sentencing such an offender] were enacted as part of the *Penalties and Sentences Act* 1992.[34] Of note, the same amending Act also amended the maximum penalty for indecent dealing from 14 years to 20 years imprisonment. The explanatory notes to the Bill which became the Act, made it clear that the objective was to ensure that sentences imposed on child sex offenders reflect the significant physical and psychological consequences of these offences. These amendments commenced on 1 May 2003. The offences committed by *Cogdale* occurred in April 2003, he was sentenced about seven months later, and the appeal was heard in April 2004. As a result of a transitional provision (s 211) the amendments applied even where the offence or conviction happened before the commencement. However, it is not apparent from the decision whether any reference was made to these provisions.

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31 *Wong v The Queen* (2001) 207 CLR 584 at [6]-[7].
32 *Hili v The Queen* (2010) 242 CLR 520 at [47]-[49].
33 *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 at [49]-[52].
34 See *Sexual Offences (Protection of Children) Amendment Act* 2003 (Act No. 3 of 2003).

[68] In 2010, further amendments were made to s 9, by the *Penalties and Sentences (Sentencing Advisory Council) Amendment Act* 2010,[35] by enacting what is now s 9(4)(b) [that in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years, the offender must serve an actual term of imprisonment unless there are exceptional circumstances] and s 9(5) of the *Penalties and Sentences Act*. The explanatory notes to the Bill which became this Act identify one of the primary objectives as to strengthen the penalties imposed upon, inter alia, child sexual offenders, stating (at p 2):

> "Strengthening the penalties imposed upon child sexual offenders complements the existing legislative measures aimed at the protection of our most vulnerable members of the community; recognises the inherent seriousness of any form of indecent treatment upon a child; reflects the lasting and potentially devastating impact this conduct may have upon the young victim; and ensures that the need for general deterrence, punishment and reflection of the community's condemnation of the conduct are at the forefront when passing sentence."

[69] Those legislative reforms are reflected also in the increasing understanding of and recognition by Courts, in more recent decades, of the profoundly damaging impact of sexual offences on child victims,[36] which has also been reflected in increasing sentences.

[70] Another legislative change worthy of mention is that at the time *Cogdale* was decided, although the serious violent offence provisions had been enacted as part of the *Penalties and Sentences Act*,[37] the offence under s 219 of the *Criminal Code* (taking a child for an immoral purpose) was not then listed in schedule 1 as a potentially "serious violent offence". That did not occur until the *Justice and Other Legislation Amendment Act* 2004, s 84, which commenced on 19 November 2005.[38] So at the time *Cogdale* was decided, it was not within the discretion of the Court to make such a declaration. This is significant, because defence counsel below submitted the Court might find some guidance from the fact that the Court in *Cogdale* did not make any suggestion that a serious violent offence declaration was appropriate.

[71] Earlier decisions, some of which were referred to in *Cogdale*,[39] are unhelpful as the maximum penalty was much lower – seven years – when they were decided.

[72] The maximum penalty for the offence of taking a child for immoral purposes, where the purpose is to indecently deal with them, is 14 years imprisonment.[40] The maximum penalty for indecently dealing with a child under 12 (count 3) is 20 years' imprisonment and for deprivation of liberty (count 2) is three years imprisonment.

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35 (Act No. 48 of 2010).

36 See, for example, *Franklin v R* [2019] NSWCCA 325 at [126]-[127], referring to *R v Gavel* (2014) 239 A Crim R 469 at [110]; *R v Cattell* [2019] NSWCCA 297 at [109]-[111]; and *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 at [56]-[57].

37 See *Penalties and Sentences (Serious Violent Offences) Amendment Act* 1997.

38 Subordinate Legislation 2005 No. 212.

39 For example, *R v Dixon* [1999] QCA 251 (referred to in *Cogdale*); and also *R v Butler* [1996] QCA 264.

40 See s 219(1) and (3)(b) of the *Criminal Code*. Where the immoral purpose is to commit an offence under s 215 of the *Code,* namely to have unlawful carnal knowledge of them, the maximum is life imprisonment (s 219(3)(b)).

[73] In the circumstances of this case:

- where the offender admits to the overwhelming effect of psychological triggers for the offending [referring to dark urges taking over, even though he consciously knew it was wrong], in the context of a long standing paedophilic ideation;
- where the behaviour was predatory and premeditated (at the least, involving the respondent following the child for about 20 minutes before luring her away);
- involved taking a seven year old child from a public shopping centre, where she was entitled to feel and be safe, in the company of her mother; and then driving her some 28 km away to a secluded, isolated place where he knew he would not be observed;
- before sexually abusing her, in a serious way, albeit short of rape; keeping the child for almost an hour and a half before returning her;
- resulting in significant trauma to the child, both in the immediate and long-term,

in our view an appropriate penalty, before taking account of mitigating factors such as a plea, cooperation and prospects of rehabilitation could not be less than 10 years imprisonment. Only such a penalty could reflect the serious nature of the offending, the significant effect of the offending on the child, the need to protect the community from predatory offending of this kind, the need for strong denunciation of the conduct and the need to deter similar behaviour by others. Such a sentence also bears rational relativity to the maximum penalty.[41] Where the sexual offending that occurs, in relation to a child who is taken, is more serious (such as involving rape), that offence will carry a higher maximum penalty (life imprisonment), and could see the offending penalised by a much higher sentence. Other aggravating factors, such as prior history of like offending, would likewise increase the appropriate penalty.

[74] It is instructive to test that conclusion by reference to the sentences imposed in some other cases which were referred to the learned sentencing judge, although distinguished as more serious. In *R v D* [2003] QCA 88, the offender who pleaded guilty to one count of deprivation of liberty and one count of rape,[42] was sentenced to 12 years' imprisonment for rape, which was reduced to 10 years on appeal. He was said to have a very lengthy criminal history, including offences of dishonesty and violence but no previous convictions for sexual offences. The victim was a five year old child. She was playing in her front yard, with some other children, while her mother was inside the house. The house backed onto the offender's. The mother's attention was distracted for about 10 to 15 minutes, after which she found the child was missing. The mother's search for the child included running to the offender's house. She entered the house, and saw the child's clothing on the bed in the first bedroom. She opened the door to the second bedroom and found the child naked on the bed with the offender leaning over her and touching her vaginal area

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41 As to which, see *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478; *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428 at [10].

42 It is noteworthy that he was not charged with the offence of taking a child for immoral purposes (s 219), although on the facts he could have been.

while holding down her legs. The child was able to run to her mother and get away. The child later told her mother that she had not responded to the mother's earlier calls, because the offender had threatened to punch her. Evidence from a medical examination of the child was said to be consistent with digital penetration of the child's vagina having occurred. He pleaded guilty on the morning of the trial.

[75] The actual sexual offending in *R v D* is objectively more serious, involving rape by digital penetration; although the overall incident appears to have been much briefer than what occurred here, and could more readily be described as opportunistic, than predatory and premeditated. The offender in *R v D* plainly had a more serious criminal history, and did not have the mitigating circumstances of the very early plea, and cooperation, of the respondent in this case. The sentence of 10 years imprisonment would have carried an automatic declaration of conviction of a serious violent offence, requiring him to serve 80 per cent. Noting that *R v D* was also decided prior to the legislative amendments discussed above, in our view, it supports a higher starting point for the respondent's case than eight years.

[76] In *R v Stoian* [2012] QCA 41 the offender was convicted, after a retrial, of one count of rape of a nine year old girl. He was sentenced to 12 years imprisonment. He had earlier been convicted of taking a child under 12 for immoral purposes, and rape, and successfully appealed his convictions. A verdict of acquittal was entered on the taking a child charge, but a retrial ordered on the rape charge. He was unsuccessful in the second appeal against his later conviction of rape, and against his sentence. The child was in the Brunswick Street Mall with her father and brother. At one stage, having just bought a drink from a nearby shop, she returned to get a straw, walking the three to five metres from her father to the shop. She came into contact with the offender, a stranger to her, in the shop.

[77] The factual basis of the sentence was that for some reason, the child followed the offender to his hotel room. She did not go with him under any form of threat. It was found to be likely she followed the offender because she thought he might give her something; being naïve and trusting. Once in the hotel room, the offender threatened the child with a knife and made her suck his penis. Although the incident was brief, it was acknowledged to have caused long lasting trauma to the child and her father. The offender was 50 at the time of the offence, and had a long standing history of serious mental illness, although that was not said to be causative of his offending conduct. He was infectious with Hepatitis B at the time. He had only a limited criminal history, but one which included a conviction of indecent dealing from 1982, when he was 24. He had no other mitigating factors in his favour.

[78] This is plainly a more serious case, in so far as the sexual offending is concerned. A more severe penalty was warranted in *Stoian*, not only having regard to the circumstances of the rape, but also due to the offender's criminal history, and complete lack of remorse, evident from the two trials.

[79] McMurdo P observed in *Stoian* at [4] that a timely guilty plea is an especially significant mitigating feature in cases of this kind, as it saves the complainant the trauma of cross-examination and the uncertainties of a prolonged trial process. Her Honour considered that had the offender entered an early plea, a sentence in the range of eight to 10 years may have been imposed. White JA said a plea of guilty might have reduced the sentence to one of nine to 10 years. It is relevant that the

offender in *Stoian* was not convicted of the additional offence of taking a child for immoral purposes, as the respondent was here.

[80] In our view, *Stoian* likewise supports a higher starting point, for the offending in this case, than eight years. Having regard to those decisions, a starting point of at least 10 years was, in our view, more appropriate. A penalty of 10 years imprisonment would have carried with it an automatic declaration of conviction of a serious violent offence, under s 161A(a) and s 161B(1).

[81] The respondent's significant cooperation with the police, by making extensive admissions (including as to his sexual offending, before any complaint was made by the child about that, or the DNA evidence was available) and his very early guilty plea, which saved the child the significant added trauma of giving evidence at a trial, should be factored into account by a reduction of the head sentence.

[82] As part of the integrated process, consideration must also be given to whether, if the penalty drops below 10 years, the circumstances of the offending are such as to warrant the conclusion that the protection of the public or adequate punishment require a longer period in actual custody before eligibility for parole than would otherwise be required by the *Corrective Services Act*; in the first instance, whether a serious violent offence declaration should be made and, if not, whether any reduction below the statutory half way point is warranted.

[83] The Attorney-General emphasises both features – protection of the community [given the existence of psychological triggers for the offending by the respondent, demonstrating that he remains an ongoing risk of reoffending, once released] and adequate punishment [in the form of a court sanctioned lengthy period in actual custody] – as justifying the exercise of the discretion to make a serious violent offence declaration.

[84] In terms of adequate punishment, we accept that the appropriate penalty for offending of this kind necessarily must have a strong denunciatory element, to reflect the community's condemnation of the conduct.[43] But that can be achieved by a higher head sentence, rather than by the making of a discretionary declaration. Indeed, the need for strong denunciation is one of the reasons for our view that the level of sentence indicated by, for example, *Cogdale*, is too low and should be increased.[44]

[85] In terms of community protection, as already noted, on this appeal the Attorney-General emphasised the risk of reoffending posed by the respondent, once released, having regard to the psychological triggers for his offending, driven by long standing paedophilic tendencies and long standing history of struggling with impulse control.

[86] Apart from this factor, emphasised on the appeal, the factors relied upon by the Crown as supporting the making of a declaration that the conviction was of a serious violent offence were: the age and vulnerability of the child; taken from a public place; the brazen, determined and predatory nature of the conduct; the duration of the incident, and the distance he travelled with the child (about 28 km);

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43 See *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300 at [140]-[147], as to the meaning of denunciation and its purpose in sentencing.

44 Cf *R v DeSalvo* [2002] QCA 63 at [8].

to an isolated location where he would not be observed; that he then abused the child for his own sexual gratification, in a manner involving skin to skin contact with her vagina; and the significant impact of the incident on the child and others. Mitigating factors were said to be that he did bring the child back; the sexual offending did not involve penetration; and that he made admissions, saving the child the very significant trauma of having to give evidence.

[87] For the respondent, it was submitted at first instance the following factors militate against the making of a declaration: that there was a high level of cooperation by the respondent with police; that he made admissions to the sexual offending, before there was any evidence to prove it (the child did not speak of any sexual offending, and the DNA evidence came later); that he has shown genuine remorse, including by his actions in taking the child back to the shopping centre immediately afterwards, and by indicating he would plead guilty within about two weeks of the event, and in fact pleading guilty on the day the indictment was presented.

[88] On this appeal, the respondent also submits that the point now emphasised by the Attorney-General (the admitted psychological triggers for the offending) was not made before the sentencing judge and, further, that rather than indicating a greater risk of reoffending, justifying a serious violent offence declaration, the respondent's candour in making admissions as to the triggers for his offending is supportive of optimism in terms of his prospects of rehabilitation.

[89] This is a case in which there are strong factors pulling in different directions:[45] in favour of postponing the date of eligibility for parole (including the circumstances in which the respondent admitted to being driven to offend in this shocking and serious way, and the need to protect the community from that risk eventuating in the future), and in favour of not doing so (the respondent's very significant cooperation with the administration of justice, by making frank admissions and pleading guilty at the very earliest opportunity). The Court must endeavour to balance those factors in arriving at a sentence that is just in all of the circumstances.

[90] On balance, we are not persuaded that there are circumstances here which aggravate the offence in a way which suggests the protection of the public or adequate punishment requires a longer period of actual custody, namely 80 per cent. As already discussed, this is not a case in which adequate punishment requires a longer period of actual custody; that objective can be achieved by the imposition of a substantial head sentence. In terms of protection of the public, plainly that is a significant consideration in the case of an offender such as the respondent. Protection of the community is relevant to both the fixing of the head sentence and the period before the offender becomes eligible for parole.[46] There may be cases in which the circumstances support a conclusion that a longer period in actual custody is warranted, for the protection of the community, even where the just and proportionate head sentence is less than 10 years. But implicit in that is a forecast of future behaviour; essentially a finding that the prospects of rehabilitation for the offender are so limited as to require them to serve all, or almost all, of the sentence imposed.[47]

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45 *Elias v The Queen* (2013) 248 CLR 483 at [27].

46 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473 and 475.

47 Cf *Bugmy v The Queen* (1990) 169 CLR 525 at 537-538; cf also *Todd v The Queen* [2020] VSCA 46 at [60] (a case in which there was evidence the offender's sexual sadism disorder which fuelled the fantasies that culminated in the murder of a young woman "presently cannot be cured").

[91] In the respondent's case, it is not yet known how he will respond to treatment programs undertaken whilst in custody. The fixing of a date for eligibility for parole does not mean the prisoner will be released on that day; it will be a matter for the Parole Board to determine if the person is suitable for release, and to impose such conditions on their release as are considered appropriate for the protection of the community. Community protection is not achieved only by actual incarceration, it is also achieved by the oversight of the Parole Board, before a person may be released on parole; and by supervision of the person, on parole, if they are released, for the remainder of their sentence, whilst they make the adjustment from custody and back into the community. Allowing the possibility of a date for eligibility for parole at an earlier stage (than 80 per cent) has two potential benefits: first, to provide the prisoner a basis for hope and, in turn, an incentive for rehabilitation;[48] and, in appropriate cases, to enable a longer period of conditional supervision, outside of the custodial environment, which may provide greater community protection in the long term.[49]

[92] It is also important that the respondent's extensive cooperation, and early guilty plea, is recognised in a tangible way in the sentence imposed.[50]

[93] In our view, balancing all of the competing factors, the sentence that is just in all the circumstances is one of eight years imprisonment, with no serious violent offence declaration, and no early recommendation for parole (leaving s 184 of the *Corrective Services Act* to operate according to its terms). The reduction in the head sentence, from a starting point of at least 10 years (or more) to eight years, is substantial in two respects: first, a reduction in the overall period of time the respondent may serve in custody and, secondly, relief from the burden of the automatic serious violent offence declaration. That is a just and appropriate way in which to take account of the positive mitigating factors in this case; and appropriately balances punishment, denunciation, deterrence, community protection and rehabilitation. A further reduction in the time to be served before becoming eligible for parole is not justified, given the very serious nature of the offending, and the need to send a strong message of denunciation of, and deterrence against, offending of this kind. In a case of this kind, the mitigating effect of a guilty plea and cooperation, whilst still deserving of tangible recognition, must yield to other factors, such as denunciation and community protection.[51]

[94] We therefore allow the appeal, and vary the sentence imposed at first instance by varying the sentence imposed on count 1 to a sentence of imprisonment of eight years, with no recommendation for eligibility for parole.

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48 *Ibid* at 536.

49 Cf *R v Collins* [2000] 1 Qd R 45 at [31] per McMurdo P.

50 *R v McDougall and Collas* [2007] 2 Qd R 87 at [20].

51 *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300 at [148].