SUPREME COURT OF QUEENSLAND

CITATION:	*R v WBK* [2020] QCA 60
PARTIES:	**R** **v** **WBK** (applicant)
FILE NO/S:	CA No 40 of 2019 DC No 133 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg – Date of Sentence: 4 February 2019 (Clare SC DCJ)
DELIVERED ON:	3 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2019
JUDGES:	Fraser JA and Lyons SJA and Boddice J
ORDERS:	**1. The application for leave to appeal against sentence be granted.** **2. The sentences imposed below be set aside to the extent only that the applicant's parole eligibility dated be fixed at 16 September 2021.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to two counts of rape and five counts of indecent treatment of a child under 16, under 12 who is a lineal descendant – where the subject offences occurred between 2005 and 2011 – where the applicant was sentenced to concurrent sentences of nine years' imprisonment for one count of rape, five years' imprisonment for the other count of rape, and periods of three or four years' imprisonment for the five indecent treatment counts – where the sentences imposed were also to be served concurrently with a sentence of four years for armed robbery imposed on 8 June 2016 – whether the sentence was manifestly excessive – whether the sentencing judge failed to have regard to the totality principle to ensure that the sentence imposed was not crushing CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG

PRINCIPLE – where the applicant was on parole at the time of his plea and sentence for the subject offences – where the subject offences did not breach the applicant's parole because they were committed before the previous sentence was imposed – where the applicant's parole eligibility date for the sentences imposed in relation to the subject offences was fixed after serving four and a half years at 16 March 2023 – whether the sentencing judge erred in failing to have regard to the aggregate period of imprisonment imposed on the applicant in fixing the parole eligibility date – whether the sentencing judge failed to comply with the requirement in s 160F of the *Penalties and Sentences Act* 1992 (Qld) that the parole eligibility date fixed by the court must relate to the offender's period of imprisonment as opposed to a particular term of imprisonment

Penalties and Sentences Act 1992 (Qld), s 9(2)(l), s 160E, s 160F

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, considered
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v BBP [2009] QCA 114, considered
R v Beattie; Ex parte Attorney-General (Qld) (2014) 244 A Crim R 177; [2014] QCA 206, considered
R v Dendle [2019] QCA 194, considered
R v GBF [2019] QCA 4, considered
R v Gordon (1994) 71 A Crim R 459, considered
R v KU & Ors; Ex parte Attorney-General (Qld) [2011] 1 Qd R 439; [2008] QCA 154, considered
R v Symss [2020] QCA 17, considered

COUNSEL: S Robb for the applicant
E L Kelso for the respondent

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

[1] **FRASER JA:** I gratefully adopt Lyons SJA's description of the offences committed by the applicant, the sentences against which he seeks leave to appeal, the grounds of the proposed appeal, the statement of the agreed facts with reference to which the applicant was sentenced, and aspects of the sentencing hearing.[1]

[2] Relevant events are set out in the following chronology:

Date	Event
1 January 2005 – 31 December	One of the subject offences

[1] [25] – [39] of Lyons SJA's reasons.

Date	Event
2005	
17 January 2010 – 1 January 2011	Other subject offences
September 2012	Applicant informed of allegations founding the subject offences – declined to participate in interview
23 July 2015	Applicant committed an offence of robbery whilst armed with a knife
8 June 2016	Sentenced to four years' imprisonment with a parole eligibility date after 15 months for robbery offence ("the previous sentence")
14 December 2017	Parole granted under previous sentence
20 December 2017	Arrested and released on bail
17 September 2018	Convicted of subject offences – taken into custody
4 February 2019	Sentenced to nine years' imprisonment (count 7), five years' imprisonment (count 5), four years' imprisonment (counts 1 & 3), and three years' imprisonment (counts 2, 4, 6) with the parole eligibility date fixed as 16 March 2023. Pre-sentence custody from 17 September 2018 until 4 February 2019 was declared to be time served under the sentence.
7 June 2020	Expiry of previous sentence
16 March 2023	Eligible for parole
18 September 2027	Expiry of subject sentence

[3] The applicant was sentenced upon the footing that because the subject offending occurred before the previous sentence was imposed, that offending did not breach the applicant's parole under the previous sentence. It is not suggested that there was any revocation of parole under that sentence. The parole eligibility date under the previous sentence was automatically cancelled when the sentencing judge fixed a later parole eligibility date: *Penalties and Sentences Act* 1992 (Qld), s 160E(2).

[4] The applicant contends that the sentencing judge did not comply with the provision in s 160F of the *Penalties and Sentences Act* 1992 (Qld). That section is set out in paragraph [41] of Lyons SJA's reasons. Section 160F(1) states that one of the objects of preceding sections of that Act is to ensure that at any one time there is only one parole release date or parole eligibility date in existence for an offender. The operative provision is s 160F(2). Its effect is that a parole release date or parole eligibility date fixed by a sentencing court must relate to the offender's total period of imprisonment rather than a particular term of imprisonment.

[5] The applicant's argument assumes, wrongly in my respectful opinion, that where a sentence is imposed upon an offender who is serving a previous sentence s 160F precludes a sentencing judge from reasoning towards a parole release date or parole eligibility date by reference to a conclusion about what part of the sentence for the subject offence should be served in custody. Section 160F(2) merely gives effect to the object expressed in s 160F(1) that there should be only one parole release date or eligibility date for an offender. That section requires only the specified relationship between a date (the parole release date or parole eligibility date fixed by an order of the sentencing judge) and the total period of imprisonment (as opposed to any particular term of imprisonment) to which the offender will be subject after the sentence is imposed. I am unable to detect in the text of s 160F or its policy any support for a construction that the section prescribes any sentencing methodology.

[6] Section 160F may be contrasted with provisions in s 9 of the same Act which do bear upon how a sentencing judge must reason towards a date to be fixed as a parole release date or parole eligibility date as an aspect of the sentence. Thus, for example, s 9(2) provides that, "[i]n sentencing an offender, a court must have regard to" matters which include "(l) sentences already imposed on the offender that have not been served". The word "sentences" comprehends the imposition of a parole release date or parole eligibility date. (As required by s 9(2)(l), the sentencing judge had regard to the previous sentence, for example in the passages quoted in [39] and [44] of Lyons SJA's reasons and [18] of these reasons.)

[7] Section 160F(2) would be engaged if, for example, a sentencing judge fixed a parole eligibility date only for one of a number of sentences then imposed by the sentencing judge, leaving no parole eligibility date in relation to part of the overall period of imprisonment that was attributable to a longer sentence. Since the sentencing judge fixed the same parole eligibility date for each concurrent term of imprisonment she imposed, the requirement of s 160F was fulfilled. There is no parole release date or parole eligibility date other than the single parole eligibility date fixed by the sentencing judge and it relates only to the single period of imprisonment to be served under the concurrent sentences imposed by the sentencing judge and the partly concurrent previous sentence.

[8] I also do not accept the applicant's argument that the sentencing judge erred by not moderating the sentence further by application of the "totality principle". The passage quoted in [33] of Lyons SJA's reasons does not suggest an absence of appropriate consideration of the totality principle. Understood in the context of the sentencing judge's remarks quoted in [44] of Lyons SJA's reasons, which refer amongst other matters to the different characters and times of the offences for which the sentences were imposed, the passage conveys only that the sentencing judge rejected the respondent's proposition that the custodial sentence to be imposed

should be moderated "because [the applicant] has been in the community on parole for another offence". I did not understand the applicant to argue that the rejection of that proposition was an error. It plainly was within the sentencing judge's discretion to decline to moderate the sentence on that account.

[9] In *Mill v The Queen*[2] the High Court described the totality principle as it applies in a case when an offender is sentenced a long time after the commission of the offence because, during the intervening period, the offender was serving a sentence imposed in another State "in respect of an offence of the same nature and committed at about the same time". Where those conditions are satisfied the second sentencing judge must consider the effect of imposing a cumulative or overlapping sentence and, if the aggregated sentences are found to exceed what is "just and appropriate", moderate the sentence which will then be imposed.[3] That aspect of the totality principle is not relevant in the present case.[4]

[10] Another aspect of the totality principle was described by Hunt CJ at CL in *R v Gordon*:[5]

> "When a custodial sentence is to be imposed which will be cumulative upon, or which will overlap with, an existing custodial sentence, the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable."

[11] In *Postiglione v The Queen*,[6] Dawson and Gaudron JJ,[7] McHugh J,[8] and Kirby J[9] referred to the totality principle as applying to ensure that a sentence is not "crushing". In *R v Symss*[10] the Court upheld an appeal against sentence upon the ground that it was "crushing", but the custodial period in that case was continuous and far longer than here.[11]

[12] The totality principle as expressed in *R v Gordon* is capable of being understood as applying only in a case where there are overlapping or continuous custodial periods under different sentences. In *R v Beattie; Ex parte Attorney-General (Qld)*,[12] Philip McMurdo J (Holmes and Gotterson JJA agreeing) held that the presently relevant aspect of the totality principle was not engaged in the circumstances of that case:

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2 (1988) 166 CLR 59 at 65 – 66.

3 166 CLR 59 at 63 – 64, approving *R v Todd* [1982] 2 NSWLR 517 at 519 – 520. See also *R v LAE* (2013) 232 A Crim R 96 at [21] – [31] and *R v Beattie*; *Ex parte Attorney-General (Qld)* (2014) 244 A Crim R 177 at [18] – [19].

4 cf *R v Symss* [2020] QCA 17 at [19] – [22].

5 (1994) 71 A Crim R 459 at 466, quoted in *Postiglione v The Queen* (1997) 187 CLR 295 at 308 (McHugh J), *R v LAE* (2013) 232 A Crim R 96 at [35] and *R v Beattie*; *Ex parte Attorney-General (Qld)* (2014) 244 A Crim R 177 at [19].

6 (1997) 189 CLR 295. See also, to the same effect, the cases cited in *R v Symss* [2020] QCA 17 at [27] – [30].

7 189 CLR 295 at 304.

8 189 CLR 295 at 308, quoting from *R v Rossi*, Unreported, Court of Criminal Appeal of South Australia, 20 April 1988 (King CJ): the totality principle applies "where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for … merciful intervention … by way of reducing the total effect".

9 189 CLR 295 at 340 – 341.

10 [2020] QCA 17.

11 [2020] QCA 17 at [6], [16], [24] – [26], [38].

12 (2014) 244 A Crim R 177 at [20].

> "The present case presented none of the circumstances in which the totality principle, in its original or extended senses, has been applied. The four offences which were committed in 1996 occurred years prior to the offending for which the respondent was sentenced in 2007. Each of the seven offences here was committed years prior to the offending for which he was sentenced in 2010. And the respondent was not in custody when the subject sentences were imposed."

It is not entirely clear from the reasons in *Beattie*, however, whether or not the sentence under review overlapped with a non-custodial part of a pre-existing sentence.

[13] As I have mentioned, however, s 9(2)(l) of the *Penalties and Sentences Act* 1992 (Qld) requires a sentencing judge to have regard to sentences already imposed that have not been served. In *Postiglione v The Queen*[13] McHugh, Gummow, and Kirby JJ regarded a materially indistinguishable statutory provision as encompassing the totality principle. Section 9(2)(l) may be treated as empowering sentencing judges to apply the totality principle in appropriate circumstances to moderate a custodial sentence that overlaps with or commences immediately upon the end of the non-custodial part of a previous sentence.

[14] Importantly for present purposes, and consistently both with the statutory text ("have regard to") and the High Court decisions, no aspect of the totality principle mandates moderation of a custodial sentence merely because a custodial (or other) sentence overlaps with or follows immediately upon a pre-existing sentence. A decision whether the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences is an aspect of the wide discretion reposed in sentencing judges to impose a sentence that is just and appropriate in the circumstances of the case.[14]

[15] If all other things are equal, any moderation of a sentence under the totality principle is likely to be required to a greater extent where (as in *Mill v The Queen*) the existing sentence and the sentence being imposed are for offences of the same nature and committed at about the same time, than in a case of the present kind where both factors are absent. The sentencing judge referred to that feature of the applicant's offences. She was entitled to take that factor into account, and also the false basis upon which the previous sentence was imposed, and the extent, seriousness, diversity and very different dates of the applicant's various offences.[15]

[16] Taking into account the declared pre-sentence custody, the sentence imposed by the sentencing judge is concurrent with the last 21 months of the previous sentence. In the circumstances of this case, the sentencing judge's omission to moderate either the head sentence or the minimum custodial period[16] further under the totality principle does not evidence an error in the exercise of the sentencing discretion. Appellate interference is not justified merely by the fact that a different sentencing judge might have given more weight to factors favouring moderation and less weight to factors militating against moderation. The sentencing judge was not

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13 (1997) 189 CLR 295 at 308 – 309, 321, 339.

14 *R v Symss* [2020] QCA 17 at [30], and see generally *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

15 See [18] – [19] of these reasons.

16 See [23] of these reasons.

obliged to find that eighteen months in custody followed by nine months on parole and a term of nine years with a minimum custodial period of four and a half years was "crushing" or otherwise too severe for the totality of the criminality in all of the offences.

[17] The applicant also argues that the sentence imposed upon him is manifestly excessive. A step in the argument is that a notional head sentence of 10 to 11 years' imprisonment before discounting for mitigating factors was outside the sentencing discretion. In considering that argument it is necessary to take into account (amongst other circumstances) the combined effect of the significance of deterrence and protection of the community and the objective seriousness of the subject offences.

[18] In relation to the first two factors it is sufficient to refer to the sentencing judge's remarks in a passage immediately preceding the passage quoted in [39] of Lyons SJA's reasons:

> "The criminal history includes a wide range of offending from early involvement with substance abuse and break and enter offences. Judge Reid previously referred to it as an unwillingness to comply with the rules of society. Now, most of those early matters relate to minor levels of offending. But there are a number of sentences of imprisonment. There are no prior convictions for sexual offending but you have committed violence against women in the course of property offending during and after the current offending period. The worst was a robbery committed after the offences against [the applicant's daughter] and after the police had first approached you about those offences. You used a large knife to threaten a woman in a bottle shop. Judge Reid – sentencing you to four years imprisonment – referred to a seven year gap in your offending to 2008. Of course, at that time he did not know, he could not know, that you had actually molested your daughter. He was told that one of the reasons for the robbery was the wish to see your children.
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> In 2008, after count 1 but before the other offences today you had assaulted a woman and taken her car. For that you were sentenced to 18 months imprisonment. Whilst you have been serving a sentence of imprisonment since 2016, there was a period on parole in the community before you were returned to custody last September. Those last four months can be declared today. The gravity of the offending makes the protection of the community of paramount importance. There must be a firm sentence of deterrence. The evidence of mental health issues is not such as to render deterrence irrelevant."

[19] As to the third factor, the offences are shocking. In 2005, the applicant ordered his four year old daughter into her bedroom, told her to get onto the bed, removed all of her clothes, touched her vagina, rubbed the top of her vagina and unsuccessfully attempted to digitally penetrate her; and he subsequently threatened to kill her if she told anyone what he had done. The applicant committed a further six sexual offences against his daughter on three separate occasions five or six years later, between January 2010 and January 2011, when she was only about nine years old.

Some years earlier an arrangement had been made under which the complainant and her older brother were being cared for by others. The applicant committed these six offences when the complainant with her brother visited him at hotels where he was staying. On the first occasion he indecently assaulted his daughter by rubbing her vagina for about ten minutes after unsuccessfully attempting to digitally penetrate her. On the second occasion, he twice indecently dealt with his daughter by licking her vagina and rubbing her vagina, in the latter case with such force as to result in the complainant crying in pain. The applicant committed his two most serious offences of this series of six offences on the third occasion. The applicant directed his nine year old daughter to follow him into a bathroom over her objection. He then undressed himself, grabbed his daughter's head, and raped her by forcing her head down to the level of his groin and causing her to fellate him. After indecently dealing with her for a short time by licking her vagina and undressing her, the applicant penetrated her vagina with his penis for a short distance, causing her to cry and scream out in pain.

[20] The Court's conclusion in *R v GBF*[17] that the circumstances "amply" supported the conclusion that a sentence of nine years' imprisonment after a trial was "well within the bounds" of the sentencing discretion does not suggest that a markedly more severe sentence would not have been within the sentencing discretion. It is also relevant that, whilst the offending in that case comprised three rape offences in addition to three indecent treatment offences, that complainant was 13 and 14. In *R v BBP*[18] the decision only was that the range for offending of the kind that occurred in that case extended beyond eight years after a trial and it could not be said that the sentence imposed was manifestly excessive. There was only one occasion of offending in which the offender indecently dealt with and raped his nine or ten year old niece (although there was evidence of other, uncharged offences). In *R v Dendle*[19] there were very serious circumstances not present here, but the four indecent treatment counts and two counts of rape were committed on one occasion against a 13 year old boy by a friend of the boy's father. The Court's decision to refuse the application for leave to appeal against the sentence of 12 years' imprisonment does not support the applicant's contention that a sentence of 10 or 11 years before taking mitigating factors into account would be outside the sentencing discretion. Another feature distinguishing the applicant's case from those decisions is that those offenders were not said to have had any criminal histories. Those decisions do not indicate that a notional sentence of 10 or 11 years' imprisonment before taking mitigating factors into account is excessive in the very different circumstances of the applicant's offending.

[21] In *R v KU & Ors; Ex parte Attorney-General (Qld)*[20] the Court referred to decisions affirming the appropriateness of sentences – after mitigation for an early plea of guilty – of between five and eight years' imprisonment for an offence of rape against a 10 year old girl by an adult whose offence did not involve actual or threatened violence or breach of trust. The rape offences in this case are of a markedly more serious character. The offences the applicant committed against his daughter when she was only about nine years old involved not one but two offences of rape; in one of those offences the applicant used such force as to cause his daughter to cry and scream out in pain; and the applicant committed a gross breach

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17 [2019] QCA 4 at [121] (Boddice J, Morrison and Philippides JJA agreeing).
18 [2009] QCA 114 at [52] (Chesterman JA, McMurdo P and Keane JA agreeing).
19 [2019] QCA 194.
20 [2011] 1 Qd R 439, particularly at [158].

of trust in committing those offences against his own daughter. Another distinguishing feature is that the sentencing judge found that the applicant's guilty pleas were neither early nor demonstrative of remorse. Consistently with *KU*, an effective sentence for the applicant's two rape offences alone, before taking into account the applicant's mitigating circumstances including his guilty pleas, might exceed 10 years' imprisonment.

[22] It was also within the sentencing discretion to increase such a sentence for the rape offences to take into account that the applicant's overall criminality was increased by the indecent dealing offences he committed against his daughter on the separate occasions when she was about nine, and also by the first indecent dealing offence which was a gross breach of trust against the applicant's four year old child accompanied by a threat to kill her.

[23] Acknowledging the reduced significance of deterrence in the context of the applicant's mental health issues to which the sentencing judge adverted, but also taking into account the diverse offences committed by the applicant on various occasions and in different eras, the seriousness of those offences, and the relevance of protection of the community, I am unable to conclude that in all of the circumstances 10 or 11 years' imprisonment before discounting for mitigating factors was outside the sentencing discretion. The sentencing judge's methodology of taking the mitigating factors into account by reducing the effective term of imprisonment to nine years, thereby drastically reducing the minimum custodial period from at least eight years to four and a half years, was conventional. The resulting term and parole eligibility date were within the sentencing discretion. The sentence is severe but it is not manifestly excessive.

[24] I would refuse the application.

[25] **LYONS SJA:** On 17 September 2018 the applicant pleaded guilty in the District Court at Bundaberg to two counts of rape and five counts of indecent treatment of a child under 16, under 12 who is a lineal descendant. The offences related to his daughter. He was remanded in custody to allow time for a psychologist's report to be obtained.

[26] On 4 February 2019 he was sentenced to concurrent sentences of nine years' imprisonment for the rape on Count 7, five years' imprisonment for the rape on Count 5, and periods of three or four years' imprisonment for the five indecent treatment counts. Pre-sentence custody of 140 days was declared as time served. The sentences imposed were also to be served concurrently with a sentence of four years, imposed on 8 June 2016, for armed robbery which had involved threatening a woman working alone in a liquor store at night, with a knife. His parole eligibility date was fixed, after serving four and a half years, at 16 March 2023. The full-time date for the sentence is 16 September 2027.

[27] When he had been sentenced to the four year term of imprisonment for armed robbery on 8 June 2016, his parole eligibility was fixed at 7 September 2017 and his full-time release date was 7 June 2020. He was not released on parole until 14 December 2017. Accordingly, at the time of entering his plea and sentence in September 2018, he was on parole but as the offences for which he was being sentenced had occurred in 2005 and 2011, that offending had not breached his parole.

The grounds of appeal

[28] Pursuant to an amended Notice of Appeal, the applicant seeks leave to appeal against the sentences imposed on Counts 1 to 7 on the following bases:

(i) the sentence is manifestly excessive;

(ii) the sentencing judge erred in failing to have regard to the aggregate period of imprisonment imposed on the applicant in fixing the parole eligibility date in relation to a term of imprisonment rather than a period of imprisonment and accordingly failed to comply with the requirement in s 160F of the *Penalties and Sentences Act* 1992 (Qld); and

(iii) the sentencing judge failed to have regard to the totality principle.

Agreed Facts

[29] The Agreed Schedule of Facts[21] indicated that the applicant had offended against his daughter on four separate occasions. One occasion was in 2005 and the rest were between 2010 and 2011. The first offence occurred when the complainant was four years old and was living with the applicant. The factual background is as follows:

> Count 1: Indecent Treatment on a date unknown between 1 January 2005 and 31 December 2005. The applicant isolated the complainant from the family, took her clothes off, held her down and attempted digital penetration. He threatened to kill her if she told anyone.

[30] The other offences occurred on three separate occasions, as set out below, some five years later between 17 January 2010 and 1 January 2011. The complainant was nine years old and living with carers.

> Count 2: Indecent Treatment. The applicant rubbed the complainant's vagina whilst he was sitting between her and her brother and attempted digital penetration.
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> Count 3 and 4: Indecent Treatment. The applicant licked and rubbed the complainant's vagina.
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> Count 5: Rape. The applicant put his penis in the complainant's mouth and moved it up and down.
>
> Count 6: Indecent Treatment. The applicant licked the complainant's vagina.
>
> Count 7: Rape. The applicant penetrated the complainant's vagina with his penis for a short distance.

[31] The Agreed Schedule of Facts stated that the complainant had initially informed authorities of the abuse in 2011, and whilst the applicant had been located by police and advised of the allegations in 2012, charges were not formally brought until 2017 when the complainant repeated the previous allegations and made further disclosures to her case worker at The Department of Child Safety (DOCS). Police were informed and the disclosures made in 2011 were reconsidered. In September 2017 there was a recorded telephone call between the complainant and the applicant in which he admitted he had sexually assaulted her and referred to factors in his own childhood as the cause. He also stated that he felt guilt and shame for what he

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21 Appeal Record Book (ARB) 60.

had done. He was arrested in December 2017 and pleaded guilty on 17 September 2018 when a new indictment was presented.

The sentencing hearing

[32] The applicant had a wide range of previous criminal offences. Many of the early offences were minor and there were no previous convictions of sexual offending. He had, however, committed violence against women in the course of property offending including the 2016 offence.

[33] At the sentencing hearing on 4 February 2019 the Crown prosecutor had made it clear that the offences for which he was being sentenced had not breached the parole that he was serving for the armed robbery. He was, however, still serving that sentence at the time the current sentences were imposed. The Crown's submission at sentence was that the range would be in the order of eight to nine years but given issues of totality, that would be moderated down to around seven and a half to eight years to take into account the total period of imprisonment and the overlap with imprisonment for which he was currently serving. The submission in relation to totality was in the following terms:[22]

> "MR COOK: Yes. And the Crown's submission is ordinarily it would be in the range of eight to nine years and, as I've touched on already, though, the Crown does make some concession that your Honour would moderate that somewhat, perhaps into the range of seven and a half to eight years, to take into account the total period of imprisonment and the overlap with that period of imprisonment from that earlier sentence. And I understand that your Honour thinks - - -
> HER HONOUR: I just don't understand the reasoning. If you have some authority that identifies that a period of parole in the community that punctuates periods of imprisonment ought to be part of the calculation in determining the total appropriate sentence. This just does not appear to me to be a case that warrants any discount.
> MR COOK: Yes.
> HER HONOUR: But are you take – you took off one and a half years today, then you're effectively – if I discounted the sentence, for example, on your submission of 18 months.
> MR COOK: Well, that'd be extreme, yes.
> HER HONOUR: Yes, but that effectively then would be to give him credit for the time that he served – the whole time that he served in custody in relation to a totally different set of offending.
> MR COOK: I'm not necessarily looking at the actual custodial period.
> HER HONOUR: I'm know you're looking - - -
> MR COOK: The whole period.
> HER HONOUR: - - - the time in the community but I – the purpose of making adjustments in relation to totality ordinarily, as I understand the principle, is to avoid the sentence of imprisonment, of incarceration being crushing.
> MR COOK: Yes.

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22 ARB 26 line 37 – ARB 28 line 3.

> HER HONOUR: And that's why I'm struggling with your submission, Mr Cook. As I said, if there is an authority that tells me that I need to be more lenient for a different offence because he has been in the community on parole for another offence.
> MR COOK: I guess I just come back to the definition of imprisonment itself, which includes whilst in the community on parole.
> HER HONOUR: Yes, but - - -
> MR COOK: And that's been the basis of my formulation here.
> HER HONOUR: But this is not an exercise in statutory interpretation. Totality is a principle - - -
> MR COOK: Yes.
> HER HONOUR: - - - that is designed to ensure that the sentence is a fair one and not oppressive because of a disproportionate amount of time in custody.
> MR COOK: And looking at those two ranges that I've put forward, your Honour, ordinarily out to nine years, I say. With moderation, seven and a half to eight years. The middle, of course, overlaps entirely at that point. Perhaps we can agree to disagree for now - - -
> HER HONOUR: Yes."

[34] In this regard the Crown prosecutor relied on the decision of *R v BBP*,[23] where a head sentence in the order of eight years had been imposed. In that case, there were some significant similarities but as that sentence was imposed after trial there was a requirement that he serve half of the sentence. Reference was also made to the decision of *R v GBF*,[24] where nine years was the head sentence following a conviction at trial for three counts of rape and two counts of indecent treatment. It was clear that both authorities relied on were sentences after trial and did not involve a sentence any greater than nine years. Counsel for the applicant submitted that the appropriate head sentence would be seven and a half to eight years given issues of totality.

[35] Counsel for the applicant at the hearing accepted the seriousness of the offending and referred to the report of the psychologist to outline factors in mitigation. It was clear from that report that the applicant had been subject to almost daily physical abuse by his alcoholic father, had been sexually abused by his grandfather between the ages of six and eight and had been further sexualised at an early age within the family environment. All of that behaviour had led to significant alcohol abuse and illicit drug use. The applicant also had a history of suicidal ideation and self-harming behaviours. The psychologist, Marissa Piat, in her Report dated 14 January 2019,[25] stated:[26]

> "[The applicant] presents with an abusive, chaotic and dysfunctional history. Commencing in early childhood he was subject to repetitive trauma in the form of sexual abuse and physical abuse, which is consistent with complex developmental trauma."

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23 [2009] QCA 114.
24 [2019] QCA 4.
25 ARB 64.
26 ARB 70.

[36] As has already been noted, the period of sexual offending between 2005 and 2011 did not breach his parole. He had been released on parole in respect of the 8 June 2016 sentence for armed robbery after serving more than 18 months in custody on 14 December 2017. The Parole Report of 23 July 2017,[27] tendered at the sentencing hearing in February 2019, indicated that he had reported as directed and was engaging well in supervision. Substance abuse had been identified as an issue and he had attended counselling sessions to address his alcoholism and was regularly attending Alcoholics Anonymous. He had also been referred to the Branyan Clinic and had been seeing a psychiatrist since December 2017 for treatment for his Bipolar Affective Disorder. He had also been referred to a psychologist to assist in reducing his anxiety and depression. He was considered to have been "actively involved" in therapy and had not taken drugs or alcohol between January 2018 and July 2018 when the report had been written.

[37] Whilst the applicant pleaded guilty, the sentencing judge considered he had not demonstrated remorse in any meaningful way until the plea was entered, which her Honour considered was a late plea.[28] The sentencing judge acknowledged that the applicant had mental health issues associated with trauma, including depression, bipolar disorder and alcoholism. Reference was also made to the fact that he had anti-social and borderline traits from his own childhood abuse. The sentencing judge also accepted that there had been considerable delay in the bringing of the charges.

[38] The transcript of the sentencing hearing indicates that her Honour considered that a sentence in the order of eight to nine years was appropriate in circumstances involving the "rape of a child within the offender's family" and stated that "I would have nominated eight to nine years as the range for the principal offence in this case".[29] Her Honour considered, however, that the gross breaches of trust, the period of offending, the threats to kill and the level of aggression made this a more serious example of offending.

[39] Her Honour noted that he had been serving a sentence of imprisonment since 2016 and that there was a period of parole in the community before he was returned to custody. The four months in custody were to be declared. She continued, however, that the gravity of the offending made the protection of the community of paramount importance and considered that there had to be a firm sentence of deterrence. Her Honour also considered that the evidence of mental health issues was not such as to render deterrence irrelevant. Her Honour continued:[30]

> "Having regard to all of the circumstances I would have imposed a head sentence of 10 or 11 years but there must be some provision for the mitigating factors. With a sentence of 10 years or more that would be impossible because of the requirement for the deferment of parole to 80 per cent of the sentence. For that reason, the only way to reflect the mitigating factors is through a reduction in the head sentence. <u>The head sentence will be reduced to nine years imprisonment but rather than parole eligibility at the usual one-third to mark the plea of guilty it will be after you have served four and a-</u>

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27 ARB 59.
28 ARB 38 lines 14 – 16.
29 ARB 29 lines 40 – 46.
30 ARB 39 lines 29 – 39.

> half years. That takes account of the discount that has come from a reduction in the head sentence and the avoidance of an 8 year minimum. Convictions are recorded for all of the offences." (my emphasis)

Has there been an error in the exercise of the sentencing discretion?

[40] It is clear from those sentencing remarks that her Honour imposed a parole eligibility date only by reference to the nine year head sentence she had just imposed. This is further reinforced by her view, expressed during submissions in relation to the period of time the applicant had already served in custody and the point at which to fix parole eligibility, that "it seems to me that it could appropriately be dealt with by looking at what is a sufficient sentence and an appropriate sentence, a just sentence for the total offending against [the complainant]"[31].

[41] Section 160F of the *Penalties and Sentences Act* 1992 however provides as follows:

> "160F Significance of an offender's period of imprisonment
>
> (1) One of the objects of sections 160A to 160E is to ensure that at any 1 time there is only 1 parole release date or parole eligibility date in existence for an offender.
>
> (2) When fixing a date under this division as the date an offender is to be released on parole or is to be eligible for release on parole, the date fixed by the court must be a date relating to the offender's period of imprisonment as opposed to a particular term of imprisonment."

[42] Accordingly, in my view her Honour did not consider the entire period of imprisonment including the four year term for armed robbery, which the applicant was currently serving, in fixing the parole eligibility date by reference only to the sentences she was imposing. It would seem that her Honour considered that particular parole eligibility date in isolation to the term of imprisonment he was already serving.

[43] This was an error.

[44] There was a further error in that matters of totality were not taken into consideration in setting the parole eligibility date. The Crown prosecutor had submitted as follows in this regard:[32]

> "MR COOK: So the offences were obviously not committed during that parole period. And it seems to date, the parole board has not suspended his parole. And that could, of course, be re-assessed after today. But it's a matter for them. It does mean that his current sentence has a full-time release date of 7 June 2020. So there'll be some reasonably significant overlap between your Honour's sentence passed today and that full-time release date. Your Honour could impose a cumulative sentence, but in my submission, it's neater to impose it concurrently. The other factor your Honour needs to

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31 ARB 26 lines 29 – 31.

32 ARB 21 lines 27 – 47.

> consider from that sentence is totality. Although that was an offence in 2015, and there's – this period of offending predates that by some time, Mr WBK is going to find himself with a significant period of imprisonment when one combines today's sentence and that sentence.
> HER HONOUR: Well, it will be a continuous period of imprisonment, but they are two quite separate and distinct periods of offending.
> MR COOK: Yes.
> HER HONOUR: Different kinds of offences and different victims.
> MR COOK: That's right. That's right. Totality could reduce the period, your Honour, to avoid a crushing result."

[45] To require half of the sentence of nine years, being a period of four and a-half years, to be served on top of a sentence which he had already served either in custody or on parole of two years and three months on a four year sentence in circumstances where he had not breached his parole is not a sentence which is redolent of totality considerations. This conclusion is reinforced by the view her Honour expressed in the exchange with Counsel that issues of totality did not apply in the circumstances before her as outlined above in paragraph [9]. Indeed, the transcript of the hearing indicates a reluctance to accept and recognise that issues of totality were actually involved at all.

[46] There was a further error. The learned sentencing judge stated that a sentence in the order of 10 or 11 years was in range, before taking into account the mitigating factors. The sentencing judge further considered that a head sentence of nine years should be imposed concurrently with the sentence he was currently serving. She further considered that as the applicant would have the benefit of a sentence under 10 years without the need to serve 80 per cent of his sentence, his parole eligibility should be fixed after four and a-half years and not the usual one third to reflect the plea of guilty.

[47] The starting point of 10 to 11 years was too high and not in accordance with authority. In the decision of *R v GBF*,[33] this court considered an application that the sentences imposed after trial were manifestly excessive. In that case the applicant committed three acts of rape and three offences of indecent treatment of a child under 16 over a period of nine months. The complainant was a half sibling who had just commenced her teenage years and the applicant was more than 20 years older. The counts included unprotected vaginal intercourse in circumstances where the applicant used emotional pressure to overcome the complainant's resistance. It was clear that the offending was persistent, had extended over nine months and involved convictions for domestic violence offences.

[48] In that case this Court considered that the circumstances amply supported a conclusion that a sentence of nine years' imprisonment to reflect the totality of the applicant's criminal conduct was within the bounds of a permissible exercise of a sentencing discretion. The Court's consideration of comparable authority, including the decisions of *R v BBP*[34] and *R v KAM (No 2)*,[35] supported a conclusion that the sentences were neither unreasonable nor plainly unjust such as to give rise to an inference there had been a failure to properly exercise the sentencing

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33 [2019] QCA 4.
34 [2009] QCA 114.
35 [2017] QCA 197.

discretion. It was considered that the applicant there did not have mitigating factors such as an early plea or significant rehabilitation and there was an absence of remorse.

[49] The decision in *R v BBP* was similarly a conviction after trial of rape and on the same occasion indecently dealing with a child. The appellant was sentenced to eight years' imprisonment for the rape, and three years for the indecent dealing which were to be served concurrently. The complainant was nine or 10 years old at the time of the offences and was the niece of the appellant. In that case, as the appeal court noted, the act of penetration which constituted the rape was shallow and momentary, and as soon as the complainant experienced pain, she pushed the appellant away and he desisted. He also threatened the complainant. It too was an appalling betrayal of trust in circumstances where he should have protected and looked after the child. The court appropriately considered that his conduct was dreadful and deserved severe punishment.

[50] In *R v Dendle*,[36] the charges involved four counts of indecent treatment of a child under 16, and two counts of rape. The offences were all alleged to have occurred on one evening. After trial the appellant was sentenced to 12 years' imprisonment on Count 2 which was the most serious offence, carrying with it a serious violent offence declaration requiring him to serve 80 per cent of that sentence in actual custody. He received lesser concurrent sentences in relation to the other four counts. That significantly higher head sentence of 12 years imprisonment reflected serious aggravating features. The offending against the complainant, who was 13 years of age, occurred over an extended period on one evening, and included threats and violence. There had been a breach of trust as the appellant was a guest in the victim's home. There were serious consequences to the complainant which ultimately resulted in his suicide some ten weeks after the offences.

[51] The abovementioned errors support a conclusion that the sentencing discretion has miscarried. Accordingly, the sentence should be set aside and the applicant should be re-sentenced.

[52] An effective head sentence of eight to nine years imprisonment, as submitted by the Crown Prosecutor at sentence, was supported by the sentences discussed in the decisions above. However, the applicant's offending contained significant aggravating features. The first offence occurred when the complainant was only four years old. It was accompanied by a threat. The other offending, some five years later, occurred over a protracted period and included two counts of rape.

[53] Having regard to those aggravating factors, the applicant's offending called for an effective head sentence of nine years imprisonment, even allowing for the significant factors in mitigation.

[54] Those factors included the applicant's pleas of guilty, which saved the complainant the ordeal of giving evidence; the applicant's remorse, expressed in the covert recording; the considerable delay in prosecuting the offences and no further sexual offending between 2011 and 2018; the applicant's childhood marred by trauma, a diagnosis of bipolar disorder, against a background of an adjustment disorder, and experiencing depression and anxiety in the community at the time of his release from custody; and the applicant's performance whilst on parole, where he was

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36 [2019] QCA 194.

considered to be well-engaged, performing reasonably well having undertaken courses in an effort to overcome his substance abuse issues, success in respect of which was supported by a number of clear drug screens.

[55] Whilst that effective head sentence is the same as that imposed by the learned sentencing judge, albeit for different reasons, matters of totality justify the fixing of a significantly earlier parole eligibility date.

[56] At the time of his plea, on 17 September 2018, the applicant had served the period from 6 June 2016 to 16 September 2018 as part of his sentence (as defined by the Act). Having regard to that period of two years, three months and ten days, and allowing for pre-sentence custody of 140 days declared as time served, a parole eligibility date is fixed at 16 September 2021.

[57] This date means the applicant has to serve an additional three years from the date of his sentence before he is eligible for parole. Such a parole eligibility date properly reflects the principle of totality whilst ensuring the applicant serves a period of actual custody relevant to this offending, consistent with the seriousness of that offending.

[58] I would order:

1. The application for leave to appeal against sentence be granted.

2. The sentences imposed below be set aside to the extent only that the applicant's parole eligibility dated be fixed at 16 September 2021.

[59] **BODDICE J:** I have had the considerable advantage of reading the separate judgments of Fraser JA and Lyons SJA.

[60] Lyons SJA's comprehensive description of the offences, grounds of appeal and sentencing remarks, which I gratefully adopt, allow me to briefly state my reasons for granting leave to appeal and for allowing the appeal against sentence.

[61] Whilst a proper exercise of the sentencing discretion may, in an appropriate case, involve the sentencing judge reasoning towards a parole release or eligibility date by reference to that part of the sentence to be served in actual custody, such reasoning must occur having given due regard to any existing periods of imprisonment.

[62] A consideration of the sentencing remarks supports a conclusion that the sentencing judge did not consider the period of imprisonment served by the applicant for the offence of armed robbery at all in fixing the parole eligibility date. The failure to do so breached an important sentencing principle, namely, that the period to be spent in custody fairly represent the totality of the applicant's criminality.

[63] In the present case, to require the applicant to serve an additional period of four and a half years actual custody prior to parole eligibility, when the applicant had already served two years and three months of a four year sentence, did not constitute a period in actual custody that fairly represented his overall criminality.

[64] For the abovementioned reasons, the sentencing discretion miscarried requiring its re-exercise by this Court.

[65] In re-exercising the sentencing discretion, I agree with Lyons SJA that the applicant's abhorrent criminal conduct, even allowing for the various mitigating factors, calls for a head sentence of nine years' imprisonment. Such a sentence is consistent with the sentences imposed in the comparable authorities discussed by Lyons SJA.

[66] I would, for the reasons given by Lyons SJA, fix the parole eligibility date at 16 September 2021.

[67] I agree with the orders proposed by Lyons SJA.