SUPREME COURT OF QUEENSLAND

CITATION:	*R v RBD* [2020] QCA 136
PARTIES:	**R** **v** **RBD** (applicant)
FILE NO/S:	CA No 82 of 2019 SC No 117 of 2018 SC No 124 of 2018 SC No 134 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Cairns – Date of Sentence: 12 March 2019 (Henry J)
DELIVERED ON:	23 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2020
JUDGES:	Holmes CJ and Mullins JA and Jackson J
ORDER:	**Application for leave to appeal against the sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of choking in a domestic setting (domestic violence offence), three counts of sexual assault (domestic violence offence), one count of unlawful stalking with violence (domestic violence offence), one count of burglary, by breaking, in the night (domestic violence offence), one count of assault occasioning bodily harm (domestic violence offence), one count of deprivation of liberty (domestic violence offence), one count of rape (domestic violence offence), one count of dangerous operation of a vehicle and 19 further summary offences – where the sentencing judge divided all the offences into three 'Sets' of offences and terms of imprisonment were imposed for each of those offences – where the Set 2 offences were directed to be served cumulatively on the terms of imprisonment for the Set 1 offences and the terms of imprisonment for the Set 3 offences were directed to be served cumulatively on the terms of imprisonment for the Set 1 and 2 offences – where the total period of imprisonment to be served under the sentences was

12 years – where a serious violent offence ('SVO') declaration was declared in respect of six of the counts – where the applicant submits that the overall operation of the sentences is manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant has to serve 80 per cent of the 12 year sentence as an SVO declaration was declared on the whole of the sentence – where the applicant submits that the sentencing judge erred in not giving specific consideration to the consequences of taking non-SVO offences into account in arriving at a total effective sentence which attracts an SVO declaration

Criminal Code (Qld), s 315A(1)(a), s 315A(1)(b)(i), s 328, s 339(1), s 349(2)(b), s 352(1)(a), s 355, s 359B, s 359E(1), s 359E(3)(a), s 419(1), s 419(2), s 419(3)(a)
Penalties and Sentences Act 1992 (Qld), s 4, s 156(1), s 161A, s 161C, schedule 1

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Derks [2011] QCA 295, cited
R v Gesler [2016] QCA 311, cited
R v Hasanovic [2010] QCA 337, cited
R v Mallie; Ex parte Attorney-General (Qld) [2009] QCA 109, cited
R v MCW [2019] 2 Qd R 344; [2018] QCA 241, cited
R v MDB [2018] QCA 283, cited
R v Ramm [2008] QCA 13, cited
R v Rix [2014] QCA 278, cited
R v Utley [2017] QCA 94, cited

COUNSEL: B J Power for the applicant
D Balic for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree, for the reasons given by Jackson J, that this application for leave to appeal should be refused. In relation to the applicant's reliance on statements in *R v Derks*,[1] it is clear that in that case, the implications of the declaration of a serious violent offence were not referred to by counsel, nor appreciated by the sentencing judge. In the present case, in contrast, the learned sentencing judge was well aware of the consequences of the serious violent offence declarations he made and gave detailed reasons for his conclusion that the result was appropriate. As Jackson J has observed, the sentence was a heavy one for an offender of the applicant's youth and lack of significant criminal history; but it is not outside a proper exercise of discretion.

[1] [2011] QCA 295.

[2] **MULLINS JA:** For the reasons given by Jackson J, I agree that the application for leave to appeal against the sentence should be refused.

[3] **JACKSON J:** This is an application for leave to appeal against numerous sentences imposed at the same time, on the ground that their cumulative operation of a period of imprisonment of 12 years is manifestly excessive, having regard to the consequence that under s 161A(a) of the *Penalties and Sentences Act* 1992 (Qld) ("the Act") the applicant was convicted of a serious violence offence ("SVO") under s 161A for a number of those offences, with a non-parole period of 80 per cent of the total period.

[4] The applicant was convicted on his pleas of guilty and sentenced for 10 offences on the indictment and a further 19 summary offences.

[5] Count 1 on the indictment was an offence on 18 May 2017 of choking, suffocation or strangulation in a domestic setting (domestic violence offence)[2] with a maximum penalty of seven years' imprisonment. It occurred on the day after the complainant ended her intimate relationship with the applicant. At 2.00 am in the morning the complainant woke to find the applicant lying naked in her bed. He asked her to have sex. She replied no and told him to go to sleep or go home. She went back to sleep. Sometime later in the morning she woke to find the applicant behind her with his right arm across the front of her neck. He applied pressure and put his hand over her mouth. She attempted to pull his arm from her neck, scratching his forearm and bicep. He continued to choke her until she lost consciousness.

[6] Count 2 was an offence of sexual assault (domestic violence offence) committed at about the same time[3] with a maximum penalty of 10 years' imprisonment. Whilst the complainant was unconscious the applicant rubbed his penis around her anus.

[7] Later that day the complainant went to the doctor with the applicant. He said that she had had a seizure. She said that she felt as though she had been strangled. She was noted to have a large number of petechial haemorrhages on her forehead, nasal bridge and cheeks. She also had subconjunctival haemorrhages on both eyes and a diffused bruise over the lateral aspect of her neck.

[8] On 24 May 2017 the applicant was charged with the offences of Count 1 and Count 2 and a temporary protection order was made against him that contained a condition of no contact between the applicant and the complainant. He was remanded in custody until he was released on bail two days later. The bail conditions also prohibited him from having any direct or indirect contact with the complainant, from going to Port Douglas under any circumstances and from leaving his bail residence between 9.00 pm and 6.00 am every day.

[9] Count 3 was an offence between 18 May 2017 and 15 June 2017 of unlawful stalking (domestic violence offence)[4] with a maximum penalty of seven years' imprisonment. The applicant stalked the complainant using various methods. He telephoned her whilst she was at her parents' house while sitting in a car outside. He entered the complainant's unit at Port Douglas on occasions using a set of keys which were subsequently taken from him. He telephoned the complainant at work,

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2 *Criminal Code* 1899 (Qld), s 315A(1)(a) & (b)(i).

3 *Criminal Code* 1899 (Qld), s 352(1)(a).

4 *Criminal Code* 1899 (Qld), s 359B, s 359E(1),(3)(a).

purporting to be a client. He created an Instagram account under a false name which he used to try to befriend the complainant. He broke into the complainant's unit three to four times via a window.

[10] Count 4 was an offence on 14 June 2017 of burglary, by break, in the night (domestic violence offence)[5] with a maximum penalty of life imprisonment. The prior evening the complainant went out with two friends in Port Douglas. The two friends stayed at her unit in the spare bedroom that night. Between 3.20 am and 5.00 am on 14 June 2017 the applicant entered the unit by using a knife to cut the screen on the kitchen window, removing the screen and entering. He locked the complainant's two friends into the spare bedroom from the outside while they slept.

[11] Count 5 was an offence on 14 June 2017 of assault occasioning bodily harm (domestic violence offence)[6] with a maximum penalty of seven years' imprisonment. After breaking in and locking the spare bedroom, the applicant entered the complainant's bedroom with the knife and sat next to her while she slept. She woke and attempted to fight him off by swinging her arms. He punched her on the right side of her face causing her to lose consciousness. The swelling and bruising to her eye were such that she was unable to open the eye.

[12] Count 6 was an offence of sexual assault (domestic violence offence)[7] with a maximum penalty of 10 years' imprisonment. During the initial assault the complainant lost control of her bladder and urinated. The applicant subsequently removed her clothes while she was unconscious. He rubbed the complainant's vagina for a period of time.

[13] Count 7 was another offence of sexual assault (domestic violence offence)[8] with a maximum penalty of 10 years' imprisonment. Whilst the complainant was still unconscious the applicant also rubbed his penis around her anus.

[14] Count 8 was an offence of deprivation of liberty (domestic violence offence)[9] with a maximum penalty of three years' imprisonment. The applicant carried the complainant who was naked and in a state of semi-consciousness from her unit to his car which was parked outside. He took a bag of the complainant's belongings including clothes. He bound her wrists with duct tape. He also wrapped duct tape around her head across her mouth. He put her in the back seat and drove north towards Mossman. He continued to detain her in the car for hours. She made unsuccessful attempts to attract help and to get away.

[15] Count 9 was an offence of rape (domestic violence offence)[10] with a maximum penalty of life imprisonment. The applicant drove to a secluded dirt track within the trees along Tinaroo Creek Road and parked there for several hours. The complainant asked him to take her to a hospital for her eye. He responded: "Shut up or I'll do it again". While in the car the applicant asked the complainant to have sex with him. She said no. Later in the afternoon, he said he wanted to have sex before he took her home. She refused again but eventually agreed to avoid being hurt further and so that he would take her home. The applicant penetrated her vaginally

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5 *Criminal Code* 1899 (Qld), s 419(1), (2), (3)(a).
6 *Criminal Code* 1899 (Qld), s 339(1).
7 *Criminal Code* 1899 (Qld), s 352(1)(a).
8 *Criminal Code* 1899 (Qld), s 352(1)(a).
9 *Criminal Code* 1899 (Qld), s 355.
10 *Criminal Code* 1899 (Qld), s 349(2)(b).

with both his finger and penis and ejaculated inside her despite her request that he not do so.

[16] Count 10 was an offence of dangerous operation of a motor vehicle (domestic violence offence)[11] with a maximum penalty of three years' imprisonment. At approximately 6.00 pm the applicant commenced driving towards the Macalister "Kuranda" Range. By then the police had been alerted to the complainant's abduction by her two friends earlier that day and were searching for her. The applicant's car was spotted. Police cars followed it. The applicant avoided two police tyre deflation sites by driving around them. Lights and sirens were activated by police cars in the pursuit. Although not driving at excessive speeds, the applicant failed to stop. On the Kuranda Range, the applicant approached a tight left turn in the road where there were no safety barriers along the edge of the escarpment on the other side of the road. The applicant drove his car across the road and off the escarpment, into the air and plunged into the forest below. The car travelled a total of 73 metres through the air, striking three trees on the way down, before landing on its front end and rolling onto its roof. The applicant helped the complainant out of the car and attempted to take her down the hill but she refused to go further. He ran away as police climbed down the hill.

[17] The complainant was taken to hospital. Her injuries included extensive soft tissue swelling overlying the right side of her face, right temporal bone and right side of the jaw, periorbital swelling and haematoma to her right eye, a black bruise over her right eye with an inability to open the eye, a right side closed vertebral fracture, a wedge fracture involving the superior end plate of the L1 vertebra, a fracture involving the superior end plate of the T12 vertebra, swelling and abrasion to the left of her neck and spinal tenderness. She was treated with pain medication, tested for sexually transmitted diseases and subjected to various radiological examinations. She stayed in hospital overnight and was discharged the following day.

[18] The 19 summary offences were of lesser importance. Some were for offences of dishonesty involving relatively minor amounts. Others were for driving and vehicle offences also of a comparatively minor order. Lastly, there were offences of contravention of the domestic violence order and breaches of the bail conditions on both 5 June 2017 and 14 June 2017. For the purposes of this application, it is not necessary to further mention the summary offences.

[19] The sentencing judge divided all the offences into "Set 1" that included Counts 1 and 2, "Set 2" that included Counts 3 to 9 and "Set 3" that included Count 10. Terms of imprisonment were imposed for each of those offences. Under s 156(1) of the Act the terms of imprisonment for the Set 2 offences were directed to be served cumulatively on the terms of imprisonment for the Set 1 offences and the terms of imprisonment for the Set 3 offences were directed to be served cumulatively on the terms of imprisonment for the Set 1 and 2 offences.

[20] The terms of imprisonment imposed were as follows:

Offence	**Term of imprisonment**
Count 1	Two years
Count 2	Two years
Count 3	Four years

[11] *Criminal Code* 1899 (Qld), s 328.

Count 4	Eight years
Count 5	18 months
Count 6	Two years
Count 7	Two years
Count 8	Two years
Count 9	Eight years
Count 10	Two years

[21] The period of imprisonment, as defined in s 4 of the Act, is the unbroken duration of imprisonment the offender is to serve for two or more terms of imprisonment ordered to be served cumulatively. Taking into account the cumulative directions as between the sentences for Counts 1 and 2 of two years, for Counts 4 and 9 of eight years and for Count 10 of two years, the total period of imprisonment to be served under the sentences is 12 years.

[22] Under s 161A(a) of the Act, an offender is convicted of a serious violent offence if the offender is convicted on indictment of an offence mentioned in schedule 1 and sentenced to 10 or more years imprisonment for the offence, calculated under s 161C. Each of Counts 2, 5, 6, 7, 9 and 10 was an offence mentioned in schedule 1. Under s 161C (2) (b) of the Act, if the term of imprisonment to which the offender is sentenced for the offence is part of a period of imprisonment of 10 years or more imposed on convictions on which the offender is being sentenced consisting of convictions of offences mentioned in schedule 1, the offender is sentenced to 10 or more years imprisonment for the relevant offence. Accordingly, the sentencing judge declared each of the convictions of Counts 2, 5, 6, 7, 9 and 10 to be a conviction of a serious violent offence.

[23] As to Counts 1 and 2, the sentencing judge found that although what the applicant did to the complainant upon those offences was far less serious than what was to come, it was objectively extremely serious in its own right. His Honour observed that having regard to *R v MCW* [2018] QCA 241 and *R v MDB* [2018] QCA 283, choking the complainant to the point of unconsciousness and, on top of that, sexually assaulting her, was conduct suggesting a head sentence range of three to four years' imprisonment.

[24] As to Counts 4 to 7, the sentencing judge observed that the applicant's conduct in breaking in at night and bashing the complainant into unconsciousness and sexually assaulting her (not including the rape later that day) could have itself attracted a sentence range of five to six years, referring to *R v Rix* [2014] QCA 278, *R v Gesler* [2016] QCA 311 and *R v Ramm* [2008] QCA 13.

[25] As to Counts 8 and 9, the sentencing judge described the circumstances comprising the deprivation of liberty leading up to the rape and observed that the rape committed in the context of the applicant having taken his victim prisoner could, in its own right, attract a sentence of eight years, but given the added context that the applicant had been stalking the complainant, was offending in breach of both his bail conditions and a domestic violence order, and had abducted her from her own home after breaking in at night and sexually assaulting her, the sentence would be materially higher, probably in a range of 10 to 12 years, referring to *R v Utley* [2017] QCA 94 and *R v Mallie* [2009] QCA 109.

[26] As to Count 10, the sentencing judge described the events leading to and the offence of dangerous driving. His Honour described the dangerous driving as an extraordinarily serious example of that offence involving an act of deliberately driving off the edge of a mountain road that was verging on suicidal. His Honour expressly sentenced the applicant on the basis that he did not attempt to kill the complainant, but that the act was done in complete contempt for her physical wellbeing and with an awareness that the probability of at least serious injury to her was very high. His Honour observed that the offence would attract a three year maximum sentence in its own right.

[27] The sentencing judge considered the sentencing option of treating one of the offences as the head sentence for all the offending. The prosecution submitted that an appropriate head sentence for the offence of rape would fall between 10 to 12 years. His Honour observed that he did not consider a total sentence of 10 years, or even 11 years, would adequately capture the applicant's criminality, even after discounting, allowing that the discounting would be off the terms of imprisonment given the effect of an SVO declaration on the non-parole periods to be served. His Honour continued:

> "In my view the sheer gravity of your collective offending deserves, even after such discounting, a total sentence of 12 years' imprisonment."

[28] The learned sentencing judge observed that the rape, sexual assaults, assault occasioning bodily harm and dangerous operation of a vehicle were all offences capable of attracting an SVO declaration and that he would unhesitatingly exercise his discretion to make such declarations for those offences. His Honour continued that that led inevitably to the proper approach on sentence being that all discounting of sentences, including discounting for pleas of guilty, ought to involve a reduction of the head sentence or sentences.

[29] His Honour proceeded to compose the three discrete "sets" of sentences, with the sentences within the sets being concurrent with each other but with those in each set being cumulative on the sentences for the prior set. He did so by separating the applicant's conduct as a course into stages marked by intervention by the authorities following which the applicant deliberately chose to press on with further offences. The first stage ended when the applicant was on remand having been arrested for Counts 1 and 2. The second stage consisted of the offences on 14 June 2017 up to the point when police endeavoured to stop the applicant's car but he made a deliberate choice to keep on driving. The third stage consisted of the driving offences culminating in Count 10.

[30] His Honour acknowledged that other minds might differ about whether Count 10 and the other summary offence of the third stage should be served cumulatively upon the earlier offending on 14 June 2017 of Counts 3 to 8. He held that:

> "As a matter of sentencing principle, and particularly as a matter of general deterrence, it is appropriate that those final two offences ought be cumulative upon the earlier offending of that day, to send a clear message that those who do not stop and instead, in deliberate disobedience of unambiguous and lawful attempts by police to stop them, press on and further offend, will receive material additional penalty beyond that given for their offending up to that point."

[31] The sentencing judge's remarks concluded as follows:

> "In my view, even giving full allowance to your pleas of guilty, your youth and your broader personal circumstances and allowing for discounting of your head sentences for the reason that you will be serving a minimum of 80 per cent of your imprisonment before being eligible to apply for parole, I conclude, as signalled earlier, that the appropriate combined total of the terms of imprisonment should be 12 years. The combination of cumulative sentences, even after the aforesaid discounting, would be materially much higher than that total, but I will materially reduce each of them to ensure that the cumulative effect of the sentences does not give rise to too crushing an overall sentence.
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> The product of that result is that the 12 years total to which I have just referred will consist of a relevant head sentence for the first set of offending of two years, for the second set of offending, eight years, and the final set of offending, two years."

[32] The applicant does not contend that any of the individual sentences was excessive. Instead, the applicant submits that the manner in which the sentences were accumulated to result in an effective 12 year sentence with an SVO declaration for the whole of the 12 year sentence resulted in a manifestly excessive sentence.

[33] The applicant submits that it would be appropriate that Count 2 be placed into Set 2. This would result in the Set 1 offences not including an offence which attracted an SVO declaration. SVO declarations would only apply then to offences in Set 2 and Set 3 that would accumulate only to 10 years, instead of 12 years.

[34] In my view, proper application of principle does not suggest that Count 2 should be included in the Set 2 offences so that the term of imprisonment for that offence of two years would operate concurrently with the sentences for the other offences in Set 2. Importantly, Count 2 was an offence committed on a quite separate occasion almost a month before the offences in Set 2 were committed, with the exception of Count 3 that constituted stalking on various days during that period. As well, the sentencing judge held that the circumstances of the sexual assault constituting Count 2 would have independently attracted an SVO declaration. That the applicant choked the complainant into a state of unconsciousness before committing that sexual assault supports that view.

[35] The applicant's second ground of appeal is that the sentences for Count 1, Count 3, Count 4 and Count 8 were not offences capable of attracting an SVO declaration. The applicant submits that although it is open for a sentencing judge to take non-SVO offences into account in arriving at a total effective sentence which attracts an SVO declaration it is required that the sentencing judge has considered the consequences of that outcome.[12]

[36] The applicant submits the sentencing court must give specific consideration to that question[13] and that in the present case there is no indication in the sentencing remarks that the total cumulative sentences of 12 years had been reduced to take

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[12] *R v Hasanovic* [2010] QCA 337, [48].

[13] *R v Derks* [2011] QCA 295, [26]-[29].

into account that the sentences included some that were for a conviction of an offence not capable of declaration of an SVO.

[37] The applicant submits that while the grouping of the offences into the three sets had a logical attraction, it disguised that the convictions which attracted an SVO declaration in Set 1, Set 2 and Set 3 were for offences and sentences imposed concurrently in each set for non-SVO offences and that the applicant is required to serve an 80 per cent non-parole period for each of those sentences, when ordinarily on a guilty plea for those sentences there would be a substantial discount, for example, leading to a non-prole period of one third.

[38] The applicant relied upon *R v Derks*,[14] where a sentencing judge increased a manslaughter sentence, as the head sentence, to take account of other offending for which the offender was being sentenced at the same time. The sentences for all offences were to be served concurrently. The sentencing judge failed to recognise that the effect of the manslaughter conviction being a conviction of an SVO was that the offender was also required to serve 80 per cent of the increased global period of imprisonment, before parole eligibility, even though the other offending was not for an SVO and would have ordinarily attracted a non-parole period of one third. That was held to constitute an error.

[39] There may be an unstated premise in the applicant's submission on this point, namely that the concurrent sentences ordered for Count 1 with Count 2, Counts 3, 4 and 8 with Count 9, and a summary offence conviction with Count 10 increased the terms of imprisonment imposed upon Counts 2, 9 and 10, which are the sentences that accumulate to create the total period of imprisonment and attract the 80 per cent non-parole period for the total period. As the discussion of the sentencing judge's remarks previously set out shows, that is not the way in which his Honour reasoned.

[40] In my view, as the analysis of the sentencing judge's reasoning previously set out shows, his Honour made no error. It was not necessary for his Honour to say more about the way in which he fashioned and arrived at the sentences within Set 1, Set 2 and Set 3 or upon their cumulative operation to show that he did not make the suggested error of failing to appreciate that unfairness might flow from the applicant being subject to the requirement that he serve 80 per cent of his concurrent non-SVO sentences before becoming eligible for parole in respect of that part of his offending.

[41] In my view, the sentencing judge was not required to reduce the total period of imprisonment under the sentences for the SVOs to reflect that for the offences that were not SVOs the applicant would otherwise have been entitled to parole eligibility at an earlier date than the 80 per cent point.

[42] Once that conclusion is reached, the application reduces to a challenge to the overall operation of the sentences as manifestly excessive. It may be recognised that the applicant is a relatively young man, with a comparatively minor previous criminal history who, by reason of the statutorily mandated non-parole period will not be eligible for parole until after more than nine years and seven months of the total 12 year period of imprisonment. That is a heavy sentence but it was imposed for extremely serious offending.

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14 [2011] QCA 295, [26]-[29].

[43] The applicant does not otherwise suggest a process of reasoning or rely on comparable decisions that would lead this court to interfere with the learned sentencing judge's exercise of discretion in fashioning the sentences in a way that resulted in a total period of imprisonment of 12 years. No error of a kind that would satisfy the requirements of *House v The King*[15] was identified in relation to that reasoning. The sentences are not manifestly excessive.

[44] In my view, the application for leave to appeal against the sentence should be refused.

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15 (1936) 55 CLR 499.