SUPREME COURT OF QUEENSLAND

CITATION:	*R v Colless* [2010] QCA 26
PARTIES:	**R** **v** **COLLESS, Luke James** (applicant)
FILE NO/S:	CA No 223 of 2009 DC No 2051 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2010
JUDGES:	Chief Justice, Holmes and Muir JJA Judgment of the Court
ORDERS:	**1. Application for leave to appeal against sentence granted;** **2. Appeal allowed;** **3. Set aside the sentences of 25 years imprisonment imposed upon the applicant on 28 August 2009 and substitute sentences of 16 years imprisonment;** **4. Otherwise confirm the orders then made.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to a series of sexual offences committed on 11 women aged between 18 and 52 years over a 27 month period – where offences included five instances of digital rape – where applicant sentenced to 25 years imprisonment for each instance of rape – where applicant had a good work record and no prior criminal history – where there were substantial mitigating circumstances – whether the sentences imposed were manifestly excessive *Corrective Services Act* 2006 (Qld), s 182(2)(b) *Penalties and Sentences Act* 1992 (Qld), s 13(1), s 13(2), s 161A(a)

Ibbs v The Queen (1987) 163 CLR 447; [1987] HCA 46, cited
R v Atwell [2000] QCA 266, distinguished
R v Breckenridge [1966] Qd R 189, distinguished
R v Brown (2002) 5 VR 463; [2002] VSCA 207, cited
R v Buckley [2008] QCA 45, distinguished
R v Burley; ex parte Attorney-General (Qld) [1998] QCA 98, distinguished
R v CAJ [2009] QCA 37, considered
R v Hornby [1996] QCA 446, distinguished
R v Jackson [1988] CCA 11, distinguished
R v Mallie [2000] QCA 188, considered
R v Riley (2006) 161 A Crim R 414; [2006] NTCCA 10, cited
R v Wark [2008] QCA 172, cited
R v Watcho (1998) 104 A Crim R 300; [1998] QCA 331, distinguished

COUNSEL: C Heaton for the applicant
A W Moynihan SC for the respondent

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

THE COURT:

Introduction

[1] The applicant pleaded guilty in the District Court on 27 August 2009 to a series of sexual offences committed on 11 women over a 27 month period covering the years 2006-2008. The offences included five instances of digital rape. For each of those rapes, the applicant was sentenced to 25 years imprisonment, of which he must serve at least 15 years (s 161A(a) *Penalties and Sentences Act* 1992 (Qld); s 182(2)(b) *Corrective Services Act* 2006 (Qld)). The applicant seeks leave to appeal on the ground that the sentences imposed upon him were manifestly excessive.

The offences and the penalties imposed

[2] Some detail of the offences and the penalties imposed may be gathered from the following table:

Count	Date of offence	Nature of offence	Location of offence	Time of offence	Age of complainant	Sentence
1	28 April 2006	Sexual assault	Ashgrove	5.45am	36 years	3 years
2	28 April 2006	Rape	Ashgrove	5.45am	36 years	25 years
3	9 June 2006	Sexual assault	Paddington	6. 00am	51 years	3 years
4	10 June 2006	Assault with intent to rape	The Gap	4.35am	21 years	10 years
5	21 June 2006	Sexual assault	Paddington	6.10am	26 years	3 years

Count	Date of offence	Nature of offence	Location of offence	Time of offence	Age of complainant	Sentence
6	21 June 2006	Assault with intent to rape	Paddington	6.10am	26 years	10 years
7	7 July 2006	Rape	Stafford	4.00pm	19 years	25 years
8	19 July 2006	Assault with intent to rape	The Gap	2.30pm	23 years	10 years
9	23 November 2006	Sexual assault	Indooroopilly	5.30pm	25 years	3 years
10	23 November 2006	Assault with intent to rape	Indooroopilly	5.30pm	25 years	10 years
11	6 December 2006	Rape	McDowall	6.00pm	38 years	25 years
12	6 December 2006	Sexual assault	McDowall	6.00pm	38 years	3 years
13	6 December 2006	Assault occasioning bodily harm	McDowall	6.00pm	38 years	3 years
14	2 March 2007	Assault occasioning bodily harm	Ferny Hills	4.45pm	52 years	3 years
15	2 March 2007	Assault with intent to rape	Ferny Hills	4.45pm	52 years	10 years
16	30 January 2008	Rape	Burleigh Heads	2.10pm	18 years	25 years
17	30 January 2008	Sexual assault	Burleigh Heads	2.10pm	18 years	3 years
18	16 July 2008	Rape	Kangaroo Point	12.30pm	27 years	25 years

All sentences are to be served concurrently.

[3] Born on 13 June 1977, the applicant was 28 years of age when he committed the first offence, and 32 years old when he came to be sentenced. He had no prior criminal history and a good work record.

Details of the offending

[4] It is necessary to set out more detail of the particular offences, and the way the offending developed, and that may be conveniently done by recourse to the learned primary Judge's sentencing remarks.

> "To start with the facts, as the Director of Public Prosecutions put it: 'During a 27 month period between April 2006 and July 2008 you attacked 11 women. This was generally at a time when they were exercising and enjoying their environment by walking, jogging and bike riding in public places where they had every right to feel safe and secure.'

The first four of the offences, in fact, occurred in suburban streets at 5.45 a.m., 6 a.m., 4.35 a.m. and 6.10 a.m. The balance occurred on bikeways, the water reservoir at Russell Terrace, Indooroopilly, the Chermside Hills Reserve, Brisbane Forest Park, the Burleigh Headlands area and the river path at Kangaroo Point Cliffs.

The attacks at these places occurred at 4 p.m., 2.30 p.m., 5.30 a.m., 6 p.m., 4.45 p.m., 2.10 p.m. and 12.30 p.m. It can be seen that many of these attacks occurred during the hours of daylight.

You either violently raped, or assaulted these women, with intent to rape causing each physical injury and psychological trauma. Dr Lawrence, whose report was tendered before the Court by Mr Kimmins, has helpfully arranged the attacks into a number of clusters.

Firstly, there were six offences committed between the 28th of April 2006 and the 19th of July 2006. Five of these were in the inner western suburbs of Rosalie, Paddington, Ashgrove and The Gap, and one was at Kedron Brook.

As I have said the first four attacks occurred early in the morning on women who were jogging or walking. In one case the woman was walking home after returning from a night out, but otherwise they were engaging in their regular exercise in the public streets of this city.

The last two occurred in mid-afternoon on women who were either bike riding or walking on a bikeway. In my view you changed your modus operandi from public streets, because as the photos show, these other places were more secluded and treed and gave you a greater chance of concealment and escape after the offences had been committed. I consider that you picked these venues to increase your ability to commit these offences without being caught.

The second cluster of offences occurred after a gap of four months. There were two more attacks which were two weeks apart in November and December 2006. The first occurred at Indooroopilly at 5.30 a.m. and the other at the Chermside Hills Reserve at 6 p.m. when the victims were walking; the latter taking her dog for a walk.

The second of these victims sought to defend herself by grabbing your testicles, as a result of which you punched her three times in the side of the head. As Mr Moynihan said: "This was gratuitous and excessive." Consequently, her injuries included swelling and bruising to the left forehead and the left ear.

Thirdly, after a gap of approximately three months, there was a further attack; the only attack that occurred in 2007. That was

on the 2nd of March on a 52 year old woman who was jogging on a trail in the Brisbane Forest Park at 4.45 p.m.

She also fought you off successfully, but as she struggled violently and screamed for help you threatened to kill her saying, "Shut up, or I will kill ya." You also punched her three times in the side of the face, causing extensive bruising to her right eye, the right side of her face, her neck, chin and ear, as well as to the left cheek and chin area.

After a further gap of 10 months you attacked an 18 year old girl at Burleigh Heads at 2.10 p.m. in the Headland area where she was walking.

The last attack occurred on a young woman, jogging at the foot of the cliffs at Kangaroo Point at 12.30 p.m. It was fortunately the commission of this offence which led to your apprehension because someone nearby had taken the registration number of your vehicle.

The women were aged between 18 and 52 years. A number of them demonstrated their trust in the safety of their environment by greeting you by smiles, in the case of the victims of count 3, counts 11 and 12 and count 18, or simply saying, "G'day", immediately before you attacked them.

Each of the rapes was digital, rather than penile. There were three intrusions to the vagina and two intrusions to the anus digitally. Your conduct can be summarised as follows:

In relation to count 1, the charge of sexual assault, you were hiding behind a car from where you lunged forward and tackled the complainant to the ground. You put your hand over her face and pinned her head to the ground. You put your hand up, under her bra, and pinched her nipples firmly.

In relation to count 2, the count of rape, you inserted fingers into her vagina and moved them from side to side for two to three seconds. She suffered abrasions to her body and neck pain as a result.

In relation to count 3, a charge of sexual assault, as you passed the victim you reached out and squeezed her left breast.

For count 4, a charge of assault with intent to rape, you put your hand over the complainant's mouth and pushed her to the ground. You touched her inner right thigh, up under her skirt, but she was able to fight you off.

Count 5 is a charge of sexual assault and count 6, assault with intent to rape. This complainant was the first of a number of women who you attacked from behind. You put your hand over her mouth and another over her chest and you rubbed her chest area outside her shirt. You put your hand underneath her

underwear and touched her buttocks. She suffered pain to the jaw and the neck area.

In her victim impact statement she said it took one and a-half weeks after that for her to clench her jaw properly. She did not know whether she was going to live during the attack. She described her feelings at the time as 'pure fear'.

In relation to count 7, a charge of rape, you pushed the victim, who was riding a bike along a bike track, on two occasions until she fell off onto the grass, adjacent to the bikeway. You put one hand around her throat. You pushed her head down and you twisted it. She could not breathe well.

You pinned her down with your weight. She thought she heard the word, 'bitch' before you digitally penetrated her vagina in a thrusting manner for about four seconds. She suffered pain to the lower neck area as well as bruising and scratching.

In her victim impact statement she says that she spent thousands of dollars seeing medical specialists and therapists, hoping they could rectify or improve the pain to her back and neck as a result of deep bruising, and damage to her spine and neck which she suffered as a result of your conduct towards her.

Count 8, is a charge of assault with intent to commit rape. Again, you grabbed the victim from behind as she walked along a bikeway, covering her mouth. She was pushed to the ground and you tried to push her closer to the bushes. She screamed and you left. She suffered abrasions and swellings to her lip, and bruises.

Counts 9 and 10 are offences of sexual assault and assault with intent to commit rape respectively. In this case you grabbed the victim from behind, you put your hands over her mouth, consistent with your modus operandi in relation to a number of these attacks.

You twisted and pushed her to the ground. You put your hand under her bra and squeezed her left breast for ten seconds. You touched her buttocks, anal and vaginal areas beneath her underwear for a few seconds before running away.

She experienced tenderness to the right side of her neck, scratches to her right shoulder and a bruise to her left shoulder. There was also a superficial point five centimetre laceration at the back entrance to her vagina which bled when stretched, and a small abrasion between her anus and her vagina.

Counts 11, 12 and 13 are respectively charges of rape, sexual assault and assault occasioning bodily harm. In this case you put your right hand over the victim's mouth and you threw her to the ground. You briefly inserted two fingers into her vagina. You also grabbed her left breast, under her bra, for a few seconds.

She was the first person whom you gratuitously assaulted. In addition to the injuries from this, which I have already mentioned, she suffered scratches and abrasions.

It appears that your level of violence was escalating, or as Mr Moynihan put it, 'You were increasing the level of violence proportionately to the level of resistance that you were experiencing so you used the extent of violence you needed to overcome the resistance which was able to be offered by these women.'

Count 14 is one of assault occasioning bodily harm and count 15 is one of assault with intent to rape. As you passed the complainant on a narrow section of the walking circuit at Brisbane Forest Park, you reached out and pulled her to the ground. You pinned her down with the weight of your body. This was the other victim who fought back and was punched and received a threat to kill. The victim impact statement that she gave says that she feared for her life. You also touched her on the outside of the vagina, underneath her pants.

A diamond earring which had been bought for her by a relative, as a 50th birthday present, two years earlier, was ripped from her ear. As well as the injuries that I have mentioned from the punch, she suffered multiple bruises, abrasions and scratches.

Count 16 is rape and count 17 is another sexual assault. Again, you walked behind the victim at the Burleigh Headland area and pulled her to the ground, pushing her head down. You pushed two fingers into her anus with some force causing immediate pain and discomfort. You forced your fingers in and out around ten times. You also put your hands under her top and vigorously groped her right breast for a short time.

She suffered abrasions and a one centimetre bleeding split type laceration on the anal opening, consistent with distended force. In her victim impact statement she talks about arriving home after she had spoken to the police and she started shaking and crying when she went to the bathroom and found that she was bleeding and thought that she had contracted a sexually transmitted disease.

The last count, count 18, another count of rape, involved you grabbing the last of your victims by the shoulders and flinging her to the ground. You put your hand over her mouth and nose so that she felt that she couldn't breathe. You penetrated her anus with your finger for about 10 seconds. As a result, she experienced a cut, bruises and grazes. To state all of this factual background underlines the seriousness of your offending."

The apprehension of the applicant and his cooperation with the authorities

[5] The applicant was apprehended following the recording of the registration number of his vehicle seen by a witness at Kangaroo Point after the applicant had committed the rape in July 2008. The applicant initially denied involvement in that offence. He did however consent to being photographed, and provided a DNA sample.

[6] The complainant in that last offence identified the applicant as her attacker from a photo board. Then on 16 July 2008, in a subsequent interview by the police, the applicant admitted the offence involved in count 18, while continuing to deny involvement in any others.

[7] Five days later, the police informed the applicant that his DNA had been matched to DNA in relation to two other of the then alleged offences. The applicant then agreed to participate in a further interview, and made full admissions of having committed all of the other offences including volunteering that he had committed the offence in June 2006 constituting count 3.

The approach of the sentencing Judge

[8] The learned Judge identified, as "the serious feature" of the applicant's offending, that he was a "serial rapist who engaged in a course of conduct in which [he] violently and sexually attacked and terrorised a large number of victims over a [twenty] seven month period in public places…a premeditated and systematic series of attacks…"

[9] His Honour referred to the victim impact statements of the complainants, to their feeling "violated and degraded", and to the adverse physical and psychological consequences they have had to endure. He read out the statement of the complainant in counts 11 to 13, of the devastating effect upon her and others.

[10] Then his Honour dealt with the psychiatric evidence as to the applicant's condition, which was described as "a mixed personality disorder with strong obsessive compulsive traits and a paraphilia involving recurrent sexual urges in relation to non-consenting persons resulting in an uncontrollable compulsion to violently attack and rape women in public places". The condition, the Judge observed, remained "unresolved and untreated", that is, his "uncontrollable urge to attack and rape women remains untreated", which the Judge said was "relevant to giving primacy to the protection of the community when passing sentence".

[11] As to the prospects of rehabilitation, the Judge referred in some detail to the psychiatric evidence:

> "Doctor Sundin says, at pages 13 to 14 of his report, that he considers that you will be an excellent candidate for a sexual offenders' treatment program, as well as individual psychotherapy to help you gain insight into the psycho-dynamic underpinnings of your behaviour, as well as by cognitive behaviour therapy to modify the disturbed compulsions.

> He considers that your risk of future sexual recidivism would be reduced by participation in a sexual offenders' treatment program.
>
> Dr Lawrence says, at various parts of her report, that psychological assistance and participation in the sexual offending therapy programs during incarceration, in her opinion, would significantly decrease the risk of re-offending in the future. She regards you as 'a very promising prospect of rehabilitation to avoid further sexual offending in future.'
>
> She says, at paragraph 25.8, that you have a strong motivation to accept your punishment, to undergo rehabilitation and intend not to re-offend.
>
> At paragraph 25.9 she says, 'As indicated, the actuarial risk assessments indicate that there is no evidence of any psychopathic qualities to his personality. His risk of violent and sexual offending on those tests is low.'
>
> At 25.11 and 25.12 she says that you are very appropriate for rehabilitation through attendance at a high intensity sexual offender program and, in her opinion, 'with the added benefit of this and the associated psychological insights that will hopefully accompany that program, the risk of re-offending sexually would be low.'
>
> Dr Keane says, at page 12 of her report, that you are motivated and keen to participate in a rehabilitation program. You have not received any previous rehabilitation or therapy, and Mr Kimmins explained to me yesterday how, in a prison situation, whilst you are on remand, that is outside of your hands. She says that you are a good candidate for rehabilitation. She thinks the prognosis for treatment is positive and that your condition could be treated to the point that you'll be able to be released back into the community at some point in time.

[12] His Honour then made this concluding comment:

> "Therefore, while those professionals speak of a reduced likelihood of re-offending, a low risk of re-offending and of you being a good candidate for rehabilitation, none of course rule out the risk of sexual re-offending."

[13] The Director of Public Prosecutions submitted before the sentencing Judge that the applicant should be imprisoned for life. Defence Counsel accepted that the applicant should be subjected to a "serious violent offence" regime, but contended that the relevant range for the rapes was imprisonment of between 10 and 14 years.

[14] The learned Judge concluded that this did not fall into the worst category of such offending, such as to warrant the imposition of the maximum penalty. He took that view because no weapon was used, there was only one instance of a

threat to kill, the applicant was remorseful (extending to the presentation of an apology for his conduct), and there were "promising prospects of rehabilitation" through completion of the sexual offending therapy program. One may add, to that list, the applicant's cooperation with the investigating police, and the early intimation of his intended pleas of guilty, which were entered upon an indictment presented ex officio, and of course the absence of any prior criminal history.

[15] In selecting 25 years imprisonment as the penalty for the rapes, His Honour reviewed a number of cases, concluding that *R v Buckley* [2008] QCA 45 was of the greatest assistance. Buckley pleaded guilty to five rapes, burglary, indecent assault and grievous bodily harm. On appeal, Buckley was sentenced to 22 years imprisonment for each of the rapes. The learned primary Judge offered the following comparisons and contrasts:

> "…the most relevant case is that of Buckley which involved three separate offences over a nine month period. I say this because although one of the offences did involve a burglary after which there was a sodomy and digital rape on a 67 year old woman the other two involved attacking women as they walked home. The complainants were 15 and 20 years of age.
>
> In relation to the 20 year old complainant, she was walking alone to her home at Dalby at 4 a.m. She was grabbed from behind and forced to the ground. He then used the strap of her shoulder bag around her neck to choke her and force her to an area where he anally and vaginally raped her. He threatened to kill her if she moved as he left.
>
> The other victim, the 15 year old girl, was attacked as she walked alone through Toowoomba at 1 a.m. He chased her and then knocked her down to the ground from behind, causing her to fall and suffer a fractured femur. He then raped her vaginally and anally.
>
> He had two previous convictions for assault occasioning bodily harm and he had also been convicted in 1989 and 1985 of being in an enclosed yard without lawful excuse. Unlike you, he was in a high risk group of future offending if I compare what was said in that case against what Dr Lawrence, in particular, said in this case.
>
> In my view, taking the decision in Buckley's case into account, what makes your course of conduct more serious, without again taking an approach dictated by the comparative number of offences involved, is that you were engaged in a course of conduct in which you violently and sexually attacked 11 women in public places, including suburban streets, over a 27 month period. In 10 of the cases it was your clear intention to rape the women and satisfy your urges. In five of the cases you succeeded."

[16] The cases of rape to which His Honour was referred involved penetration by the penis, for example *Jackson* [1988] CCA 11, *Atwell* [2000] QCA 266, *Watcho* [1998] QCA 331, *Hornby* [1996] QCA 446, *Buckley* [2008] QCA 45, *Burley* [1998] QCA 98 and *Breckenridge* [1966] Qd R 189. His Honour addressed any significance resting in the circumstance that these rapes were accomplished by digital penetration. He said:

> "In relation to the submitted distinction between digital and penile penetration, again, as the Director of Public Prosecutions submits, the starting point is what the law says. Starting with the statute, if one commits rape, the maximum penalty is life imprisonment. That is the case whether the rape be committed by a penis, a digit or an object. He says it is not a question of one being more aggravated than the other, but it depends on all the circumstances.
>
> As the President of the Queensland Court of Appeal said in the case of [*Wark*] that I read from yesterday, while cases of penile-vaginal or penile-anal penetration will often be more serious and attract heavier penalties than cases involving only digital penetration, the appropriate sentence in each case will depend on its own circumstances. Relevant exacerbating factors include whether the complainant is a child, whether violence has been used, the physical and psychological effect of the offence on the victim and whether the offender has relevant criminal history.
>
> The other judges, one of whose comments I read out yesterday, took the same view."

[17] While the *Criminal Code* establishes the same maximum penalty, whether the rape be accomplished by penetration by the penis or digitally, it is reasonable to observe that, without additional aggravating features (weapons, extra brutality, threats of serious harm, premeditation, residual injury etc), a rape accomplished digitally may generally be seen as somewhat less grave than a rape accomplished by penile penetration. See *R v Wark* [2008] QCA 172. That is because it may be less invasive, would not carry a risk of pregnancy, and would ordinarily carry substantially reduced risk of infection. Although his Honour did not express those distinctions, he plainly considered that any limiting significance of its being digital penetration was in this case overwhelmed by the circumstance that the applicant, a "predatory serial rapist", engaged in a "course of conduct" using violence and causing physical and psychological injury to his victims. We will return to this issue.

The submissions on this application

[18] Mr Heaton, who appeared before this court for the applicant, submitted that the sentencing Judge failed to balance the objective circumstances of the offending and the matters in mitigation. He referred to the limited scope of the applicant's depredations, saying "his intention was only to penetrate them digitally so that once he had managed to achieve that, he desisted and left". The rapes, he submitted, were not in the most violent category, the violence exhibited being limited, except in relation to two complainants, to that "necessary to overcome resistance". He emphasized the applicant's

cooperation with the authorities, and his encouraging prospects of rehabilitation. He submitted that *Buckley* was a case of a "considerably higher degree of criminality and violence". He acknowledged there is no case of appellate authority comparable to the present. He contended for a range of 15 to 20 years imprisonment, seeking a sentence "towards the bottom of that range, that is 15 to 16 years".

[19] On the other hand, Mr Moynihan SC, the Director of Public Prosecutions, supported the learned sentencing Judge's approach, submitting that 25 years "properly reflects the seriousness of the course of conduct, matters in mitigation, and is well within the established range and sound exercise of the wide discretion". Mr Moynihan submitted that the Judge was correct to regard the instant case as more serious than *Buckley's* case, because, as the Judge put it when sentencing the applicant:

> "…you were engaged in a course of conduct in which you violently and sexually attacked 11 women in public places, including suburban streets, over a 27 month period. In 10 of the cases it was your clear intention to rape the women and satisfy your urges. In five of the cases you succeeded."

Analysis

[20] Previous appellate authority does not provide any definitive assistance in determining the appropriate penalty in this case.

[21] The cases referred to by Mr Moynihan are readily distinguishable.

[22] The life term imposed in *Jackson* [1988] CCA 11, following a trial, related to seven instances of penile rape, three of sodomy or attempted sodomy, and nine indecent assaults. Jackson menaced his victims with a knife or a screwdriver, and seriously threatened them orally. He required complainants to disclose intimate personal details. The gravity of Jackson's offending may be gathered from these observations by the Chief Justice in the Court of Criminal Appeal:

> "With one exception, each (complainant) was seized from behind, had a hand placed over her mouth and was menaced with a sharp instrument, either a knife or a screwdriver. In a number of cases he uttered threats to subdue resistance, his main purpose being to terrify so they would submit to what he demanded of them…Accompanying his actions of seizing them in the dark and menacing them with a weapon, he used such phrases as 'I will slit your bloody jugular' and 'Don't scream or I'll cut your bloody throat open'. Some pleaded with him. One, according to her statement, said, 'Don't kill me. My mother loves me.' Another said that she just froze. Despite such pleas he showed no pity. In four of the cases he pulled their upper garments over their heads so that they could not see him. In a number of the cases he forced the victims under threat to disclose personal details of a kind a person is not ordinarily expected to reveal to anyone or, if at all, only in circumstances

> of the greatest intimacy. He submitted his victims to degrading treatment of the most bestial kind."

Because of the brutality of the offending, *Jackson* was a worse case than this.

[23] *Atwell* [2000] QCA 266 also attracted life terms for two rapes, and as well, he was convicted of three attempted rapes, 10 burglaries, a burglary with violence and other assaults. Atwell attacked 11 women, aged 59 years to 86 years, in their houses at night time, when they were asleep. He held a pillow over the faces of five of the women. There were three instances of penile penetration. Atwell had prior convictions for sex offending, and lacked insight. The circumstance that Atwell's victims were, as put in the Court of Appeal, 11 "older or elderly women who were attacked in the sanctity of their own homes" lent that case particular gravity.

[24] *Watcho* [1998] QCA 331 was sentenced to life imprisonment for rape. He had a prior conviction for raping a woman in her own home. He threatened her with a garden fork. While serving that sentence, during a period of day leave he attacked the second complainant in her own yard, threatening her with a metal bar. He punched her. He used margarine to facilitate penile penetration. On the same day, at night time, he raped a woman in her own home and stole her money. Then he abducted her in her own car, leading to more sexual assaults. The aggregation of Watcho's conduct was even more serious than in the present case.

[25] *Hornby* [1996] QCA 446, where seven rapes attracted life imprisonment following a trial, was a particularly grave case, involving gagging and binding the victims, uttering threats to kill, threats made with a knife, displaying photographs of corpses, fracturing the spine of a 67 year old grandmother: graphically terrifying and degrading behaviour.

[26] *Burley* [1998] QCA 98 was sentenced to 20 years imprisonment for seven rapes. They included penile penetration of the vagina and anus of his victims. The offences were committed over a period of eight months. He used a knife and submitted his victims to serious threats.

[27] *Breckenridge* [1966] Qd R 189 raped a nine year old girl, having abducted her at night time, such that her body was split by the force he used, requiring surgical repair. He had been sentenced at first instance to 30 years imprisonment, which, as the law then stood, meant that he would not, ordinarily, be eligible for parole until he had served 15 years. On appeal, a sentence of life imprisonment was substituted, which, by reason of the way in which the *Offenders Probation and Parole Act* 1959 was then structured, actually improved his prospects of earlier parole. Breckenridge had twice previously sexually molested sleeping women. That was a uniquely graphic case.

[28] In support of the sentence imposed, Mr Moynihan relied on the learned Judge's view that this case was more serious than *Buckley*.

[29] The circumstances of the offending in *Buckley*, who was sentenced to 22 years imprisonment for five rapes, were as follows, as taken from the judgment in the Court of Appeal:

> "The applicant committed the offences for which he was sentenced between 6 March 1999 and 21 January 2000. The first two rapes were committed on a 20 year old woman who was walking alone to her home in Dalby at about 4am. The applicant grabbed her from behind and forced her to the ground. He then used the strap of her shoulder bag around her neck to choke her and force her to an area where he anally and vaginally raped her, causing what was described in a medical report as 'major anal trauma' and other less serious genital injuries. At the end of the assault he threatened to kill the complainant if she moved as he left.
>
> The second series of assaults was committed on a 67 year old woman. At about 5am one morning, the applicant broke a window to get into the bedroom where the victim was sleeping. He tried to sodomise her inside the bedroom and then dragged her out of the house into the backyard, where he attempted to put his penis into her mouth. He then sodomised her while placing his fingers in her vagina. Those events gave rise to rape and indecent assault charges.
>
> The third set of offences was committed on a 15-year old girl whom the applicant attacked as she walked alone in a Toowoomba city street at about 1am. He chased her, and then knocked her to the ground from behind, causing her in the fall to suffer a fractured femur. Notwithstanding her plea that she thought her leg was broken, he raped her vaginally and anally. At one stage when he thought she had looked at him he slapped her on the face and head."

[30] While the present applicant violated more victims, Buckley's conduct displayed a persisting, sadistic brutality of an order which far surpasses that exhibited by the applicant. Also, Buckley was guilty of penile penetration, of both the vagina and the anus.

[31] As to any significance in that, it suffices for the present, in addition to the observations in [17], to set out what was said in the High Court in *Ibbs v The Queen* (1987) 163 CLR 447, where the West Australian legislation imposed a maximum penalty of 14 years imprisonment for sexual penetration without consent. The legislation specified five modes of penetration, apt to include digital and penile penetration. The court held the maximum appropriate to the worst category case for all modes, and not the worst case in each of the five respective situations. As put at p 451-452:

> "The maximum penalty prescribed for the offence of sexual assault is reserved for the worst type of case falling within s.324D… . The maximum penalty is not prescribed as an appropriate penalty for the worst type of case falling within each of the respective categories of sexual penetration described in

> s.324F. The inclusion of several categories of sexual penetration within the offence described as sexual assault carries no implication that each category of sexual penetration is as heinous as another if done without consent. When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case. In a case of sexual assault, a sentencing judge has to consider where the facts of the particular case lie in a spectrum at one end of which lies the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined."

[32] A number of authorities caution against broad generalisations as to the comparative seriousness of penile and digital rape. See, for example, *R v Brown* (2002) 5 VR 463, 478 and *R v Riley* [2006] NTCCA 10.

[33] There is no need to deal with this aspect further. What the primary Judge said was unexceptionable. The important task confronting him was to assess the gravity of the aggregation of the applicant's conduct. The repetitive extent of his offending could reasonably be seen to minimize the significance of the circumstance that the rapes were digital not penile.

[34] But the question remains whether in the context of the cases to which reference has been made, after allowing for the limited guidance they offer as to the resolution of this one, the 25 year term imposed for the rapes was manifestly excessive.

[35] Mr Heaton referred to *R v CAJ* [2009] QCA 37, where the offender pleaded guilty to six counts of rape committed on three victims. He was sentenced to 10 years imprisonment. In one case he tricked his way into the woman's house, where he penetrated her vaginally and anally until ejaculation, uttering threats as he did so. A month later, he penetrated a second complainant's vagina digitally. The Court of Appeal referred in *CAJ* to *R v Basic* [2000] QCA 155 and *R v Mallie* [2000] QCA 188. In *Mallie*, the offender broke into his victim's house, punched her, demanded that she masturbate him, raped her then again punched her. The court there endorsed a range of 10 to 14 years. Mr Heaton submitted that those cases "demonstrate that for the separate offences committed by the applicant, he might reasonably have expected a sentence within the range of seven to 10 years, and for the offences involving greater violence, perhaps more like 10 years".

[36] It is in this context that Mr Heaton advanced 15 to 20 years imprisonment as the range appropriate in this case. He did not contend that the learned Judge erred in any particular respect, other than by the selection of a term of imprisonment which was manifestly excessive, in that it fell outside the Judge's discretion to impose that sentence.

[37] The feature which critically distinguishes this case from those relied on by the Crown is the substantial number of complainants (11) and the prolonged period (27 months) over which the offending occurred, and that on the applicant's admission, he would not have stopped but for his being apprehended. By

continuing to offend as he did, as time went on, the applicant was contributing to a growing community anxiety over the safety of women going about their ordinary day to day activities. The question in the end is the extent to which the substantial impact of the applicant's offending operated to elevate the appropriate penalty.

[38] Notwithstanding the gravity of the offending and its serious adverse consequences for multiple victims, there were substantial mitigating circumstances: the applicant's cooperation with the authorities from an early stage, including his confession to the crimes, saving an even more substantial police investigation; his genuine remorse; the early intimation of his intention to plead guilty, and his doing so, saving the resources of the State, and highly significantly, removing any prospect of the complainants having to give evidence and be subjected to cross-examination thereby re-living their appalling experience; the fact that without his confessions, convictions might not have been obtained on some of the counts; the absence of any prior criminal history; and the applicant's promising prospects of rehabilitation.

[39] It is difficult to see how the learned Judge made any adequate allowance for the aggregation of those mitigating features. Making proper allowance for the pleas of guilty alone would mean that in arriving at 25 years, the Judge must have started from a term substantially exceeding 25 years. The court is statutorily obliged to take account of a guilty plea (s 13(1) *Penalties and Sentences Act*), and in reducing the sentence which would otherwise be imposed, the court may have regard to the timeliness of such a plea (s 13(2)).

[40] The 25 year sentences imposed for the rapes were manifestly excessive, and should be set aside. The applicant should be sentenced to 16 years imprisonment for each of those rapes. That means he will have to serve 12.8 years in custody before any entitlement to apply for parole arises. Whether or not he then secures a grant of parole would be for the parole authorities to determine. Also, the effectiveness of his rehabilitation, having completed the sexual offender program, will obviously bear on the question whether at a future time recourse need be had to the mechanisms of the *Dangerous Prisoners (Sexual Offenders) Act* 2003.

[41] These orders should be made:

1. allow the application for leave to appeal against sentence;
2. allow the appeal against sentence;
3. set aside the sentences of 25 years imprisonment imposed upon the applicant on 28 August 2009 and substitute sentences of 16 years imprisonment;
4. otherwise confirm the orders then made.