SUPREME COURT OF QUEENSLAND

CITATION:	*R v AAH & AAG* [2009] QCA 321
PARTIES:	**R** **v** **AAH** (applicant) **R** **v** **AAG** (applicant)
FILE NO/S:	CA No 334 of 2008 CA No 335 of 2008 DC No 51 of 2006 DC No 635 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 September 2009
JUDGES:	Fraser and Chesterman JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Applications for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicants pleaded guilty to 10 counts of rape and one count of deprivation of liberty and were each sentenced to eight and a half years imprisonment with serious violent offence declarations – where applicants undertook to give evidence against co-offenders and were sentenced pursuant to s 13A of the *Penalties and Sentences Act* 1992 (Qld) – whether sentences were manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – whether the parity principle should be applied – whether applicants' sentences were excessive in view of co-offenders' sentences

Penalties and Sentences Act 1992 (Qld), s 9(2)(i), s 13A, s 161B

Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
Malvaso v The Queen (1989) 168 CLR 227; [1989] HCA 58, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v AAG & AAH [2009] QCA 158, considered
R v Barclay [1999] QCA 457, considered
R v Basic (2000) 115 A Crim R 456; [2000] QCA 155, considered
R v Bolton [2005] QCA 335, considered
R v D & Attorney-General of Queensland [1995] QCA 332, cited
R v Flew [2008] QCA 290, considered
R v Gerrits, unreported, Court of Criminal Appeal, CA No 158 of 1991, 4 October 1991, considered
R v Hussein & Hussein [2006] QCA 411, considered
R v Hussein & Hussein [2009] QCA 246, cited
R v Mallie [2000] QCA 188, considered
R v Mason and Saunders [1998] 2 Qd R 186; [1997] QCA 421, considered
R v Mitchell [1998] QCA 031, considered
R v Newman [2007] QCA 198, cited
R v Penniment [1992] QCA 110, considered
R v Thompson (1994) 76 A Crim R 75; [1994] QCA 393, cited
R v Wark [2008] QCA 172, considered

COUNSEL: P E Smith for the applicants
M J Copley SC for the respondent

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

[1] **FRASER JA:** I gratefully adopt White J's description of the factual background, the issues, and the analysis of authorities in her Honour's reasons, which I have had the advantage of reading in draft. I respectfully agree with her Honour's conclusion and with that of Chesterman JA, whose reasons I have also had the advantage of reading in draft. I also express my general agreement with their Honours' reasons, but in view of the fact that our conclusion differs from views expressed in *R v AAG & AAH* [2009] QCA 158, I propose to identify the matters which weighed most heavily with me in deciding that the applications should be refused.

[2] In *R v AAG & AAH*, in which the Court set aside the applicants' previous abandonment of the applications for leave to appeal and reinstated those applications, McMurdo P, with whose reasons Holmes JA and A Lyons J agreed, expressed the views (at [13]) that the authorities relied upon by the respondent to support a 15 year head sentence after a trial (which was the sentencing judge's

implicit notional starting point) were unpersuasive in light of the applicants' relative youth and lack of prior relevant convictions; (at [13]) that *R v Mitchell* [1998] QCA 31 and *R v Mason & Saunders* [1997] QCA 421 suggested that the applicants after a trial would probably have been sentenced to between 11 and 13 years imprisonment; (at [18] – [19]) that the analysis in *R v Hussein & Hussein* [2006] QCA 411 (concerning sentences imposed upon the applicants' co-offenders) suggested error in the sentencing judge's apparent acceptance that a 15 year term of imprisonment for the applicants after a trial would have been appropriate; and (at [20] – [21]) that allowing for discounts for the applicants' cooperation with the authorities, pleas of guilty, and their cooperation under s 13A of the *Penalties and Sentences Act* 1992 (Qld), the appropriate sentences were about seven years imprisonment (with declarations under s 161B that each applicant was convicted of a serious violent offence).

[3] Those were necessarily provisional views. The Court was there considering whether it was in the interests of justice to grant the applications to set aside the applicants' abandonment of their applications for leave to appeal. The result of that decision was that the Court, now differently constituted, became obliged to consider the applications for leave to appeal on their merits. McMurdo P made it plain (in paragraph [23] of her Honour's reasons) that additional case law which was not cited by the parties in the interlocutory application might demonstrate that the applications should be refused.

[4] At the hearing of the applications some significant additional decisions were brought to the Court's attention, as McMurdo P had anticipated might occur. I would add to White J's analysis of those and other authorities only some further discussion about *R v Wark* [2008] QCA 172. In that recent case a 51 year old offender with a relatively insignificant criminal history entered an early plea of guilty. He inflicted gratuitous violence in the course of his multiple rape offences but, serious as his offences were, they did not involve the shocking feature of pack rape of which each of these applicants was guilty. In this case each applicant committed and participated in the commission by three other offenders of the abduction of the complainant and a series of rapes, extending even to one occasion of the indignity of simultaneous rape by two of the offenders. Accompanied by the production of screwdrivers as this conduct was, each applicant participated in imposing an overwhelming threat and each contributed to the infliction upon the complainant of the violence involved in so many rape offences. The predictable results of the complainant's appalling ordeal included not only some physical injury but also substantial psychological harm. These circumstances, which are more fully described in White J's reasons, so severely aggravated the applicants' culpability that it must be regarded as being at least as serious as that of Wark, despite that offender's infliction of gratuitous violence.

[5] The Court re-sentenced Wark on appeal to a term of 12 years imprisonment. McMurdo P concluded (at [8]) that had that applicant pleaded not guilty a sentence of 15 or even 16 years imprisonment could have been imposed. Mackenzie AJA expressed the view (at [19]) that the facts of that case placed it towards the upper end of a range of 14 to 16 years imprisonment as a starting point before allowing for matters of mitigation. Cullinane J, with whose reasons McMurdo P and Mackenzie AJA also agreed, concluded (at [52]) that the sentencing judge did not err in finding that the range for the type of offending involved in that case would be some 14 to 16 years imprisonment.

[6] I bear in mind the differences in circumstances of the offences and the offenders, and especially these applicants' relative youth. Even so, in light of the 12 year term of imprisonment imposed by this Court in *R v Wark* and the Court's unanimous decision that the notional range for that offender after a trial extended to 16 years imprisonment, it is not easy to discern any excess in the notional starting points for these applicants' sentences of 15 years imprisonment after not guilty pleas and 11 years after the guilty pleas.

[7] *R v Mitchell* and *R v Mason & Saunders*, to which the President referred in *R v AAG & AAH*, do not justify any different conclusion, in my respectful opinion. As White J has pointed out, this Court was not called upon to review the length of the terms of the imprisonment in those cases. Subject only to consideration of *R v Hussein & Hussein*, the decisions discussed by Chesterman JA and White J, some of which were not discussed in *R v AAG & AAH*, persuade me that the applicants' sentences were not manifestly excessive.

[8] The Husseins' sentences of 11 and 11 and a half years for their offences committed with the applicants were not in issue in the sentence applications considered in *R v Hussein & Hussein*. What were in issue were the "global head sentences" of 15 and 15 and a half years which were directly imposed for offences the Husseins had committed against a different complainant but which, as the Court there found, also reflected the Husseins' criminality in the offences they committed with the applicants. Further, the actual decision in *R v Hussein & Hussein* was that the 15 and 15 and a half year sentences of imprisonment imposed upon the Husseins were not manifestly excessive. It does not follow from that decision that the sentencing judge's adoption of 15 years imprisonment as the notional starting point for the applicant's sentences was excessive. The applicants rely upon Jerrard JA's statement in *R v Hussein & Hussein* (at [52]) that "[t]he fact that there were two separate episodes of rape means that the 15 year head sentence, although high, was not manifestly excessive." In light of the analyses of the authorities by Chesterman JA and White J, including the later decision in *R v Wark*, I must respectfully express my reservation about the proposition that a 15 year head sentence was high for the Husseins who, on two separate occasions, abducted and both repeatedly raped and participated in other repeated rapes of the complainants.

[9] I record my respectful agreement with Chesterman JA's remarks about the parity principle, to which White J has also referred. In that respect, in *Lowe v The Queen* (1984) 154 CLR 606 the High Court held that equal justice requires that, as between co-offenders, there should not be a marked disparity between their sentences which gives rise to a justifiable sense of grievance; if such a disparity arises the more severe sentence should be reduced even if it is otherwise within the permissible range of sentences. In *Postiglione v The Queen* (1997) 189 CLR 295 Dawson and Gaudron JJ pointed out that the parity principle raises a question which does not merely concern the imposition of different sentences for the same offence, but rather one which concerns the due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality.

[10] In *Postiglione* Kirby J insisted that perfect consistency between the sentences of co-offenders is not necessary and that a sentence is to be reviewed only where the disparity is such as to engender a "justifiable sense of grievance" on the part of the prisoner or "give the appearance that justice has not been done." (The quoted words were those of Gibbs CJ in *Lowe v The Queen* at 610.) Gummow J put the test in

similar, although perhaps even more demanding terms, in the same case (*Postiglione* at 323):

> "The principle for which *Lowe* is authority appears to be that the Court of Criminal Appeal intervenes where the difference between the two sentences is manifestly excessive and such as to engender a justifiable sense of grievance by giving the appearance, in the mind of an objective observer, that justice has not been done".

Put another way, the question is whether an objective comparison of the sentences reveals what Mason J called (in *Lowe v The Queen* at 611) a "badge of unfairness".

[11] In the applicants' written outline, their counsel argued that when one analysed the penalty of 11 to 11 and a half years imposed upon the Husseins with respect to the present offences and took into account the applicants' s 13A co-operation, the applicants' head sentence of 8 and a half years was excessive. In both the written and oral argument, the applicants' counsel referred to the sentences imposed upon the Husseins, and this Court's treatment of them in *R v Hussein & Hussein* in support of that same proposition. These arguments were put in support of the proposition, which I have already rejected, that the applicants' sentences were excessive. As I understood the argument, the applicants' counsel did not submit that the difference between the sentences was such as to invoke any sense of grievance, justifiable or otherwise and he did not argue that the parity principle should be applied.

[12] The only reference to "parity" which I detected in the argument for the applicants' was their counsel's submission that "if one analyses" the 15 and 15 and a half years received by the Husseins "in terms of a parity type issue" then 11 to 13 years after a trial would have been an appropriate head sentence for the applicants. That submission was made in the midst of and in support of an argument that analysis of comparable decisions demonstrated that the applicant's sentences were excessive. That argument did not raise any question about the parity principle. As appears from the statements in *Lowe* and *Postiglione* quoted above, that principle is not concerned with the underlying logic or manner of construction of a sentence but with the result of a comparison between the sentence actually imposed (in this case, eight and a half years imprisonment with the declaration) and a sentence imposed upon a co-offender (here, 11 and 11 and a half years imprisonment with the declaration).

[13] The only ground of each of the applicant's application for leave to appeal, and the only ground of each proposed appeal, is that the sentence is manifestly excessive. It was that ground which, in *R v AAG & AAH*, the Court thought had sufficient substance to justify the strong step of setting aside the applicants' abandonment, after legal advice, of their applications for leave to appeal. Neither in the applicants' written outline of submissions nor in their counsel's oral argument was it contended that application of the parity principle required any adjustment of the applicants' sentences. The applicants did not contend that they have a justifiable sense of grievance arising out of the difference between their sentences and those imposed upon the Husseins. No application was made to amend the grounds of the application and the proposed appeal. Understandably, the respondent's counsel did not address any such contention in his written outline or in oral argument. Neither counsel referred to any decision concerning the parity principle. In my respectful opinion the point is not in issue in these applications in any respect and it is

inappropriate to decide it. However, in case I am wrong in that view, I record my respectful agreement with my colleagues' conclusion that application of the parity principle, to the extent that it was raised in these applications, does not justify any adjustment of the applicants' sentences.

[14] I would refuse the applications.

[15] **CHESTERMAN JA**: The facts which give rise to these applications for leave to appeal against sentence are comprehensively and carefully set out in the judgment of White J. Her Honour has analysed the relevant authorities with equal thoroughness. I gratefully adopt her Honour's exposition of the facts and the cases. Although I agree with all her Honour has written I will give my own short reasons for thinking the application should be refused.

[16] The applicants' argument, advanced by their counsel, centred on the submission that a comparison between their sentences and those imposed on the Husseins shows the former to be excessive.

[17] The Husseins were convicted after a trial on 18 January 2006 of several counts of rape against a woman identified as complainant C. On 9 March 2006 they pleaded guilty to the offences against complainant D to which the applicants also pleaded guilty. On 8 May 2006 one of the Husseins was sentenced to 15 and a half years and one to 15 years imprisonment for the offences against C, and each to 11 years imprisonment for the offences committed against complainant D. The latter sentences were those which the learned judge would have imposed on the applicants, but for their co-operation in the prosecution of their co-offenders, which resulted in the reduction in sentence to eight and a half years.

[18] There was very little, if anything, to distinguish the applicants from their co-offenders in age, antecedents or involvement in the several forceful and degrading rapes they each committed as principal offender, or assistant. The case is made more serious by the fact that the attacks upon D were carried out by four men in concert. It was entirely appropriate to sentence all four offenders at the same level. The reductions afforded the applicants by reason of their co-operation was appropriate in extent, as White J's reasons demonstrate.

[19] Does the Husseins' punishment mean that the applicants' sentences were excessive? In my opinion it does not for three reasons.

[20] The first reason concerns the parity principle. Although counsel for the applicants did not in terms rely upon it, the obverse of the principle is implicitly the basis of his submissions. The argument is that the difference in sentence imposed upon the applicants and on the Husseins shows insufficient disparity to mark the differences between their offending.

[21] The parity principle applies only to co-offenders: *Postiglione v The Queen* (1997) 189 CLR 295 at 325 per Gummow J: *Lowe v The Queen* (1984) 154 CLR 606 at 609 per Gibbs CJ, at 611 per Mason J and at 617-18 per Brennan J.

[22] The applicants and the Husseins were only co-offenders with respect to the series of offences against complainant D. As to those offences the disparity in penalties imposed upon the Husseins and on the applicants is in the applicants' favour and is explained by their co-operation with the administration of justice. The applicants were not co-offenders with the Husseins with respect to the offences against complainant C for which they were sentenced to 15 and 15 and a half years

imprisonment. The comparison between those sentences and those imposed on the applicants does not invoke the parity principle.

[23] The second reason is that the sentencing of the Husseins for all their offending, against both C and D, called for the application of the totality principle. This, as McHugh J explained in *Postiglione* at 308:

> "… is the principle of sentencing … which enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by … reducing the total effect."

It:

> "… requires an evaluation of the overall criminality involved in all the offences with which the prisoner is charged… . Where necessary, the Court must adjust the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences… ."

[24] The Husseins had the benefit of the ameliorating effect of that principle. But for it their sentences for the offending against C and D would have resulted in a much higher sentence. For that reason the moderated sentence imposed on the Husseins is not an appropriate comparator against which to judge the appropriateness of the penalties imposed upon the applicants.

[25] Had cumulative sentences been imposed on the Husseins for the two sets of offences the result would have been a very long term of imprisonment indeed, which might have crushed hope and prospects of rehabilitation. Each of the series of offences against C and D would have attracted terms of imprisonment of between 10 and 14 years. The application of the principle meant that the overall sentence was to be moderated. The sentence imposed should have been greater than was called for by the circumstances of the set of offences chosen as the occasion for the sentence but had to reflect the seriousness of both sets of offences.

[26] The third reason is that the sentences actually imposed upon the Husseins for the totality of both sets of offences was lenient and, in my respectful opinion, inconsistent with the cases to which we were referred, some of which were also referred to the Court in *Hussein*.

[27] One must bear in mind that the *ratio* of Hussein[1] was only that the 15 and 15 and a half year sentences imposed were not manifestly excessive. The opinion that the sentences were high was *obiter dicta*. The assessment is not, in my respectful opinion, borne out by the cases which White J has analysed in some detail and which I will mention briefly.

[28] Bolton was sentenced to 10 years for one rape. The force used was greater than that inflicted by the applicants on D, but it was not great. The victim was subdued by fear. He was 18 and without prior criminal history. He pleaded guilty.

[29] Mallie was also sentenced to 10 years after a plea of guilty. The case was aggravated by the circumstance that Mallie broke into the complainant's home at

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1 [2006] QCA 411.

night. He was remorseful and showed reasonable prospects of rehabilitation. He was 20. The Court noted that the appropriate range of penalty was between 10 and 14 years imprisonment.

[30] Wark pleaded guilty to an ex-officio indictment charging him with five counts of rape and five of sexual assault. He abducted his victim and subjected her to severe and repeated violence. He was sentenced on appeal to 12 years imprisonment.

[31] Flew pleaded guilty to five counts of sexual assault, including rape and was sentenced to 10 years imprisonment. He subdued his victim whom he encountered walking alone at night by holding a knife to her. He used the knife to remove her underclothing but did not otherwise offer any violence. He was 28 at the time of the offence and 38 when sentenced. He had a criminal history for dishonesty and violence. The court repeated the observation that the appropriate range was between 10 and 14 years imprisonment.

[32] In some of these cases the level of violence was greater, though not in *Flew*, and not much in *Bolton*, than the applicants employed. What makes the applicants' case more serious, as White J observed, is that the offence was committed by four men acting in concert. They subjected D to successive, frequent, degrading acts of sexual assault. In her case no violence was necessary in order to subdue her. She was enticed by deceit to a remote location and set upon by the four men. Escape was impossible. The rapes were committed by a gang. The number of instances of penetration was therefore higher and the circumstances more degrading than in the case of a single offender.

[33] This feature makes the case more serious than the four I have mentioned. That feature more than offsets any favourable comparison with the applicants' case arising by reason of the greater degree of force found in *Wark* and *Mallie*.

[34] These cases are sufficient to establish that the notional sentences of 11 years which the learned judge would have imposed upon the applicant before discounting for their co-operation was well within range.

[35] The basis for thinking that the 15 years were high came from a comparison with the sentences imposed in *Penniment* and *Gerrits* (which White J has analysed). In my opinion those two cases and *Barclay* (also analysed by White J) establish that 15 years was modest. Gerrits was sentenced to 16 years, essentially for breaking into a woman's house, striking her savagely, and sodomising her. He was convicted after trial.

[36] *Penniment* was also a case of burglary and the rape of the occupant, a woman known slightly to him. He pleaded guilty and was effectively sentenced to 16 years. He overpowered his victim by the infliction of great violence.

[37] These three cases are all instances of one series of offences committed by a single offender. For that reason they are less serious than the present.

[38] The conspicuous feature of the offending against D and for that matter against C, is the fact that there were several attackers and multiple rapes committed by each offender. This feature makes the crime significantly more serious (allowing for special cases) than rape by a single assailant. This feature was not, I think, given sufficient recognition in the *obiter* remarks in *Hussein*. It calls for an adjustment in a comparison with sentences imposed on single assailants.

[39] When one looks at the circumstances of the offences committed by the Husseins against C, which are described by Jerrard JA, and the circumstances of their offending against D, described by White J, committed a few months later, it is, I think, impossible to think that 15 years was other than moderate. The Husseins were serial predatory rapists and a considerable danger to young women who might be alone at night. Given that the maximum penalty for rape is life imprisonment and that these were very serious rapes indeed a penalty of 15 years imposed as punishment for the two sets of rapes was very far from being severe. A term substantially longer would not have been unjust or disproportionate.

[40] In my opinion the sentences imposed upon the Husseins form no basis for doubting that 11 years was an appropriate sentence for the applicants (and the Husseins) with respect to the offences committed upon D.

[41] I would refuse the applications.

[42] **WHITE J:** The applicants, who are brothers, seek leave to appeal against sentences of eight and a half years, imposed on them for each of ten counts of rape to which they pleaded guilty in the District Court at Brisbane on 17 January 2006 and on 6 March 2006, on the ground that the sentences are manifestly excessive. They do not seek to disturb the sentence of two and a half years imposed on each of them for one count of deprivation of liberty.

[43] The learned sentencing judge made declarations that each rape offence was a serious violent offence. The applicants contend that if the declarations are to remain the sentences should be reduced to seven years. Alternatively, if the head sentence of eight and a half years is undisturbed, the declaration ought not be made.

[44] The applicants were jointly charged with two brothers, Afsheen Kashef Hussein and Azhar Zuhayr Hussein, with one count of deprivation of liberty and one count of rape committed on complainant D on 13 February 2005. Afsheen Hussein was further charged with one count of stealing from the complainant. On arraignment on 17 January 2006 the applicants pleaded guilty. The co-accused pleaded not guilty. The sentence hearing was adjourned part heard from 18 January to 6 March 2006. On that date the applicants pleaded guilty on a new indictment (which did not include the Husseins as co-offenders) to a further nine counts of rape arising out of the same incident. The sentence then proceeded.

[45] The applicants filed applications for leave to appeal against sentence within time but, through their solicitors and with legal advice, abandoned those applications on 9 May 2006. On 9 December 2008 they applied to extend time within which to seek leave to appeal. At the hearing on 13 May 2009 their counsel applied successfully to have those applications heard as applications to set aside the abandonment and to reinstate the applications for leave to appeal.[2]

[46] To complete the chronology, on 18 January 2006 the Husseins were convicted after a trial of six counts of rape on complainant C (not involving these applicants) which were committed on 17 September 2004. On 9 March 2006 they pleaded guilty to 10 counts of rape on complainant D (the complainant in respect of whom the applicants had pleaded guilty on 17 January 2006 and 6 March 2006) and one count of deprivation of liberty. Afsheen Hussein pleaded guilty to one count of stealing from complainant D.

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2 *R v AAG & AAH* [2009] QCA 158.

[47] On 8 May 2006 Afsheen and Azhar Hussein were sentenced in respect of the offences committed against complainant C to 15 and a half and 15 years imprisonment respectively for the rapes, and 11 and a half and 11 years respectively for the rapes committed against complainant D. Their appeals against conviction for the offences committed against complainant C were dismissed and their applications for leave to appeal against sentence in respect of complainants C and D were refused on 20 October 2006.[3] On 19 August 2009 the Husseins' applications[4] for extensions of time within which to appeal against the sentences imposed with respect to complainant D were dismissed.[5]

[48] In respect of all offenders, some rapes were committed as principal offender and some as aiding the other offenders.

[49] Complainant D was a 19 year old unemployed young woman who, after an argument with her boyfriend on the evening of 13 February 2005, was left alone in Fortitude Valley. She was under some financial pressure and decided to seek money by soliciting for prostitution on Brunswick Street. She had done this before but not in the previous 12 months. At about 9.45pm a van pulled up in front of her with, apparently, a single driver occupant. The complainant agreed, for a fee of $150,[6] to engage in sexual activity with the driver after ascertaining from him that he was alone. She noted some bulky object covered with a tarpaulin in the rear. The driver indicated that they could use "his" apartment at Toowong but after a telephone call said that it was no longer available and that he would take her to Mt Coot-tha.

[50] The driver was the applicant, AAH. Hidden under the tarpaulin in the rear of the van were his brother, AAG, and the Hussein brothers. The learned sentencing judge accepted that this was a plan suggested by one of the Hussein brothers. They had taken complainant C to Mt Coot-tha the previous September and had not then been identified as the assailants.

[51] The driver stopped the vehicle in Milton to enable the complainant to purchase condoms, then drove to the base of Mt Coot-tha and parked in a poorly lit car park.

[52] As AAG stopped the vehicle he called out in a language not known to the complainant, likely the native tongue of the young men, possibly Fiji Hindi as observed below, for all were born in Fiji. As the three men emerged from the covering in the rear of the van the complainant screamed and tried to escape through the passenger door but her exit was blocked by the Husseins. Afsheen Hussein was armed with a screwdriver which was approximately 20 centimetres in length. The complainant was pulled from the vehicle and her handbag taken from her. She continued to scream and Afsheen held the blade of the screwdriver at her throat telling her to shut up and do as she was told or she would be killed.[7] His brother then had hold of her arm.

[53] The complainant was directed to get into the back of the van and take her clothes off, which she did. She was told she would not be hurt if she did as she was directed. The complainant feared for her life and was crying and pleading that she not be hurt.

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3 *R v Hussein & Hussein* [2006] QCA 411.
4 Filed 9 June 2009.
5 *R v Hussein & Hussein* [2009] QCA 246.
6 $130 in the complainant's statement.
7 AR 26, AR 109.

[54] The car was driven a short distance to another location at Mt Coot-tha where, over the next hour, she was raped by each man vaginally, anally or digitally, sometimes with others present and once by two men together. She was forced to fellate the men and was subjected to other acts of abuse and degradation. Apart from the forceful sexual acts no other violence was perpetrated on her. During her ordeal the offenders laughed and joked amongst themselves.

[55] The first act was being forced to fellate Afsheen Hussein whilst he held the screwdriver. He then put on a condom and sodomised the complainant. This caused her a great deal of pain and she cried throughout. He got out of the van and his brother, Azhar, and AAH got in together. AAH was holding another screwdriver in his hand. It was not the Crown case that he threatened the complainant with it, merely that he had it. The complainant was directed to fellate him. She was then ordered to fellate Azhar who had penetrated her vagina digitally. She was then ordered to fellate AAH again and while doing so was penetrated anally from behind by Azhar Hussein.

[56] Azhar Hussein left the van and AAH directed the complainant to lie down and had vaginal intercourse with her. When he left, his brother AAG got into the van and the other men encouraged the complainant "to make it good" as it was his "first" time. He had vaginal intercourse with her. He was not wearing a condom. Following that criminal act he turned the complainant over and had anal intercourse with her. He then directed her to lie on her back and engaged in vaginal intercourse again. AAG was handed the smaller screwdriver by one of the other men and she was directed to get dressed. When she asked what was to happen next she was told that they had finished with her and she would be dropped off.

[57] The van was driven for a short distance before the side door was opened and she was directed to get out near the summit of Mt Coot-tha. Afsheen Hussein refused to return her handbag to her after she had asked for it because the offenders' fingerprints would be on it. The van then drove off.

[58] The complainant approached a couple in a car parked at the summit and sought assistance. The female occupant was an off duty police officer.

[59] Police were able to identify the van from video footage taken outside the convenience store at Milton, from other footage in Fortitude Valley and from traffic cameras located on Coronation Drive. The following day AAH admitted to a friend that he, his brother and the Hussein brothers had been involved in the incident at Mt Coot-tha and that the female involved had been threatened with a screwdriver before each had had sex with her.

[60] The registration number of the van was released to the press and on 16 February 2005 AAG contacted a friend and asked him to repaint his van. Information was passed to police about the van which in turn led them to the applicants. Police attended at the applicants' home and located a number of items which linked them to the crime. AAG went to Sydney to avoid police. AAH agreed to participate in an electronically recorded interview with police on 18 February 2005. In that interview he said that he and three men had travelled into Fortitude Valley, decided to engage a prostitute and a prostitute had agreed to have sex with the four of them for $200. He identified the other men. He told police other misleading things but did admit to driving the van and that all four had had sex with the complainant. He denied that a screwdriver had been produced. He was at pains to minimise the

criminal nature of the activity and asserted that at all times the complainant was a willing participant.

[61] AAG was spoken to by police on 19 February 2005 in Brisbane and told them that the other participants had decided to engage a prostitute but that he was not part of the activity. Whilst admitting to having sexual intercourse with the complainant, he minimised his participation and denied that there was any criminal conduct involved. The following day he informed police that he wished to take part in a further interview. He then related an account more or less consistent with that of the complainant save that he tended to minimise the nature of the criminal conduct and his own part in it. He accompanied police to Mt Coot-tha in an effort to recover the complainant's handbag.

[62] The forensic analysis of swabs taken from the complainant indicated the presence of DNA from the Husseins. That linked them to the unsolved rape of complainant C who was picked up by them in Fortitude Valley and driven to Mt Coot-tha and, after producing a knife to intimidate that complainant, each had proceeded to rape and abuse her in various ways.

[63] AAH was positively identified by the complainant from a photoboard.

[64] On medical examination the complainant was noted to have tenderness to the vaginal and perio-anal areas, a number of fine splits bleeding from her vagina towards her anus and two lacerations in the area. The ordeal has had serious consequences for the complainant who has moved a long way away from Brisbane. A two year relationship ended. At the time of sentence she suffered anxiety, nightmares and flashbacks and had difficulty in coping with day to day life.

[65] AAH was born in Fiji and was aged 21 when the offences were committed and 22 when sentenced. He was married and his wife was living in Fiji at the time of the offences. He was in employment as a tyre technician when arrested. He had a limited criminal history including one offence of stealing in 2002 and one offence of public soliciting for prostitution in 2003. AAG was born in Fiji and was 22 at the time of commission of the offences and 23 at sentence. He, too, was married but his wife was living with him in Australia when the offences were committed. He was employed as a delivery driver at the time of his arrest. He had a very minor previous criminal history. Both applicants wrote letters of apology which were tendered on sentence.

[66] The antecedents of the co-offenders are relevant and were considered by the learned sentencing judge, who had been the trial judge in their trial for the rape of complainant C. Afsheen Hussein was born in Fiji and was aged 25 when the offences were committed and 26 at sentence. He was married and his wife was residing with him in Australia when the offences were committed and he was in employment. His previous criminal history included the conviction for the rapes of complainant C. Azhar Hussein was born in Fiji and was 20 when the offences were committed and 21 at the time of sentence. He was a single man who was unemployed and his criminal history included the conviction for offences against complainant C.

[67] The applicants had undertaken to give evidence against the Hussein brothers. In the event, after their conviction of the rapes of complainant C, the Husseins pleaded guilty in respect of offences against complainant D and the applicants were not

required to give that evidence. The sentence of the applicants proceeded in closed court pursuant to s 13A of the *Penalties and Sentences Act* 1992 (Qld).

[68] The prosecutor below contended that after a trial a sentence in the order of 15 years imprisonment would have likely been imposed. Taking into account factors favourable to the applicants he submitted that a head sentence of 12 to 13 years would reflect those factors including the plea of guilty and the limited previous criminal history. The s 13A co-operation would, he submitted, reduce the head sentence to 10 years which necessarily meant that a serious violent offence declaration would be made in respect of the offences attracting that penalty. Defence counsel submitted for a sentence of nine years without a serious violent offence declaration after all mitigating factors were taken into account. The learned sentencing judge observed that without the reduction for s 13A matters he would have imposed sentences of 11 years for the rapes.

[69] His Honour noted that the applicants were "well and truly big and strong. How frightening, indeed, it must have been for the very vulnerable complainant." The Husseins were noted to be physically slighter although it was conceded by the prosecutor that the Husseins were more seriously involved both in the planning and in the threats than were the applicants.

[70] In very thorough sentencing remarks his Honour particularly noted the importance of the applicants identifying their co-offenders, who were in turn able to be identified as the offenders against complainant C. The serious nature of the offending was emphasised by his Honour:[8]

> "It is to be remembered that pack rape whilst armed is one of the most serious crimes in the whole criminal calendar – a pack rape that took place in a deserted spot of the prisoner's [sic] own choosing and with a weapon in the circumstances of some wickedness with the threat to kill."

[71] In response to the defence submission that the applicants were immature, naïve and extremely stupid, his Honour observed that they were:

> "…knowingly very actively involved over quite some period, during which … there was a range of indignities heaped upon her, the certain persistence, the strength of numbers, in a deserted spot of their choice and with the two screwdrivers involved, one in particular with the threat."

His Honour carefully considered all the aggravating features relevant as to whether or not there should be declarations of serious violent offences and was persuaded that it was appropriate to do so. His Honour took account of the mitigating features of the pleas of guilty, the identification of the co-offenders and the s 13A co-operation.

[72] The applicants contend that his Honour fell into error when he accepted the starting point proposed by the prosecutor of 15 years imprisonment after a trial.

[73] When the applicants applied to have their applications for leave to appeal to be reinstated this court (but differently constituted) necessarily considered if there was possible error infecting the sentences imposed to determine if there were prospects

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[8] AR 90.

that an application might be successful. That is, that there "would be a miscarriage of justice not to allow their applications."[9] The President, with whom Holmes JA and A Lyons J agreed, identified as error the learned sentencing judge's starting point of 15 years imprisonment after a trial.

[74] The submissions by counsel for the applicants[10] as described by the President were that the authorities demonstrated that a sentence after a trial of between 10 and 12 years imprisonment was the appropriate starting point and that an offender sentenced under s 13A was often given a deduction of fifty per cent or more, whereas in this case a reduction of only 23 per cent on the sentence which otherwise would have been imposed was given. The submission was that the notional head sentence ought to have been reduced to five to six years with a serious violent offence declaration. Alternatively, the s 13A and other mitigating matters ought to have led the judge not to make a serious violent offence declaration.

[75] The President was unpersuaded that a 15 year head sentence would have been appropriate had the applicants been convicted following a trial because of their relative youth and lack of prior relevant convictions. Her Honour concluded, after a review of a number of authorities:[11]

> "It may be that additional material and case law will be placed before the court hearing the applications for leave to appeal against the sentence which demonstrate that the applications should be refused."

No further material was placed before this court. It is necessary then to review all the authorities advanced to support the relative positions of the applicants and the respondents.

[76] The decisions in *R v Mitchell*[12] and *R v Mason & Saunders*[13] were sentences relied on to conclude that a starting point of 15 years imprisonment in the present case was too high although they were the sentences which the prosecutor below submitted supported that starting point. The three applicants were all co-offenders who were convicted after a trial of a great many offences including offences of rape and indecent assault constituted either by an act of sodomy or an act of oral sex and, in the case of Mitchell, assault occasioning bodily harm. The offences were committed against a young woman known to all of them and the offenders were described by the sentencing judge as her friends whom she trusted. All of the offenders, like the complainant, were affected by alcohol when they left a night club. Instead of driving the complainant to see her boyfriend at the watchhouse, the car was driven into the bush where she was ordered out and told to undress. When she refused she was struck about the face by Mitchell and then did as told. As the sentencing judge related, she was then, over the following hours, repeatedly raped, sodomised and forced to engage in oral sex, and on occasions was sexually assaulted by more than one man simultaneously. Throughout most of the time she was crying and fearful for her safety. The ordeal took place over two to four hours. The offenders were described as operating as a gang.

[77] The injuries sustained by the complainant were more severe than in the present case. She received a cut to the top of the lip and inside the bottom lip from the initial

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9 *R v AAG & AAH* [2009] QCA 158 at [4].
10 Who was counsel on these applications.
11 *R v AAG & AAH* [2009] QCA 158 at [23].
12 [1998] QCA 31.
13 [1997] QCA 421.

assault, bruises on both breasts, on the buttocks and lower back, scratches to her knees and her back, two small lacerations on the cervix which were bleeding on examination and tenderness in the vaginal opening and upon examination of the anus. Mitchell was aged 32 with a serious criminal history involving offences of violence. He was sentenced to a head sentence of 15 years imprisonment. Mason was aged 33 and he, too, had a criminal history involving some acts of violence although not as serious as Mitchell. He was sentenced to a term of imprisonment of 14 years for the rapes. Saunders was aged 27 and his criminal history involved an assault conviction many years previously but otherwise consisted of offences against the *Drugs Misuse Act* 1986 (Qld) or street offences. He was sentenced to a head sentence of 12 years imprisonment for the counts of rape.

[78] The appeals against sentence effectively concerned only the declaration that the offences were serious violent offences. Those declarations were set aside as the offending conduct occurred prior to the amendments to the *Penalties and Sentences Act* which introduced Pt 9A to that Act in 1997. The Court of Appeal did not address the appropriateness of the sentences imposed and no comparable sentences were referred to by the learned sentencing judge. It seems that more gratuitous violence was inflicted upon that complainant than in the present case. In *R v AAG & AAH*[14] the President concluded that *Mitchell* and *Mason & Saunders* suggested that the present applicants after a trial would probably have been sentenced to between 11 and 13 years imprisonment.

[79] It is necessary to look more widely at what are submitted to be comparable authorities. The first of the cases referred to is that of *R v Gerrits*.[15] The complainant was asleep in front of the television late at night after her husband had gone to work, while her daughter was asleep in her own room. She was struck over the head with a bottle and started bleeding. The assailant, who was the applicant for leave to appeal against sentence, hit her on the face with the broken bottle. She was taken to a bedroom and was subjected to penile anal penetration. He engaged in other acts of sexual degradation, threatening throughout that he would get the daughter if she did not comply with his requests. Medical examination noted that the complainant had multiple lacerations to her face, abrasions inside the lower lip consistent with lip tooth contact action, a laceration to her head, bruising to her breasts and multiple areas of dried blood on her trunk and on her thighs. There was an eight centimetre laceration from a knuckle of her fourth finger to her wrist. There were four areas of bleeding within the rectal mucosa.

[80] After a trial the applicant was sentenced to 16 years imprisonment for the burglary, 14 years imprisonment for what was then an indecent assault consisting of an act of carnal knowledge against the order of nature, and lesser sentences for other offences. The focus of the submissions on appeal related to the 16 years imprisonment on the burglary count but it is useful to have regard to the Court of Criminal Appeal's observations about the sentence structure. The applicant had a bad criminal record including a number of convictions for breaking and entering with intent. The psychiatric opinion was that he was a sexually sadistic man at risk of committing further acts of anti-social behaviour against women. Williams J said:[16]

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14 [2009] QCA 158.

15 Unreported, Court of Criminal Appeal, CA No 158 of 1991, 4 October 1991.

16 Unreported, Court of Criminal Appeal, CA No 158 of 1991, 4 October 1991at p 12.

> "There have been instances where this Court has had to consider a serious sexual assault, sometimes rape, committed on a woman after her home had been burgled. Sometimes the court has determined the appropriate head sentence given the overall criminality of the conduct and imposed that sentence on the charge of rape, leaving the charge of burglary to carry a relatively nominal sentence … On other occasions the court has imposed relatively moderate sentences with respect to both the sexual offence and the burglary and made the sentences cumulative … But also, in an appropriate case, particularly where both offences carry life imprisonment as the maximum penalty that may be imposed, the court has imposed with respect to the burglary account the sentence which reflects the overall criminality of the conduct in question. That was the approach of the learned sentencing Judge here. It cannot be said that any one of those three approaches is necessarily right or wrong."

[81] In *R v Penniment*[17] the applicant pleaded guilty to one count of entering a dwelling house at night with intent, one count of rendering the occupant incapable of resistance and one count of rape. He was sentenced to 10 years imprisonment for entering the dwelling house, 12 years for the acts of rendering the occupant incapable of resistance and 15 years for the rape, with a recommendation for parole eligibility after six years. The complainant was a 23 year old woman asleep in her bed in a hotel in Brisbane when the applicant broke into her room and attacked her with the intent of having sex with her. Macrossan CJ noted that the applicant had applied "an appalling degree of force" on the complainant, choking her to the point of unconsciousness and making violent threats to her. He was affected by liquor and made an early plea of guilty. His Honour noted that the head sentence of 15 years had to be considered in light of the pre-sentence custody which could not (as the law then stood) be declared as time served but, by convention, tendered to be doubled to take account of parole eligibility. Accordingly, the head sentence imposed was equivalent to 16 years. The penalty was described as "severe" but also said to be within a range justified by decisions of the court in recent times. The plea of guilty was recognised in the early parole recommendation.

[82] *R v Barclay*[18] was another case mentioned in *R v AAG & AAH*. The complainant, a 35 year old woman, had been living in a makeshift area under a house on the street where the applicant lived and had a passing acquaintance with him. He entered her accommodation while she was asleep in the early hours of the morning and severely bashed her, threatening to kill her and accusing her of irrational things. He punched her in the chest and face until she could barely see. He drove her head into the cement floor and bit her on various parts of her body. He squeezed her throat so that blood ran from an ear. He engaged in acts of sexual assault and then effected penile vaginal penetration. He held her while he slept and at dawn he again sexually assaulted her and raped her. Medical evidence confirmed the violence of the attack. He was convicted after a trial and sentenced to 15 years imprisonment on the counts of rape with serious violent offence declarations and other concurrent terms of imprisonment. The assailant was aged 39 years with previous convictions for rape, assault occasioning bodily harm and drug offences. It was described as a very serious example of the offence of rape. The court regarded the sentence as supported by *Penniment* and *Gerrits*.

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17 [1992] QCA 110.

18 [1999] QCA 457.

[83] *R v Bolton*[19] was referred to by both counsel on this appeal although not mentioned in *R v AAG & AAH*. The complainant was a young female foreign student on holiday in north Queensland. She was walking alone along the beach near the edge of a wooded area when the applicant grabbed her from behind and forced her to the ground. When she shouted for help he told her to "shut up" and had a knife with a 10 to 12 centimetre blade. She struggled and in so doing grabbed the knife and injured her hand. The applicant told her that if she tried to resist again he would hurt her. She was dragged into the bush, pushed into the ground and, although she struggled, he overcame her, pushed a cloth into her mouth and took off her clothing. He held the knife to her neck and had unprotected sexual intercourse with her. The complainant was left with injuries to three fingers which required surgical repair and had fine linear abrasions to the throat and neck consistent with the blade of the knife being drawn across her skin. The applicant pleaded guilty, expressed no remorse that was accepted by the sentencing judge, and was sentenced to a term of imprisonment of 10 years for the rape. A serious violent offence declaration was made. The applicant was aged 18 and had no previous criminal history.

[84] Keane JA, with whom the other members of the court agreed, referred to *R v Basic*[20] and *R v Mallie*.[21] Those cases were single offender rapes. In *Basic* the sentence was one of eight years imprisonment with a serious violent offence declaration which was not disturbed on appeal. The court there said that the rape was not in the most violent category, the complainant's injuries were not serious and no weapon was used. Keane JA observed that the rape in *Bolton* was violent; Bolton had used a weapon and the complainant suffered harm as a result of the use of the knife to subdue her. His Honour added that those circumstances:[22]

> "… are enough to suggest that a notional head sentence in the range of seven to 10 years discussed in *Basic* may well have been inadequate in the present case, even having regard to the applicant's youth."

[85] *Mallie* was a case of assault occasioning bodily harm and sexual assault which occurred when the applicant broke into the home of the complainant at night. She suffered severe psychiatric consequences from the attack. The offender was aged 20 years and had a history of alcohol and cannabis abuse and one prior incident of personal violence. He pleaded guilty. The court there held that the appropriate range was 10 to 14 years imprisonment and dismissed an application for leave to appeal against the sentence of 10 years. The offender was remorseful and there were reasonable prospects of rehabilitation. Keane JA concluded in *Bolton* that the plea of guilty, youth and lack of prior criminal history of the offender were sufficiently taken into account and the sentence reflected those factors but also reflected the very serious nature of the offending.

[86] Another case not mentioned in *R v AAG & AAH* is that of *R v Wark*.[23] The applicant pleaded guilty on ex officio indictment to five counts of rape, five counts of sexual assault, one count of assault with intent to rape, one count of assault occasioning bodily harm while armed, one count of deprivation of liberty and two summary offences. The complainant was walking beside a highway in

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19 [2005] QCA 335.
20 (2000) 115 A Crim R 456; [2000] QCA 155.
21 [2000] QCA 188.
22 [2005] QCA 335 at [19].
23 [2008] QCA 172.

north Queensland early one Saturday morning and accepted a lift from the applicant who persuaded her to accompany him to his home on a rural property, promising to drive her to her destination. When she attempted to leave the house he struck her about the head with a piece of wood causing bleeding. He grabbed her by the hair and dragged her back inside where he forced her on to a bed, removed her clothes and tied her hands to the bed head with a rope. He then sexually assaulted her. He used the rope to pull her on to the floor where he forced her to fellate him, slapping her repeatedly on the face. He engaged in other assaults and acts of sexual indecency before forcing her to fellate him again. He dragged her to a shower where he made her perform oral sex on him again. The ordeal continued with further sexual assaults, finally whipping her and penetrating her anus with an object. She was able to free her hands when he left the room and escaped the house to neighbours. He was sentenced to a term of imprisonment of 13 years for the rape. The court concluded that insufficient discount was given for the plea on ex officio indictment and the associated remorse, and a term of imprisonment of 12 years was substituted for 13 years.

[87] In *R v Flew*[24] the applicant pleaded guilty to five offences, including rape, which occurred some 10 years before they were dealt with in the District Court. The complainant was walking home by herself along the footpath on the Gold Coast Highway at Palm Beach when the applicant, who was unknown to her, put his arm around her and said she was coming with him. She responded negatively and he told her that he had a knife and put it under her shirt against her torso. The complainant was forced off the footpath and into a secluded area where she was pushed to the ground. He removed part of her clothing and used his knife to cut the straps of her bra. He sexually assaulted her and then used the knife to remove her underpants. He made her engage in a sexual act and then engaged in vaginal sexual intercourse. Finally he made her fellate him. The complainant ran home and complained to her mother and police were called.

[88] DNA was taken and it was this DNA which was matched with the applicant's in 2007 when he was arrested in relation to other matters. The complainant was cross-examined at committal. The applicant was aged 28 years at the time of the offences and had been imprisoned for armed robberies in New South Wales. He was said to have been affected by amphetamines at the time of the offences and had no recollection of them. On appeal the applicant complained that he had not received sufficient recognition for his plea of guilty. Keane JA observed that the decision of *R v Newman*[25] confirmed that in cases of violent rape where the offender is entitled to the benefit of a plea of guilty the range of appropriate sentences is between 10 and 14 years imprisonment. His Honour noted that the adverse consequences of the terrifying assault on the victim continued to the present and stressed the importance of the denunciation of such crimes.

[89] Finally, the sentence imposed against the co-offenders, the Hussein brothers, must be considered.[26] Afsheen Hussein was sentenced to 15 and a half years imprisonment on each of the six counts of rape on complainant C and Azhar Hussein to 15 years imprisonment. Afsheen Hussein was sentenced to 11 and a half years imprisonment for the counts of rape committed on complainant D and Azhar Hussein to 11 years, which were to be served concurrently. They complained on

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24 [2008] QCA 290.

25 [2007] QCA 198.

26 *R v Hussein & Hussein* [2006] QCA 411.

appeal that their sentences were manifestly excessive but their own senior counsel had submitted for a global penalty of 15 years for Afsheen Hussein and 14 years imprisonment for Azhar Hussein. Jerrard JA, with whose reasons Jones J and Atkinson J agreed, referred to *Mitchell*, *Mason & Saunders*, *Barclay*, *Penniment*[27] and *Gerrits*. His Honour said:[28]

> "The appalling extent of force used by the offenders in [*P*]*enniment* and *Gerrits* suggests that the head sentence imposed in this matter was too high, but only if attention is focused solely on the offences committed against C. A conclusion the sentence is too high also overlooks that senior counsel for the applicants invited the learned sentencing judge to impose what counsel called a global head sentence, meaning one which reflected the applicants' overall criminality for all their offences."

After considering the facts against complainant D, his Honour stated:

> "The offences against D revealed the Husseins as predatory and serial rapists prepared to threaten use of a weapon to overcome resistance. It is true that their offending did not involve the use of further violence to the victim, other than that necessarily involved in the commission of the actual offences, which distinguishes them from the offenders in the cases to which they and the prosecution refer … But although they make the valid point that their violence was limited to their sexual offending, they preyed upon two vulnerable victims, and the circumstances of both sets of offences involved a considerable risk of actual violence if the victim began to resist."

His Honour noted that because there were two separate episodes of rape it meant that the 15 year head sentence, although high, was not manifestly excessive.

[90] The Husseins applied for an extension of time within which to appeal against the sentences imposed in respect of complainant D and C on the ground of fresh evidence and other grounds unnecessary to mention. Those applications were refused.[29]

[91] The clearest distinction between these applicants and the applicants in *Gerrits*, *Penniment*, *Barclay*, *Bolton*, *Wark* and *Flew* is that those offenders acted alone. In most of those cases more violence was inflicted upon the victim to subdue her or, in some cases, gratuitously, than here. The sentences imposed in those cases tended to reflect that level of violence and, in some cases, a previous history of offending violently. Here the complainant was effectively abducted by four men, two described by the learned sentencing judge as big strong men, to a remote location at night and threatened with a weapon that she would be killed if she did not comply with their demands. As Jerrard JA observed in the Husseins' sentence appeal application, the potential for violence was very real. Whilst all rapes must be denounced and violent rapes more so, a pack of men raping a woman as these men did lifts the offending to a level which must be condemned in the strongest terms. The punishment must reflect community outrage and the need for general deterrence.

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27 Described as Tenniment in the judgment.

28 [2006] QCA 411 at [49].

29 *R v Hussein & Hussein* [2009] QCA 246.

[92] The only truly comparable cases in Queensland are *Mitchell, Mason & Saunders* and *Hussein & Hussein*. There was no consideration of the appropriateness of the head sentences in *Mitchell* and *Mason & Saunders* as the applications for leave to appeal concerned only the serious violent offence declarations. On the authority of *Gerrits* and *Penniment,* where there were sole offenders and where terms of 16 years imprisonment were not interfered with, it might be observed that the offenders in *Mitchell* and *Mason & Saunders* received very moderate sentences.

[93] The Husseins' only co-operation with the administration of justice was to plead guilty to the offences against complainant D. The sentences of 15 and a half years and 15 years respectively after a trial in respect of complainant C were regarded as "global" sentences in the sense that they were guilty of offending against two complainants and the misconduct and violence was worse in the case of C.

[94] The factors favourable to the applicants, which were said not to be sufficiently regarded, were their youth, and relatively crime free history. In *Bolton* the offender was 18 years with no previous criminal history and had pleaded guilty. His sentence of 10 years was not considered excessive. Indeed, there was no mention even that it was a heavy sentence. It was submitted that these applicants were immature and lacked judgment. These were not offences which came from those character deficits. In some cases youthful immaturity might explain and, indeed, excuse some anti-social criminal conduct. But young men who plan to abduct and force a woman to participate in a range of sexual misconduct cannot take refuge in the fact of their relative youth. These applicants were married men. They were not boys.

[95] Another complaint is said to be the failure to accord appropriate recognition to their co-operation in the administration of justice. They gave untruthful accounts of the evening initially and, even when admitting to what had occurred, sought to minimise their criminal conduct. Even the s 13A statements are at odds in places with the complainant's account. Their written apology to the court shows only limited insight into the terrible experience that the complainant had undergone at their hands. But they did implicate the Husseins and were prepared to give evidence against them which meant that two dangerous men have been removed from the community.

[96] Just what discount is given for information will depend upon various factors. Section 9(2)(i) of the *Penalties and Sentences Act* identifies assistance to law enforcement agencies in the investigation of the subject offence and other offences as a factor to be taken into account when sentencing. The principle has been discussed in many cases. It is regarded as particularly important in cases of organised crime.[30] In *R v Thompson*,[31] where an offender disclosed over 2,000 property offences and implicated others, this court reduced a sentence by 40 per cent to reflect the magnitude of the co-operation[32] and because the offender ran "the risks involved in providing highly valuable information about offenders other than himself." That was an exceptional case.

[97] There is no suggestion that these applicants put themselves at any particular risk by naming the Husseins. In *R v D & Attorney-General of Queensland*[33] this court[34] observed that:

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30 *Malvaso v The Queen* (1989) 168 CLR 227 per Deane and McHugh JJ at 239.
31 (1994) 76 A Crim R 75.
32 (1994) 76 A Crim R 75 at 79.
33 [1995] QCA 332.
34 Macrossan CJ, Byrne and White JJ.

> "Excessive leniency in circumstances like those presented here carries risks. First, the effective sentence may be so disproportionate to the gravity of the offence … as to affront community standards … It [the discount] ought not, however, to be so great as to overreach the need for sufficient punishment or to encourage false allegations."[35]

[98] The learned sentencing judge explored in some detail the factors which he needed to take into account when considering an appropriate reduction in sentence for the applicants' co-operation, both in naming the Husseins initially and in being prepared to give evidence against them, unnecessary as it proved to be. His Honour said that he would have sentenced the applicants to 11 years for the rape charges without the s 13A co-operation. He gave a discount of two and a half years for that co-operation, that is, a discount of about 25 per cent. On these facts it cannot be concluded that he erred in giving that discount.

[99] Mr Smith, for the applicants, finally submitted that the Husseins would be eligible for parole after 8.8 years and the applicants after 6.8 years, a difference of only two years which might lead to a justifiable sense of grievance by the applicants. Two years is a considerable period in a prison. Furthermore, the Husseins, whose dangerousness was noted by Jerrard JA, will only be granted parole if the authorities are persuaded that they no longer constitute a risk to young women, particularly sole sex workers. No other question of parity was raised.

[100] The truly appalling feature of the conduct in this case was the abduction of a lone woman by four men for their sexual gratification with threats of violence backed up by the production of a screwdriver if she did not submit. The global sentence imposed on the Husseins was moderate; their combined offending could, in my view, have supported a higher sentence when the sentences in cases such as *Gerrits*, *Penniment*, *Wark* and *Flew* are considered. Of themselves, then, the sentences imposed on these applicants were not, therefore, manifestly excessive.

[101] The nature of these crimes was such that the serious violent offence declarations were appropriately made.

[102] The applications for leave to appeal against sentence should be refused.

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35 [1995] QCA 332 at p 5.