SUPREME COURT OF QUEENSLAND

CITATION:	*R v Major; ex parte A-G (Qld)* [2011] QCA 210
PARTIES:	**R** **v** **MAJOR, Troy Lane** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 264 of 2010 DC No 2882 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2011
JUDGES:	Margaret McMurdo P, Chesterman JA and Fryberg J Separate reasons for judgment of each member of the Court, Margaret McMurdo P and Chesterman JA concurring as to the orders made, Fryberg J dissenting in part
ORDERS:	**1. Appeal allowed.** **2. Set aside the sentences imposed on counts 3, 7 and 10 and the order on counts 1, 4, 5, 6, 8 and 9 suspending those sentences after 741 days with an operational period of five years.** **3. On each of counts 3 and 7, order that the respondent be sentenced to five years imprisonment suspended after 741 days with an operational period of five years.** **4. On count 10, order that a conviction be recorded and that the respondent be placed on probation for three years on the terms and conditions set out in s 93 *Penalties and Sentences Act* 1992 (Qld).** **5. The sentence imposed at first instance is otherwise confirmed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – AMENDMENT – where the grounds contained in the notice of appeal contended that the sentences imposed at first instance were "inadequate" – where the appellant sought leave to amend the notice of appeal to add the word

"manifestly" before "inadequate" following the decision in *Lacey v Attorney General* (2011) 85 ALJR 508; [2011] HCA 10 – where the respondent contended that the original notice of appeal was incompetent and that it did not invoke the jurisdiction of the Court of Appeal so that the appellant's right of appeal was exhausted – where the respondent did not suffer any prejudice from allowing the amendment – whether leave should be given to amend the notice of appeal

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent pleaded guilty to seven counts of assault occasioning bodily harm, and one count of threatening violence at night, wounding and assault occasioning bodily harm while armed – where the respondent was sentenced for the offence of wounding to four years imprisonment suspended after a period of 741 days with an operational period of five years – where the respondent was sentenced on all remaining counts to two years imprisonment suspended after 741 days with an operational period of five years – where 741 days of pre-sentence custody was declared as time served under the sentence and the respondent was released from custody upon his sentence – where the appellant contended the sentences were manifestly inadequate because they failed to reflect the gravity of the offences generally, the aspect of general deterrence and gave too much weight to mitigating factors – whether the sentences imposed were manifestly inadequate

Acts Interpretation Act 1954 (Qld), s 49
Criminal Code 1899 (Qld), s 1, s 317, s 320, s 320A, s 323, s 668D, s 669A, s 671
Criminal Practice Rules 1999 (Qld), r 7, r 13, r 65, r 66, r 81
District Court of Queensland Act 1967 (Qld), s 8
Penalties and Sentences Act 1992 (Qld), s 93, s 94, s 95
Supreme Court of Queensland Act 1991 (Qld), s 29(1), s 118, s 118A

Attorney-General v Tichy (1982) 30 SASR 84; (1982) 6 A Crim R 117, considered
Carroll v The Queen (2009) 254 CLR 379; [2009] HCA 13, considered
Director of Public Prosecutions (Cth) v De La Rosa (2010) 243 FLR 28; [2010] NSWCCA 194, cited
Director of Public Prosecutions (Cth) v Gregory (2011) 250 FLR 169; [2011] VSCA 145, considered
Director of Public Prosecutions v Karazisis [2010] VSCA 350, cited
Director of Public Prosecutions (NSW) v Lombard (2008) 184 A Crim R 565; [2008] NSWCCA 110, cited
Gillam v Payne [1997] QCA 219, cited
Hili v The Queen (2010) 85 ALJR 195; [2010] HCA 45, cited

Hofmeir v Brewster [1997] QCA 68, cited
Lacey v Attorney-General of Queensland (2011) 85 ALJR 508; [2011] HCA 10, considered
Lowndes v The Queen (1999) 195 CLR 665; [1999] HCA 29, cited
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
Nelson v The Queen (1991) 65 ALJR 240, considered
Pearce v The Queen (1998) 194 CLR 610; [1998] HCA 57, cited
R v Allpass (1993) 72 A Crim R 562, cited
R v Bell; ex parte Attorney-General (Qld) [2000] QCA 485, distinguished
R v Carroll; Carroll v R (2010) 77 NSWLR 45; [2010] NSWCCA 55, cited
R v Conochie; ex parte A-G (Qld) [1999] QCA 199, cited
R v Evans; R v Pearce [2011] QCA 135, cited
R v Hodges [1995] QCA 125, cited
R v Holder (1983) 13 A Crim R 375; [1983] 3 NSWLR 245, cited
R v JW (2010) 77 NSWLR 7; [2010] NSWCCA 49, cited
R v Ketchup [2001] QCA 508, distinguished
R v KM [2004] NSWCCA 65, cited
R v Lacey; ex parte A-G (Qld) (2009) 197 A Crim R 399; [2009] QCA 274, distinguished
R v Matamua; ex parte Attorney-General (Qld) [2000] QCA 400, cited
R v Pierpoint (2001) 126 A Crim R 305; [2001] QCA 493, cited
R v Regazzoli [2001] QCA 482, distinguished
R v Roach [2009] QCA 360, cited
R v Singh [2006] QCA 71, considered
R v Warwick [2006] QCA 83, cited
The Queen v De Simoni (1981) 147 CLR 383; [1981] HCA 31, cited
Yong Internationals Pty Ltd v Gibbs [2011] QCA 161, cited

COUNSEL: W Sofronoff QC SG, with D R Kinsella, for the appellant
M Byrne QC, with J S Veivers, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Colville Johnstone Lawyers for the respondent

[1] **MARGARET McMURDO P:** The respondent, Troy Lane Major, pleaded guilty on 24 August 2010 to seven counts of assault occasioning bodily harm (counts 1, 4, 5, 6, 8, 9 and 10); threatening violence at night (count 2); wounding (count 3); and assault occasioning bodily harm while armed (count 7). He also pleaded guilty to four summary offences, two under the *Weapons Act* and two breaches of a domestic violence order. On 6 October 2010, he was sentenced on count 3 to four years imprisonment suspended after a period of 741 days with an operational period of five years. On all remaining counts charged on indictment he was sentenced to two years

imprisonment. The endorsement on the indictment states that these sentences were also suspended after 741 days with an operational period of five years but this appears not to strictly accord with the judge's sentencing remarks or with common sense, the two years (730 days) having been served in full as pre-sentence custody by the time of sentence. Neither party has asked the court to correct this error which causes no detriment to the respondent. On the summary offences, he was convicted but not further punished. The indictment records that 741 days of pre-sentence custody was declared as time served under the sentence.

[2] The appellant, the Attorney-General of Queensland, appealed from those sentences contending that they are:

> "inadequate and accordingly not the proper sentences for the following reasons:
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> (a) they failed to reflect adequately the gravity of the offences generally and in this case in particular;
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> (b) they failed to take sufficiently into account the aspect of general deterrence; and
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> (c) the sentencing judge gave too much weight to factors going to mitigation."

Reasons for allowing the amendment to the notice of appeal

[3] This appeal was first listed for hearing on 14 April 2011. The appellant sought to amend the grounds of appeal to add the word "manifestly" before "inadequate" following the High Court's decision in *Lacey v Attorney-General of Queensland*.[1] The respondent's counsel objected to that course and the matter was adjourned at the respondent's request until 2 June 2011. At that hearing, this Court gave leave to the appellant to amend the notice of appeal, stating that it would give its reasons later.

[4] These are my reasons for allowing the appellant to amend the grounds of appeal.

[5] The respondent contended that the original notice of appeal was incompetent and that it did not invoke the jurisdiction of the Court of Appeal so that the appellant's right of appeal was now exhausted. In support of those contentions the respondent relied on: *Lacey* and *R v Regazzoli*.[2]

[6] The respondent emphasised that in *Lacey* the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) held that the jurisdiction conferred on the Court of Appeal by s 669A *Criminal Code* 1899 (Qld) in relation to appeals brought by the Attorney-General of Queensland "requires that error on the part of the sentencing judge be demonstrated before the Court's 'unfettered discretion' to vary the sentence is enlivened."[3] Their Honours then stated:

> "The appellant submitted to this Court that if he were to succeed the order of the Court of Appeal should be set aside and in its place an order made dismissing the appeal to that Court. In the alternative, an order was sought that the notice of appeal be dismissed as incompetent. Given that the Attorney-General's notice of appeal raised the alternative ground that the sentence imposed was 'manifestly inadequate', the appeal could not be dismissed as

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1 (2011) 85 ALJR 508; [2011] HCA 10.

2 [2001] QCA 482.

3 [2011] HCA 10, [62].

> incompetent on the basis that its grounds failed to invoke the jurisdiction conferred by s 669A(1) properly construed." [4]

[7] The respondent contended that it followed from those observations that the present case can properly be distinguished from *Nelson v The Queen*[5] where the High Court stated:

> "It is difficult to envisage circumstances in which a Court of Criminal Appeal could, in the absence of some reason such as inordinate delay or prejudice to the Crown properly refuse leave to amend a regularly filed notice of appeal so as to add a tenable further ground of appeal."

[8] That is because, the respondent argued, the present notice of appeal was not regularly filed so that the appellant's application was not to add a further tenable ground of appeal as in *Nelson*, but to amend a ground of appeal which did not invoke the jurisdiction of the Court.

[9] The respondent's argument is clever but wrong. The legislature has given the appellant a right to appeal under s 669A. In bringing such appeals, the appellant is expected to exercise that right on behalf of the community and responsibly as a model litigant. The appellant purported to exercise that right by filing a notice of appeal within the allowed statutory time frame and in terms consistent with what was then believed to be the law in Queensland in accordance with the majority decision of this Court in *R v Lacey; ex parte A-G (Qld)*.[6] The proposed amendment to the grounds of appeal by adding the single word "manifestly" did not affect the essence of the submissions made by the appellant which were filed in this Court before the High Court handed down its decision in *Lacey*. The respondent, therefore, did not suffer any prejudice from the allowing of the amendment. Absent sound reasons, none of which have been adverted to in the present case, this Court would be loathe to refuse an amendment in these circumstances which would have the result of closing off the Attorney-General's avenue of appeal.

[10] The amendment takes effect retrospectively, that is, at the time of the filing of the notice of appeal. This case is therefore completely different from *Reggazoli* where the application for an extension of time to appeal against his conviction was refused because he had already had an earlier appeal in the same matter determined on the merits. The comments cited above in *Nelson*[7] remain apposite in this case.

[11] For all these reasons, the interests of justice strongly favoured the granting of the appellant's application to amend the notice of appeal by adding the word "manifestly" before the word "inadequate" and I joined in the order of this Court allowing the amendment.

The appeal against sentence

The sentencing proceedings on 24 August 2010

[12] I turn now to the appeal against sentence. These are my reasons for allowing that appeal.

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4 Above, [64].
5 (1991) 65 ALJR 240.
6 (2009) 197 A Crim R 399, 416, [147]; [2009] QCA 274.
7 See [7] of these reasons.

[13] The prosecutor gave the sentencing court on 24 August 2010 the following information. The respondent was between 34 and 37 years old when he committed the offences and 39 years old at sentence. His criminal history was relatively minor and all recorded in the Magistrates Court. In 1990, 1993 and 1996, he was convicted and fined for drug offences. In 1990, he was convicted and fined for wilful damage to property and ordered to pay restitution of $159.50 and convicted and fined for breaching the *Bail Act*. In 2001, he was fined without conviction for *Weapons Act* offences.

[14] The circumstances of his present offending were as follows. The complainant was the respondent's de facto wife of 15 years and the mother of his two children. On 18 September 2005 they were living together on a Moreton Bay island. The respondent punched the complainant in the face and kidneys. She curled into the foetal position. He kicked her in the back of the legs. Both the complainant and the respondent had been drinking alcohol (count 1).

[15] Between 1.00 and 2.00 am the following morning the respondent held a black-handled Buck brand knife to her throat and said something like, "I could kill you with this. All it would take would be one slice here and you would be gone." (count 2).

[16] The complainant tried to hide in the pantry. The respondent punched her to the body and dragged her out to the kitchen table. She suffered bruising to her back and side. He took her right hand and splayed it out flat on the table. He almost cut off the tip of her middle finger with a knife; it remained attached by but a small piece of skin. She blacked out from the pain. She later wrapped a tea towel around her finger and went to bed. The next morning she was still in pain, and went to hospital. She had suffered a deep laceration, removing the nail on her finger; a compound fracture to the distal phalanx with the broken bone exposed by the cut; and a small artery was bleeding copiously. The injury was treated, sutured with two stitches and she was given antibiotics and pain medication. She falsely told doctors she cut her finger on a piece of glass (count 3).

[17] In July 2006, the complainant and the respondent were staying at a friend's house at Burpengary. They went to bed. The respondent began to verbally abuse the complainant, threatening to "mash her in the head". She invited him to get it over and done with. He obliged by punching her in the nose which bled. She spent the night in the bathroom. She sustained two black eyes (count 4).

[18] In September 2007, the respondent chased the complainant around the house where they were then living and out into the yard. He grabbed her around the throat causing a bruise. He punched her in the breast and in both arms. He threw a bottle at her left thigh and right foot which caused bruising (count 5).

[19] In December 2007, the respondent and the complainant were visiting Fraser Island. On 27 December, the respondent, who had been drinking heavily, was driving along the beach when he had an accident. He began to verbally abuse the complainant. He grabbed her and she pushed him away. He wrestled her to the ground and began to choke her. He hit her on the side and on the back of her head. She suffered bruising to the head and neck (count 6).

[20] On or about 10 February 2008, the complainant and respondent were at their home. The respondent had been drinking since about 5.00 pm and had consumed 18 pre-mixed Jim Beam cans by the time he began to verbally abuse the complainant. He

pulled her hair and punched her around the head. She was lying on her side on a couch. He hit her with a wooden baton in the lower back and punched her in the head with his fist (count 7).

[21] In April 2008, the complainant and respondent had friends over for a barbeque. He had been drinking for some period. He began by verbally abusing her and then punched her to the right side of the head. He grabbed her by her hair, pulled her off her chair by the hair, and punched her again to the back of the head. He then punched her to the right side of head and pulled her to the ground. When she tried to get up he kicked her twice to the lower back (count 8).

[22] In August 2008, the complainant and respondent were drinking at a friend's place. After they arrived home, the respondent confronted the complainant in the bathroom. He pushed her into the bath tub and smashed a photo frame over her head. He grabbed her hair and pulled her along the floor by her hair into the lounge room. She suffered hair loss and bruising to her back, right side, hip and arm (count 9).

[23] On 25 September 2008, the respondent was drinking pre-mixed Jim Beam cans at home from about midday. At about 6.00 pm he began to verbally abuse the complainant, calling her a slut. Her friend and her brother-in-law left about four hours later at about 9.45 pm. The respondent told the complainant that she was "a fuckwit" and implied that it was the complainant's fault that her friend had left. He punched her in the right eye and ear. He then punched her in the throat, grabbed her hair and yanked her head backwards. He punched her in the back of the head and pulled her around by her hair before again punching her in the face. She suffered ongoing pain to the head, some bruising and hair loss (count 10).

[24] Police came to the house late on 25 September and again the next day. The complainant made a complaint to police. The respondent declined to be interviewed. He was charged and remanded in custody until sentence. Police found a wooden baton, three wooden night sticks and a pair of nunchakus (the *Weapons Act* offence).

[25] On 26 September 2008, the complainant was granted a domestic violence order which was renewed on 18 November 2008. The respondent breached the order at the end of November 2008 by writing abusive comments about the complainant and Crown witnesses in a letter to their young children. On 4 December 2008, the domestic violence order was amended to stop all contact, direct or indirect, between the respondent and their children. On 16 December 2008, he sent two letters to the children in breach of this order (the domestic violence offences).

[26] The complainant's victim impact statement was given the day before the respondent pleaded guilty and was not challenged by the respondent. It contained the following information which, sadly, is not atypical of survivors of domestic violence. She was taking pain killing medication for neck, back and shoulder injuries and regularly visited a chiropractor for back and nerve damage, all resulting from the respondent's assaults. She had lost a great deal of hair and required hair extensions because her hair was damaged and uneven from his assaults. She suffered from ringing in her ears because he had hit her in the head so many times. She had a permanent black eye from the last assault. She had continuing pain from the cut to her finger and had lost feeling in the finger tip. She was suffering from depression and anxiety, was on medication for stress and anxiety and took sleeping tablets. During the course of the respondent's abuse, she was afraid he might kill her and the children. She and the children were

receiving counselling. The respondent's behaviour had alienated her from her friends. The children were frightened, scared and anxious and were demonstrating behavioural problems. She was in a difficult financial position because she was unable to work due to a post-traumatic stress disorder resulting from the abuse.

[27] The respondent had served almost two years in pre-sentence custody. The matter was listed for trial but the respondent indicated that he would plead guilty so that it was unnecessary to require the attendance of witnesses at court.

[28] The prosecutor submitted that the most serious offence was the deliberate wounding of the complainant's finger. He contended that an effective global head sentence of three and a half to four years imprisonment was appropriate with parole eligibility or suspension after the time already served.

[29] The judge expressed his disagreement with that submission, noting the serious aspects of the respondent's offending in count 3 (unlawful wounding), particularly its deliberate nature. His Honour asked the prosecutor to provide assistance with further comparable unlawful wounding sentences, noting that count 3 seemed much worse than breaking a bottle over someone's head as in *R v Ketchup*[8] or using a knife in a dangerous way which resulted in a victim being cut. The sentence hearing was adjourned for this purpose.

The sentencing proceedings on 22 September 2010

[30] When the hearing resumed on 22 September 2010, the respondent was represented by different counsel.

[31] The prosecutor provided further comparable sentences together with written submissions. He submitted that domestic violence was prevalent and that a sentence severe enough to reflect deterrence and denunciation was particularly important. The offending occurred over the course of three years. It was persistent. The most serious count was count 3, unlawful wounding, which involved the deliberate infliction of pain. The impact on the complainant has been significant. After referring to cases said to be comparable, particularly *Ketchup*, he submitted that the appropriate sentence for all the offending was a global head sentence in the region of four to five years imprisonment on count 3 (unlawful wounding) with release to parole or by way of suspension after the time already served (a little over two years).

[32] Defence counsel adopted the prosecutor's contentions in his written submissions that the appropriate sentence was a global one in the range of four years imprisonment, perhaps even four and a half years as this offending occurred over a three year period, with suspension after the lengthy period of time already served in pre-sentence custody, and with the maximum operational period.

[33] By way of mitigation, defence counsel made the following submissions. The respondent was involved in a very serious road accident in 1988 and suffered brain damage and was on a disability pension. He suffered from stomas, holes in the stomach wall where bodily waste can accumulate and enter the blood stream. In 2007, he nearly died as a result of a stoma and was hospitalised for about six weeks. He now has a colostomy bag. At the time of these offences, he drank heavily and mixed alcohol with a cocktail of prescribed drugs. Since being in custody he underwent three

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[8] [2001] QCA 508.

operations and was due to have a fourth. Whilst not down-playing the grave impact of the offending on the complainant, counsel emphasised that these claims were not supported by expert reports, referring to Fryberg J's observations in *R v Singh*.[9]

[34] The judge stated that he would decide the case on the agreed facts[10] and adjourned the matter to consider the appropriate sentence.

The judge's sentencing remarks on 6 October 2010

[35] The judge, in passing sentence on 6 October 2010, referred to the following matters. After listing the offences, his Honour noted that he had requested further submissions as to whether the level of sentencing suggested by the prosecutor was appropriate. He had been assisted by comparable Court of Appeal decisions. The respondent had no prior convictions for violence. He had pleaded guilty and demonstrated some cooperation with the authorities and remorse.

[36] The offences occurred over a three year period but not constantly or continuously. The worst offence was that of unlawful wounding (count 3). The judge recited the dreadful circumstances of that offence, noting, however, that the respondent had not been charged with an offence involving any element of intention. Nonetheless, this was a serious example of a deliberate act of unlawful wounding, more so than in *Ketchup* or *R v Bell; ex parte Attorney-General (Qld)*.[11] His Honour considered that the sentencing range apparently established by the Court of Appeal constrained him but the sentence should be higher than in *Ketchup* or *Bell* as the unlawful wounding was more determined and deliberate.

[37] The respondent's offending occurred when he was intoxicated but this did not diminish its seriousness. The judge took into account the mitigating features in reducing the head sentence. An appropriate global head sentence was four and half to five years imprisonment, but because of the significant time the respondent had spent in custody the judge reduced that to four years imprisonment which he imposed on the most serious offence, unlawful wounding (count 3). The respondent had served more than half the sentence already so that the four year sentence should be regarded as one of four and a half to five years. The judge directed that the respondent be released after serving 741 days, that is, the period already served in pre-sentence custody.

[38] The judge noted his concern about the respondent's past behaviour and the need for community protection in the future, and particularly the need to protect the complainant and the children. The maximum operational period of the sentence was five years and that was appropriate. If the respondent committed any further offences during that time, he would be brought back to court and could be required to serve the balance of the sentence.

The comparable cases

[39] It is helpful to commence the discussion necessary to resolve this difficult case by a brief consideration of this Court's decisions in *Bell* and *Ketchup* upon which considerable reliance was placed at sentence and in this appeal.

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9 [2006] QCA 71; see my observations in *R v Evans; R v Pearce* [2011] QCA 135, [1]-[13].

10 That seems to be a reference to the facts stated in the prosecutor's written submissions which defence counsel adopted.

11 [2000] QCA 485.

[40] In *Bell*, the respondent pleaded guilty to assault occasioning bodily harm whilst armed on 7 December 1999 and a second count of assault occasioning bodily harm on 16 December 1999. He also pleaded guilty to a second indictment containing two counts of assault occasioning bodily harm whilst armed, one count of unlawful wounding and two counts of assault occasioning bodily harm, all occurring on 16 June 2000. The victim was his de facto spouse. Bell committed the first offence on the two count indictment when he assaulted the complainant with a hammer after she refused to give him cigarettes. This caused lacerations to her ankles, arms and legs. He committed the second offence on the two count indictment when he woke the complainant, punched her in the mouth a number of times, knocked her to the ground and choked her. As she ran away, he threw a brick at her causing a wound which required a number of stitches. He committed the charges on the second indictment when he struck her on the head with a billycan causing a laceration which needed stitches. Shortly afterwards, he picked up a kitchen knife and swung it at her. She put up her hands to defend herself and received cuts to the hands, two of which were 1 cm long. He then picked up a brick and hit her on the right shoulder. He next pushed her onto the road and kicked her in the head and all over the body causing bruising. Four or five hours later, he grabbed her around the throat with his right hand, holding her windpipe to stop her from screaming and applied what she described as a great deal of force.

[41] Bell, a chronic alcoholic, had a bad criminal record involving assaults on females, including seven prior convictions for assaults on the present complainant and a conviction for assault on a former de facto spouse. Some of the offences were committed in breach of a domestic violence order and during the operational period of a suspended sentence for like offending against the same complainant.

[42] The prosecutor submitted the sentencing range was between three to four years imprisonment given Bell's criminal history. Defence counsel appeared to concede that a sentence of three years imprisonment was appropriate. The judge imposed an effective global sentence of two years imprisonment with a parole recommendation after nine months. This Court accepted that the sentence was manifestly inadequate and increased the sentence imposed for the offences of assault occasioning bodily harm whilst armed to three and a half years imprisonment with a recommendation for parole eligibility after 18 months.

[43] In *Ketchup*, the respondent pleaded guilty to one count of unlawful wounding and two counts of assault occasioning bodily harm, and summary offences of a breach of a domestic violence order and being drunk in a public place. The unlawful wounding occurred when he struck his de facto wife on 28 December 2000 for a second time with a 40 ounce rum bottle on the back of the head, breaking the bottle and causing lacerations to her face. She received 38 sutures. Photographs showed the lacerations were significant and likely to leave residual scarring. A few months later, while Ketchup and the complainant were drinking heavily, he elbowed her to the mouth, knocking her to the ground. When another woman tried to call police, he pulled the phone cord from the wall and hit the complainant's face with it. He also punched her on a number of occasions and took a bread and butter knife from his pocket and held it against her throat. He then pushed her head into a mattress making it difficult for her to breathe. She struggled free but the assault continued. He kicked her in the ribs four or five times and hit her with a wooden table leg to the left knee.

[44] The third indictable offence occurred the following month when they had both been drinking heavily. They went to a phone booth to call a taxi. Ketchup used the phone

hand set to hit her several times about the body. They went by taxi to another hotel where Ketchup grabbed the complainant, threw her money away, kicked her, grabbed her by the hair and punched her repeatedly to the head and body. When the police arrived, her forehead was bleeding.

[45] Ketchup was originally sentenced to six years imprisonment with parole eligibility after two years and nine months. He was 37 years old and had a significant criminal history including 11 convictions for breaches of domestic violence orders. The last two related to this complainant and the others to former de facto partners. He also had a significant criminal history including assaults occasioning bodily harm, serious assault on a police officer and aggravated assault on a female. He had been sentenced to short terms of imprisonment for past offences of assault. At the time the first two counts were committed, he was on probation for a breach of a domestic violence order.

[46] This Court considered that *Bell* and other comparable Court of Appeal cases demonstrated that Ketchup's sentence was manifestly excessive. The range was three to four years imprisonment. This Court substituted a sentence of four years imprisonment on each count to be served concurrently. It followed that at that time parole eligibility was, in the absence of a different order, at the half way point.

Conclusion

[47] The judge correctly identified that the most serious of the respondent's offending was count 3 (unlawful wounding) committed during the first episode of domestic violence on 19 September 2005. The respondent's deliberate and cruel actions in splaying the complainant's hand on the kitchen table and all but cutting off the tip of her finger was callous in the extreme. But as the judge correctly appreciated, he could only sentence on counts charged in the indictment. That is because no-one can be punished for an offence of which they have not been convicted. If authority is needed for this self-evident proposition, see *The Queen v De Simoni*[12] and *Pearce v The Queen*.[13] Unlawful wounding carries a maximum penalty of seven years imprisonment.[14] The prosecution did not charge the offence of unlawful wounding with intent to maim or disfigure which carries a maximum penalty of life imprisonment.[15] The complainant's uncontested victim impact statement claimed a permanent loss of sensation to her finger tip, a matter which would seem to amount to grievous bodily harm.[16] But the prosecution did not charge the offence of doing grievous bodily harm which carries a maximum penalty of 14 years imprisonment.[17] And nor did it charge the offence of torture which also carries a maximum penalty of 14 years imprisonment.[18]

[48] I cannot accept the appellant's contention that the respondent's offending in count 3, unlawful wounding, serious though it was, placed this in the worst category of offences of unlawful wounding, an offence without any element of intention to cause harm. Ketchup's offending in breaking a rum bottle over the head of his de facto partner and causing lacerations requiring 38 stitches leaving disfiguring scars was in its own way equally serious. This was especially so as he had a significant criminal history and

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12 (1981) 147 CLR 383; [1981] HCA 31.
13 (1998) 194 CLR 610, Kirby J, 639; [1998] HCA 57.
14 *Criminal Code*, s 323.
15 *Criminal Code*, s 317.
16 *Criminal Code*, s 1. Definition of "grievous bodily harm" includes an injury which causes or is likely to cause a permanent injury to health.
17 *Criminal Code*, s 320.
18 *Criminal Code*, s 320A.

offended whilst on probation for a breach of domestic violence order. If the respondent had been sentenced on count 3 alone (or count 3 together with counts 1 and 2 which occurred the same evening) a head sentence in the range of three and a half to five years imprisonment, with parole eligibility after serving one-third of that sentence, would have been appropriate in light of the respondent's guilty plea, lack of prior relevant criminal history and time spent in pre-sentence custody. The judge imposed a sentence of four years imprisonment (effectively four and a half to five years imprisonment because of the pre-sentence custody) and suspended it after 741 days with an operational period of five years. *Bell* and *Ketchup* demonstrate that, had that sentence been imposed on count 3 alone, or to reflect the offending in counts 1 to 3 which all occurred on the same evening in September 2005, or even together with the next episode of domestic violence in July 2006 (count 4), it would not have been inadequate.

[49] But the judge imposed the sentence on count 3 as a global sentence to reflect all the respondent's offending over 10 counts on eight separate occasions during three years. In sentencing offenders for multiple offences, judicial officers can legitimately impose either a global sentence on the most serious offence or offences to reflect all the offending, or impose cumulative sentences for one or more episodes of offending. Either approach is acceptable as long as the ultimate effect of the sentence fairly balances the exacerbating and mitigating features. In imposing cumulative sentences, particular care must be taken to ensure the result is not crushing: see *Mill v The Queen*.[19] Further, sentencing statutes often render cumulative sentences problematic. As Wells J noted in *Attorney-General v Tichy*:[20]

> "Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient. There are dangers in each course [consecutive or cumulative sentences]. Where consecutive sentences are imposed it may be thought that they are kept artificially apart where they should, to some extent, overlap. Where concurrent sentences are imposed, there is the danger that the primary term does not adequately reflect the aggravated nature of each important feature of the criminal conduct under consideration."

[50] The last sentence in that quoted passage is apposite in the present case. All 10 of the respondent's offences (eight episodes of domestic violence) were serious. The offences of unlawful wounding (count 3) and assault occasioning bodily harm whilst armed (count 7) were particularly so. The maximum term of imprisonment for the latter offence was 10 years imprisonment, three years more than for count 3 (unlawful wounding). Count 7, you will recall, involved the respondent assaulting the complainant with a baton, one item in a cache of weapons police later found in his possession when his three year reign of terror upon the complainant was finally ended.

[51] Unfortunately, neither the prosecutor nor the experienced sentencing judge appreciated that the present case differed from *Ketchup* and *Bell* in that here the offences occurred over a much longer period of time and involved not one or two episodes of serious domestic violence over some months as in *Ketchup* and *Bell*, but eight separate episodes of domestic violence over a three year period. The judge therefore wrongly determined that he was constrained by the sentencing range established by the Court of

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19 (1988) 166 CLR 59; [1988] HCA 70.

20 (1982) 30 SASR 84, 93; (1982) 6 A Crim R 117, 126.

Appeal in *Ketchup* and *Bell*. This error in the judge's approach to determining the appropriate sentence, one which was urged on him by the prosecutor on two separate occasions, has resulted in a manifestly inadequate sentence. It means that the appeal must be allowed and that this Court must now re-sentence the respondent and "may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper".[21]

[52] Had I been sentencing at first instance, I would have imposed a sentence of five years imprisonment on count 3 to reflect the seriousness of that count. But, to reflect the seriousness of the totality of the respondent's offending, I would have imposed the global head sentence on count 7 which carried the heaviest maximum penalty of 10 years imprisonment and was also serious in its own right.

[53] The dreadful effects of prolonged episodes of domestic violence are notorious. They are consistent with those outlined in the complainant's victim impact statement, relevant parts of which were cited in the prosecutor's written submissions at sentence which defence counsel adopted. Deterrence, both personal and general, is an important factor in sentencing in domestic violence cases. So too is denunciation. The community through the courts seeks sentences which show the public disapprobation of such conduct. The effects of domestic violence go beyond the trauma suffered by victims, survivors and their children to their extended families, and friends. Domestic violence also detrimentally affects the wider community, causing lost economic productivity and added financial strain to community funded social security and health systems.

[54] The respondent's case was not without mitigating factors. Most importantly, he pleaded guilty, at least at a time before witnesses were required to attend court, and the committal proceeding was by way of full handup statements. An additional factor in his favour was the absence of any prior history of violence. Unlike *Bell* and *Ketchup*, he did not commit the present offences while subject to other community based sentencing orders or a domestic violence order. His counsel submitted at sentence, without challenge, that he had suffered brain damage in a serious accident in 1988 causing major health issues. He suffered from stomas and used a colostomy bag. His offending was committed in circumstances where he had been combining alcohol and painkilling drugs apparently prescribed for his serious health problems.

[55] The respondent's health issues and alcohol and drug abuse suggest that he is likely to need a great deal of support in the community and that both he, the complainant, their children and the community would benefit from him being subject to an extended period of supervision such as that provided by parole. A sentence on count 7 to reflect the totality of the respondent's offending in all 10 counts committed on eight separate occasions over three years would have been in the range of six to eight imprisonment years with parole eligibility at the one-third point.

[56] But circumstances have changed since the respondent was sentenced in October last year. The sentence the subject of this successful appeal was precisely that urged on the judge by the prosecutor at first instance. The judge was troubled by that submission and adjourned the matter so that the prosecutor could obtain further information as to the appropriate range. The prosecutor maintained his original submission as to the sentencing range. This is a factor highly relevant for this Court's consideration in now sentencing the respondent. As the Court of Appeal in Victoria recently noted in

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[21] *Criminal Code*, s 669A(1).

Director of Public Prosecutions (Cth) v Gregory,[22] the prosecution has a duty to assist the sentencing judge to avoid error so that a party will not ordinarily be permitted to depart from the substance of the case it advanced at first instance. This is fundamental to the due administration of justice.[23]

[57] The respondent has served over two years in pre-sentence custody which was properly and fairly declared as time served under the sentence when he was released from prison upon his sentence in October last year. The appellant contends the respondent should now be returned to prison to serve about three and a half months further imprisonment before parole eligibility. As the Victorian Court of Appeal also noted in *Gregory*, appellate courts are hesitant to return to custody someone who has been granted their liberty.[24] That is especially so where the prisoner has served a lengthy period of imprisonment (here, more than two years) and the return to custody is for but a short period. The respondent has, it may be inferred, commenced his rehabilitation since his release into the community, something which is in the community interest. It would be most unhelpful both to his and to the community's interest to now return him to prison. Further, he has had the additional punishment of the uncertainty of this matter hanging over his head since the appellant filed the notice of appeal on 4 November 2010.

[58] For those reasons, the sentence I would now impose is less severe than the sentence I would have imposed at first instance. The changed circumstances since the respondent was originally sentenced now warrant the imposition of a sentence on each of count 3 and count 7 of five years imprisonment suspended after 741 days with an operational period of five years. To ensure the respondent receives the support he needs and the supervision the community, including the complainant and the children, require, I would order that on count 10 he be placed on probation for three years on the usual terms and conditions. His lawyers have informed the Court that he would consent to probation and have fully advised him as to the matters contained in s 93, s 94 and s 95 *Penalties and Sentences Act* 1992 (Qld). As this Court is varying the orders made, it should also correct the error endorsed on the indictment that counts 1, 4, 5, 6, 8 and 9 should be suspended after 741 days with an operational period of five years.

[59] The orders I propose are as follows:

1. Appeal allowed.

2. Set aside the sentences imposed on counts 3, 7 and 10 and the order on counts 1, 4, 5, 6, 8 and 9 suspending those sentences after 741 days with an operational period of five years.

3. On each of counts 3 and 7, order that the respondent be sentenced to five years imprisonment suspended after 741 days with an operational period of five years.

4. On count 10, order that a conviction be recorded and that the respondent be placed on probation for three years on the terms and conditions set out in s 93 *Penalties and Sentences Act* 1992 (Qld).

5. I would otherwise confirm the sentence imposed at first instance.

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22 (2011) 250 FLR 169; [2011] VSCA 145.

23 Above, [75]-[77].

24 Above, [79].

[60] **CHESTERMAN JA:** I agree with the President, and with Fryberg J, that the respondent should have been sentenced to a term of imprisonment of between six and eight years, but that it is not now appropriate to impose that sentence given the conduct of the prosecution before the learned sentencing judge and the fact that the sentence contended for by the appellant would return the respondent to prison for a relatively short period, after he had been dealt with, apparently finally, and released from custody in October last year.

[61] I agree substantially with the President's reasons for these conclusions. The points on which I do not agree appear in the brief reasons which follow.

[62] I accept the accuracy of Fryberg J's analysis of the jurisdiction of the Court of Appeal with respect to appeals against sentence by the Attorney-General, and with his Honour's opinion as to the error which appears in the appellant's Notice of Appeal, as amended. In particular I agree with what his Honour has written about the grounds of appeal and their conceptual confusion. I agree with what the President has written about allowing the amendment to the Notice of Appeal.

[63] I agree also with Fryberg J that the record of proceedings in the District Court contains an error which should be corrected.

[64] I share Fryberg J's opinion that the factors of mitigation were not such as to justify ordering that the respondent be eligible for parole after serving one third of the appropriate sentence. I agree with his Honour's reasons for forming that opinion and with his Honour's conclusion that the factors of mitigation would adequately have been recognised by a small reduction in the head sentence and in the non-parole period.

[65] I agree with the President and Fryberg J that it is appropriate to sentence the respondent to a term of three years' probation. Their Honours differ as to the conditions to be imposed as part of that sentence. There is something to be said for both points of view and I have not found the dispute an easy one to resolve in my own mind. In the end I favour flexibility rather than attempting now to foresee what problems might arise in the course of probation and what conditions would be best suited to deal with them. There was limited argument and evidence on these matters. Accordingly I think it best to leave the imposition of appropriate conditions to the experience and good sense of the appointed probation officer.

[66] I agree with the orders proposed by the President.

[67] **FRYBERG J:** This appeal raises questions in three areas: the jurisdiction of the Court of Appeal, the amendment of the notice of appeal and the merits of the appeal.

Jurisdiction

[68] Jurisdiction to hear and determine appeals against sentence by the Attorney-General is conferred on this court by s 669A of the *Criminal Code 1899*, applied by virtue of s 29(1) of the *Supreme Court of Queensland Act 1991*. The former section provides:

> "**669A Appeal by Attorney-General**
> (1) The Attorney-General may appeal to the Court against any sentence pronounced by—
> (a) the court of trial; or
> (b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court;

> and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper."

The Code requires that an appeal be brought within one month of the date of the sentence, but it also empowers the court to extend time.[25] Otherwise, Parliament has left the procedural aspects of an Attorney's appeal to be dealt with by the rules of court. The *Criminal Practice Rules* require an appeal to be started by a notice of appeal.[26] They do not prescribe the content of such a notice; and in particular, they do not in terms require the notice of appeal to set out grounds of appeal. Nonetheless it is the invariable practice, at least in State matters, to include grounds of appeal in the notice.

[69] The respondent submitted that "the absence of a ground asserting manifest inadequacy means that this court's statutory jurisdiction has not been invoked and, accordingly the notice of appeal is incompetent." He submitted that the notice of appeal was a nullity and that consequently, not only was there nothing before the court to amend, but also the appeal fell to be dismissed. He called in aid the passage from the reasons of the majority of the High Court in *Lacey v Attorney-General of Queensland* cited by the President in her reasons for judgment.[27] He also relied on the following passage:

> "In our opinion, the appellate jurisdiction conferred upon the Court of Appeal by s 669A(1) requires that error on the part of the sentencing judge be demonstrated before the Court's 'unfettered discretion' to vary the sentence is enlivened."[28]

[70] That submission raises two issues: first, whether there is any requirement for the notice of appeal to include grounds of appeal; and second, whether their omission renders the notice a nullity.

Grounds in the notice of appeal

[71] The provisions of the Code and the rules relating to appeals by the Attorney-General against sentence are in marked contrast to those relating to appeals against conviction and applications for leave to appeal against conviction or sentence by an accused person. Those rights are conferred by s 668D of the Code. They are to be exercised by filing an application for leave or a notice of appeal, as the case may be.[29] Each document must "state, briefly and precisely, the grounds of appeal". For an appeal by the Attorney-General, as noted above, there is no requirement in the rules to state the grounds of appeal.

[72] Although the rules impose no requirement to state the grounds, the form[30] approved by the Rules Committee under s 118A of the *Supreme Court of Queensland Act 1991* for a notice of appeal against sentence by the Attorney-General does require the grounds to be specified. The *Criminal Practice Rules* provide that the forms to be used for proceedings under the rules include the approved forms.[31] It is therefore arguable that the Attorney-General is obliged to specify the grounds; although it may be doubted

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25 Section 671.
26 *Criminal Practice Rules 1999*, r 81.
27 Paragraph [6].
28 *Lacey v Attorney-General of Queensland* [2011] HCA 10 at [62].
29 Rules 65(1), 66(1).
30 Form 34.
31 Rule 13.

whether the Rules Committee has power by the approval process to alter the requirements of the rules, which are made by the Governor in Council.[32]

Effect of non-compliance

[73] It is unnecessary to resolve that point. Even if the rules be construed as requiring the grounds to be specified, failure to do so does not invalidate a proceeding unless the court directs otherwise. That is expressly provided by r 7. That being so it is unnecessary to have to resort to s 49 of the *Acts Interpretation Act 1954*.[33] Failure to use the correct form cannot render the notice of appeal a nullity.

[74] A similar result has been reached in New South Wales. Save for the word "unfettered", s 669A is materially similar to s 5D of the *Criminal Appeal Act 1912* (NSW), which was considered by a special bench of five judges of the New South Wales Court of Criminal Appeal in *R v JW*.[34] In that case it seems to have been accepted that there was no statutory requirement for the notice of appeal to contain the grounds[35]; but it was held that the notice was not in any event invalid.

[75] Nor is the respondent's position advanced by reference to the reasons for judgment in *Lacey*. Nothing in either of the passages referred to above[36] suggests that the jurisdiction of the Court of Appeal to entertain appeals on sentence by the Attorney-General depends upon the presence in the notice of appeal of an arguable ground. The High Court referred to a failure to invoke the jurisdiction and to dismissal of the appeal as incompetent. Their Honours did not suggest the proceeding would have been a nullity in the absence of any proper ground of appeal, nor that the court would have lacked jurisdiction to deal with the matter if the notice were appropriately amended.

[76] Of course that does not mean that a notice of appeal which disclosed no arguable ground of appeal would be allowed to stand. On the contrary, it would, unless amended, be dismissed for lack of utility (and possibly for other reasons). It would not be struck out for want of jurisdiction.

[77] The same result follows from a consideration of the terms of s 669A of the *Criminal Code*. Jurisdiction is conferred by the first conjunctive clause in that section. It furnishes an example of a provision which at once confers a right on a person and jurisdiction on a court. The second conjunctive clause identifies powers which the court may exercise in disposing of the appeal. As the majority of the High Court wrote in *Lacey*, "The purpose of s 669A(1) is to create an appellate jurisdiction exercisable upon the application of the Attorney-General and coupled with a wide remedial power."[37] The respondent's submission conflates these two functions. Jurisdiction depends on:

- lodging process making an appeal at the Registry;
- the appellant being the Attorney-General;
- the existence of a sentence pronounced by a court answering the description in one of the lettered paragraphs; and
- the appeal being against that sentence.

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32 *Supreme Court of Queensland Act 1991*, s 118.
33 Compare *Yong Internationals Pty Ltd v Gibbs* [2011] QCA 161.
34 [2010] NSWCCA 49; (2010) 77 NSWLR 7.
35 *DPP v Lombard* [2008] NSWCCA 110.
36 Paragraph [69].
37 [2011] HCA 10 at [56].

> Subject possibly to s 671, that is all that is required for the jurisdiction to arise in a particular case.

[78] The passage quoted above makes it plain that the requirement for appealable error relates to the exercise of the court's power, not to the existence of its jurisdiction. The other passage relied on by the respondent should be understood in the same sense.

[79] Notwithstanding his submission that the notice of appeal was a nullity, the respondent did not seek an order striking it out. He submitted that the proper order was that the appeal should be dismissed. There was an apparent inconsistency in that submission: if the appeal was a nullity, there was nothing to dismiss - all that was needed was to strike it out. The explanation for this approach seems to be an attempt to pre-empt any application by the appellant for an extension of time in which to appeal, in the event that the respondent's argument on jurisdiction succeeded. Relying on the decision in *R v Regazzoli*[38], the respondent submitted that any such application should fail as a result of the dismissal of the present appeal. It is unnecessary to deal with the merits of that argument because the respondent's submission on jurisdiction was not correct.

Amendment

[80] For the reasons recorded by the President, the relevant discretionary factors pointed strongly toward allowing the amendment. They led me to join in the order to that effect.

[81] The respondent did not suggest that the court did not have power to permit the amendment of a notice of appeal filed by the Attorney-General. The order which was made assumed the existence of that power. There is no present reason to examine the correctness of that assumption.

Merits of the appeal

[82] The appellant has appealed against all of the sentences imposed at first instance. The President has set out above the sentences as endorsed on the court order sheet by the sentencing judge's associate. The endorsement is not correct. In passing sentence, the judge, Griffin DCJ, said:

> "I sentence you to four years' imprisonment for the unlawful wounding. For all other indictable offences, you are sentenced to two years' imprisonment, to be served concurrently. Having reduced the head sentence to four years' imprisonment, I now look at the period of time which you have already served.
>
> Under our law in Queensland, you would be entitled to parole after having served half the sentence. You have, in fact, served more than half the sentence already. That is another feature that I have taken into account in dealing with the sentence in the way I have and so, in some ways, a sentence of four years' imprisonment is somewhat artificial. It should really be regarded as one of four and a half to five years but, in the circumstances of this case, it should be disposed of in the way I have described.

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38 [2001] QCA 482.

> You are to be released after serving 741 days in custody. You have already served that. So the sentence will be suspended after your serving 741 days."

The verdict and judgment record accords with the associate's endorsement.

[83] As I understand the judge's words, he intended to suspend only the four year sentence, that is, the one imposed for wounding (count 3). That understanding accords with the common sense of the situation. The respondent had already served more than two years at the date of sentencing. The sentence of two years could not be suspended after 741 days.

[84] The District Court is a court of record. That status, accorded by statute[39], should not be trivialised. The court has a responsibility to ensure its record is as accurate as possible. Maintaining that accuracy is not simply a matter for the parties. This court sits above the District Court in the hierarchy of courts. While it does not have direct responsibility for the accuracy of the records of the District Court, this court should not in my opinion ignore an opportunity to correct manifest error in the record when it is brought to the court's attention. Quite apart from questions of historical accuracy, the uncorrected error would flow through to the respondent's criminal history, where it would be likely to cause future confusion. And as Spigelman CJ observed in *R v JW*:

> "27 … The notice of appeal should be regarded as a formal document which contains within itself the issues to be determined on the appeal. Precision in this respect may, for example, be of significance if the matter arises in another forum, for example, in the High Court on a special leave application or in a further application for leave to appeal if leave had once been refused.
>
> 28 In this criminal justice context it is important that there be a formal document identifying precisely what was before the Court of Criminal Appeal. It is the notice which forms the record of the court upon which the parties join issue. (See *R v Halmi* [2005] NSWCCA 2; (2005) 62 NSWLR 263 at [51].)"[40]

[85] The endorsement and the verdict and judgment record should be amended by the appropriate court officers to delete the references to suspension of the sentences.

[86] Putting aside that formality, the appeal cannot succeed unless the appellant demonstrates error in the sentence imposed below.[41]

Sentencing error

[87] As amended, the sole ground of appeal was:

> "**2. Grounds of Appeal**
>
> (i) The sentences imposed are manifestly inadequate and accordingly not the proper sentences for the following reasons:
>
> a) They failed to reflect adequately the gravity of the offences generally and in this case in particular;

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39 *District Court of Queensland Act 1967*, s 8.

40 [2010] NSWCA 49; (2010) 77 NSWLR 7.

41 *Lacey v Attorney-General of Queensland* [2011] HCA 10.

b) They failed to take sufficiently into account the aspect of general deterrence; and

c) The sentencing judge gave too much weight to factors going to mitigation."

[88] The introduction of the word "manifestly" by the amendment of the notice of appeal created internal incongruity in the ground of appeal: the "reasons" set out in the lettered subparagraphs became redundant. As the learned Solicitor-General recognised in his oral argument, "manifestly inadequate" are "words describing the magnitude of the error that must be sought in circumstances *where no distinct error can be identified, but rather the error is to be inferred from the inadequacy of the sentence*."[42] That reflected what was said by the High Court in *Carroll v The Queen*:

> "8. The particular principle which the Director sought to invoke in his appeal to the Court of Criminal Appeal against the sentence passed upon the present appellant was the last category of case identified in the well-known classification stated in *House v The King*:
>
> > 'It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'[43]
>
> The Director's allegation in his notice of appeal to the Court of Criminal Appeal, that the sentence passed was 'manifestly inadequate', was an allegation of this kind of error. It was not an allegation that the primary judge had acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect her, had mistaken the facts or had not taken into account some material consideration. If a case of specific error of any of those kinds was to be made it would have been necessary to identify the asserted error in the grounds of appeal. But as indicated at the outset, no case of specific error was alleged; the sole ground of appeal was manifest inadequacy of sentence."[44]

[89] That approach was reiterated recently by the High Court:

> " 58 The single ground of appeal advanced by the Director in each appeal to the Court of Criminal Appeal was that the sentences imposed at first instance were manifestly inadequate. That is, the error which the Director asserted that the sentencing judge had made was of the last kind mentioned in *House v The King*. By asserting manifest inadequacy, the Director alleged that

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42 Emphasis added.

43 [1936] HCA 40; (1936) 55 CLR 499 at 505.

44 *Carroll v The Queen* [2009] HCA 13 [8]-[9].

> the result embodied in the sentencing judge's orders was 'unreasonable or plainly unjust'. The Director did not allege that any specific error could be identified (as would be the case if the sentencing judge were said to have acted upon wrong principle, allowed extraneous or irrelevant matters to guide or affect her, mistaken the facts or not taken into account some material considerations). Rather, the Director asserted that it was to be inferred from the result that there was 'a failure properly to exercise the discretion which the law reposes in the court of first instance'.
>
> 59 As was said in *Dinsdale v The Queen*, '[m]anifest inadequacy of sentence, like manifest excess, is a conclusion'. And, as the plurality pointed out in *Wong*, appellate intervention on the ground that a sentence is manifestly excessive or manifestly inadequate 'is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases'. Rather, as the plurality went on to say in *Wong*, '[i]ntervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons'. But, by its very nature, that is a conclusion that does not admit of lengthy exposition."[45]

[90] It follows that a ground of appeal on the basis of manifest excess or inadequacy should not spell out reasons suggested by the appellant from the alleged error. If for forensic purposes an appellant wishes to suggest reasons for the alleged excess or inadequacy, he or she may do so by way of submissions. To include such reasons in the notice of appeal is at best inelegant and in some cases may cause confusion by disguising what should in reality be a separate ground of appeal.

[91] In the present case the appellant did not refer to the "reasons" as such in his submissions. Instead, he advanced two different submissions: first, that an effective head sentence of seven years imprisonment was called for to reflect the total criminality of the offending; and second, that the sentences imposed in this case were part of a wider sentencing trend that has given no weight to the increase in the maximum penalty for assault occasioning bodily harm from three years to seven years imprisonment and for common assault from one year to three years imprisonment. Those changes were effected by the *Criminal Law Amendment Act 1997*. He submitted that they and other changes showed the seriousness with which Parliament regarded offences of violence and evidenced a view that current sentence levels the courts could impose were too low. But he expressly disclaimed any wish for a guideline judgment.[46]

[92] Each of the two issues argued by the appellant would, if demonstrated, constitute an error of principle by the sentencing judge. I would have held that they should have been pleaded as separate grounds of appeal. However the respondent took no such point. He did not suggest any prejudice or want of procedural fairness, doubtless

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45 *Hili v The Queen* [2010] HCA 45 (citations omitted).

46 Compare *Penalties and Sentences Act 1992*, Part 2A.

because the two grounds were squarely raised in the appellant's outline of submissions. The amended notice of appeal may therefore be allowed to stand on this occasion. But this should not be understood as a precedent. This court should follow the practice adopted by the Victorian Court of Appeal:

> "127 In Victoria, the contention that a sentence was manifestly inadequate is invariably expressed as a submission that the sentence was outside the range reasonably open to the sentencing judge in the circumstances. As with the ground of manifest excess, the ground of manifest inadequacy is a stringent one, difficult to make good. Error of this kind will not be established unless the appellate court is persuaded that the sentence was 'wholly outside the range of sentencing options available' to the sentencing judge. Put another way, it must be shown that it was not reasonably open to the sentencing judge to come to the sentencing conclusion which he/she did if proper weight had been given to all the relevant circumstances of the offending and of the offender.
>
> 128 The Court will be astute to enforce the stringency of this test. As the High Court has emphasised:
>
> > 'The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.'"[47]

[93] The respondent submitted that the sentences imposed in the District Court were appropriate and were in conformity with the range indicated by the decisions of this court in *Ketchup*[48] and *Bell*[49]. He conceded that the increase in the maximum penalty for violent offending in 1997 clearly demonstrated that the Parliament did require the gravity of such offending to be recognised by the courts. He submitted, however, that this increase in penalty had been recognised by the justice system for the past 14 years and that there was nothing to suggest that previous decisions of the courts, including of this court, had not applied the Parliamentary intention.

[94] The sentencing judge distinguished those two cases, but he also felt constrained by them. That constraint was reinforced by the submissions of the Crown Prosecutor. I sympathise with his Honour. District Court judges usually have to deal with large numbers of sentences in a day; often they do not have time to carry out the sort of analysis necessary in difficult cases such as this, particularly if the outcome is likely to be contrary to a Crown concession. The President has conducted that analysis and I respectfully find it convincing. I agree with her that the sentence imposed did not reflect the criminality involved in the whole of the respondent's offending.

[95] Although the respondent supported the sentence imposed below, he conceded that the totality principle worked both ways; that is, he accepted that if the total criminality required the imposition of cumulative sentences, such sentences could be imposed. That concession was rightly made, although as counsel pointed out, that was not the approach adopted by the Crown at first instance. The New South Wales Court of Criminal Appeal has held that although the totality principle has been applied

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47 *DPP v Karazisis* [2010] VSCA 350, citing *Lowndes v The Queen* [1999] HCA 29; (1999) 195 CLR 665 at p 671-2.

48 [2001] QCA 508.

49 [2002] QCA 344.

commonly in favour of offenders, "it is not to be disregarded for the converse purpose of assessing whether the overall effect of the sentences is sufficient having regard to the usual principles of deterrence, rehabilitation and denunciation".[50] Whether the sentences were made concurrent or cumulative, they needed to be examined to ensure that they reflected the totality of the respondent's criminality. I need not enlarge on that criminality; it is apparent from what has been written by the President. The total duration and intensity of all of the offending were not reflected in the sentences imposed in this case. The sentencing discretion must be re-exercised.

[96] It is therefore unnecessary to reach a conclusion on the appellant's second submission. It is however desirable to record it:

> "37. It is respectfully submitted that the sentence imposed on the respondent in the instant case is part of a wider sentencing trend that has given no weight to the increased maximum penalty for violent assaults and to the more stringent sentencing regime in such cases. The cases considered by the learned sentencing judge in this case as bearing on the appropriate range of penalty were influenced by judgments that reflect that trend.
>
> 38. This is demonstrated by a comparison of the sentences prior to and post the legislative changes. The range of penalties for serious examples of assaults occasioning bodily harm has not changed to reflect the heightened penalties and hardened sentencing regime."

To demonstrate the trend the learned Solicitor-General analysed the range of sentences imposed in a number of domestic violence cases both prior to and after the legislated change. Those cases were *R v Hodges*[51], *Hofmeir v Brewster*[52], *Gillam v Payne*[53], *R v Conochie; ex parte A-G (Qld)*[54], *R v Matamua; ex parte Attorney-General (Qld)*[55], *R v Pierpoint*[56], *R v Warwick*[57], *R v Roach*.[58] The submission concluded:

> "40. It is submitted that, when the sentencing trend for violence in a domestic setting is viewed, there is an insufficient change in the practices to reflect Parliament's will to increase the maximum penalty applicable to assaults occasioning bodily harm, as well as the hardened sentencing regime."

Another sentencing error

[97] Both in this court and at first instance counsel for the respondent referred to a passage in the reasons delivered in this court in *R v Singh*.[59] At first instance counsel cited the

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50 *R v KM* [2004] NSWCCA 65.
51 [1995] QCA 125.
52 [1997] QCA 68.
53 [1997] QCA 219.
54 [1999] QCA 199.
55 [2000] QCA 400.
56 (2001) 126 A Crim R 305; [2001] QCA 493.
57 [2006] QCA 83.
58 [2009] QCA 360.
59 [2006] QCA 71.

passage in support of a request to the judge that his Honour put what the victim wrote in the statement in perspective. That is a puzzling submission. One would have thought that such a request hardly needed authority; but if it did, such authority was not to be found in that case. The passage cited did not deal with the question of keeping things in perspective.

[98] Indeed it is difficult to see much scope for the application of what was said in *Singh* to the victim impact statement in the present case. Most of what was contained in the statement was self-evidently likely to be correct and must have been known to the respondent. To the extent that it contained statements of fact not known to him, they relate to matters easily ascertainable by request to the Crown. The respondent apparently made no request in advance to see hospital records or medical reports and his counsel even conceded that the complainant "certainly would be suffering certainly in relation to my client's behaviour". With a couple of exceptions there were no lay diagnoses of medical or psychiatric conditions.

[99] The statement did assert that the complainant had to see a chiropractor to have nerve damage to L4 and L5 caused by the abuse fixed; and that she could not work due to post-traumatic stress disorder. The comments in *Singh* potentially applied to those assertions. If they had been of concern, counsel should have drawn the judge's attention to the difficulty which they created and relied on *Singh* to seek an adjournment until appropriate verification could be provided. That did not happen.

[100] In any event the reference to *Singh* does not seem to have impressed Griffin DCJ. His Honour said, correctly as it now appears[60], that he would regard the passage as obiter.

[101] However his Honour also said this:

> "HIS HONOUR: I do, however, regard what Justice Fryberg said in the way in which the statements are to be used as having a significant ingredient of therapeutic value for the victims as being entirely correct and one must often see the statements in that guise. I have never understood the prosecution as putting forward those statements as demonstrating lack of remorse or underscoring or adding to the gravity of the case which is described in the factual matters put forward by the prosecution. I will regard your client's criminal responsibility on the basis of the agreed facts in this case."

The appellant submitted that his Honour was wrong in ignoring what the victim had said.

[102] I agree with that submission. His Honour was not limited to the facts in the statement of agreed facts. Facts put forward by the prosecution in the victim impact statement are not to be ignored. They must be given their *due* weight. The passage in *Singh* was concerned to ensure that the defence were not placed in a position of embarrassment or dilemma, often at the last minute, by assertions the truth of which they did not know and were unable to ascertain. That did not happen in the present case, nor did the respondent submit otherwise in this court.

[103] It is unnecessary to consider whether this error would, by itself, be sufficient to warrant upholding the appeal. It was not advanced as such by the appellant.

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60 See *R v Evans and Pearce* [2011] QCA 135.

The sentence which should have been imposed

[104] What sentence should have been imposed? I agree with the President that the proper range of penalty for the totality of the offending would have been imprisonment for a period between six and eight years. My preference would have been to achieve that by the imposition of cumulative sentences rather than by attaching the sentence to count 7, but there is no need to expand upon the reasons for that. Either option is acceptable.[61] I part company from her Honour on the question of the period for parole eligibility. Her Honour would have ordered eligibility at the one-third point of the sentence in the light of the mitigating factors to which she referred.[62] I do not think those factors merited such leniency.

[105] The most important of the factors was, as the President has observed, the plea of guilty. It was a late plea of guilty. The last of the offences was committed on 25 September 2008. The respondent was taken into custody the following day. The committal hearing in respect of nine of the charges took place on 11 May 2009 (custody in respect of the remaining charge of assault occasioning bodily harm commenced on 8 October 2009). Although it was a full hand up committal, the respondent did not avail himself of the opportunity to plead guilty. He was committed for trial. The indictment was presented in the District Court on 8 October 2009 with, I infer, the additional charge included in it. The respondent was then legally represented. On 19 November 2009 the case was listed for trial as number one in the week commencing 23 August 2010. The resolution of the matter by notification of intention to enter pleas of guilty did not occur until the week prior to that date. It was a late plea of guilty by a 39-year-old man who had previously appeared often enough in the Magistrates Court (five times in 11 years on 13 charges) to know the value of an early plea.

[106] The sentencing judge was told that the notification avoided the need to make arrangements for witnesses and that the complainant specifically was not required to be subpoenaed or brought to court or brought in for a conference. That however was entirely fortuitous. It reflects poorly on the state of preparation of the trial by the Office of the Director of Public Prosecutions. The attendance of witnesses should have been secured well before the week preceding the trial. The matter does not enhance the respondent's position.

[107] Notwithstanding the lateness of the plea, the respondent is entitled to some reduction in his sentence by reason of it. In my judgment, however, it is important that the degree of mitigation be clearly seen to be less than that afforded to those who plead guilty at an early stage of proceedings. To mitigate the sentence to the same extent as is commonly done for early pleas of guilty would be to encourage other offenders to delay a decision about a plea until the week before trial.

[108] None of the other proposed mitigating factors was particularly powerful.

- The absence of any prior history of violence is negated to some extent by the prolonged duration of the offending the subject of the charges. Nonetheless it must be recognised that he did not commit any of the offences after having been previously convicted of similar offences.
- It is also true that the respondent did not commit the offences while subject to a domestic violence order or a community-based sentencing order, but

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61 See *R v Tichy* (1982) 6 A Crim R 117 at pp 125-6.

62 Paragraph [54].

that is not a mitigating factor. It is simply a ground for distinguishing the cases of *Bell* and *Ketchup*. Moreover its impact is lessened by the two breaches of a domestic violence order after his arrest.

- The sentencing judge was told that the respondent suffered brain damage in a serious accident in 1988 but there was no evidence that this was in any way connected to his offending, nor any that it impaired his responsibility for his criminal behaviour in any way. Indeed his counsel specifically told the judge that this was not something which in any way mitigated his behaviour. The appellant submitted that fundamentally, the court could not act on a fact that was not proved. I agree. In the absence of evidence I would not reduce the sentence on this account.
- The respondent also told his counsel, who told the judge, that he had been mixing alcohol with a cocktail of drugs, thereby aggravating his anger. Much of the offending took place while he was affected by alcohol. That explains his cruelty to some extent and distinguishes the case from one where cold-blooded callousness might be taken into account as an aggravating factor on sentence. It is not in my judgment appropriately regarded as a mitigating factor. Indeed, his conduct in repeatedly getting drunk while on drugs with knowledge of how he behaved when drunk on other occasions was arguably an aggravating factor.
- The judge was also told that the respondent suffered a life-threatening injury in 2007, namely holes in the stomach wall (stomas) for which he was hospitalised for six weeks and which nearly caused his death. There was no suggestion that that in any way contributed to his offending conduct (at least four of the charges predated it).
- Counsel also told the judge, "He wears a colostomy bag", but no detail was provided. Perhaps the need to wear such a bag would increase the difficulty of life in prison for him, but without more information I find it impossible to give much weight to this factor.

[109] There is little if anything in the evidence to suggest that a lengthy period of parole would benefit the respondent. He has not done anything to indicate sound prospects of rehabilitation and the domestic violence offences demonstrate his lack of remorse.

[110] In these circumstances the mitigating factors could adequately have been reflected by a small reduction in the head sentence and a small reduction in the non-parole period.

[111] At first instance the following sentences would have been appropriate to reflect all of the relevant considerations: on count 7 (the count for which the maximum penalty was 10 years imprisonment), imprisonment for seven years with a parole eligibility date after three years and three months; on count 3 (wounding), imprisonment for five years, suspended after serving three years and three months for an operational period of five years; and on the other counts, lesser terms of imprisonment. On the summary counts the sentences actually imposed by the judge would have been appropriate.

What sentence should now be imposed?

[112] In the alternative the respondent invited the court to exercise what the Victorian Court of Appeal has called "the residual discretion" in appeals by the Attorney-General.[63] He submitted that even if the court found manifest inadequacy in the sentence imposed

[63] *Director of Public Prosecutions (Cth) v Gregory* [2011] VSCA 145.

below, there remained a discretion not to interfere. The appellant did not challenge the existence of such a discretion and its existence is compatible with the terms of s 669A of the *Criminal Code* and with decisions in other Australian jurisdictions.[64]

[113] The respondent submitted that the court should not interfere with the sentence imposed at first instance for two reasons. The first was that the sentence was the one which the prosecutor had submitted was appropriate. The second was that the respondent has now served the period of actual imprisonment imposed upon him and has commenced reintegration into the community; so that to return him to jail some nine or 10 months after his release would not only be unfair but would also interfere with a process (reintegration) which is part of the proper administration of justice.

[114] The President has described the somewhat fractured nature of the proceedings below. It is true that on the first day of hearing the Crown Prosecutor submitted that an effective head sentence of three and a half to four years was appropriate. However that changed after the judge questioned the submission. The Crown Prosecutor's final submissions were in writing:

> "12.1 It is submitted that the appropriate sentence in the present matter is in the region of four years imprisonment, with release to parole or by way of suspension structured after time already served (approximately two years), having regard to *R v Ketchup.*
>
> 12.2 That sentence might be imposed in relation to each count on the indictment, or in relation to the wounding offence with lesser concurrent terms for the other offence on the indictment.
>
> 12.3 In relation to the summary offences, the Court might take those into account in arriving at sentence, but otherwise convict and not further punish on the summary offences.
>
> 12.4 It is well within the sound exercise of the Court's sentencing discretion to consider that a head-sentence of higher than four years imprisonment is appropriate. It is submitted that if that view was taken by the Court, the head sentence would not exceed five years imprisonment, with parole eligibility or suspension still structured after time already served."

[115] In imposing sentence Griffin DCJ said:

> "I have referred to the mitigating features in this case. They will be taken into account and they will be taken into account by me, not in a reduction at the bottom end of the sentence but in reducing the head sentence.
>
> I will reduce the head sentence from what I consider to be an appropriate sentence of four and a half to five years by the mitigating features of your plea of guilty. That is in the case of the unlawful wounding which I think is appropriately dealt with as not only the major and most serious offence but the one which encapsulates all of your offending.

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64 *R v Holder* (1983) 13 A Crim R 375; [1983] 3 NSWLR 245; *R v JW* [2010] NSWCCA 49; (2010) 77 NSWLR 7; *Director of Public Prosecutions (Cth) v Karazisis* [2010] VSCA 350; *R v Carroll; Carroll v R* [2010] NSWCCA 55; (2010) 77 NSWLR 45; *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194.

> I sentence you to four years' imprisonment for the unlawful wounding."
>
> The respondent had been in custody for slightly over two years. Taking that into account his Honour suspended the balance of the sentence.

[116] It is therefore not quite correct that the sentence imposed was the one which the prosecutor had submitted was appropriate. However it was similar and the prosecutor's submission contributed to the error which has been identified in this court. It is also the fact that the submission now made by the appellant differs significantly from that made by the prosecutor, in a manner adverse to the respondent.

[117] A related but important point is the fact that in this court, the sentence which the appellant submits ought now be imposed is one of imprisonment for seven years, with eligibility for release on parole fixed at one-third of that period. The court is, of course, not limited to the parole eligibility period urged by an appellant, but where the appellant is the Attorney-General and the appeal was argued on his behalf by the Solicitor-General, I am reluctant to depart from the appellant's submission in a manner adverse to the respondent. This is, after all, the Crown's second attempt to get it right, and the considered submission of the senior law officers should be viewed with respect.

[118] On that basis, the respondent would be returned to prison for less than three months (assuming he be granted parole on the eligibility date) rather than for the further 12 months which in my judgment he ought to serve. It is generally undesirable for a person who has served a substantial period of imprisonment and been released to be sent back to prison after his reintegration into the community has commenced, particularly if the further period of imprisonment is relatively short. That consideration has some weight despite the fact that the respondent did not attempt to place any further evidence of his reintegration before the court.[65]

[119] These considerations favour the imposition of sentences which would not result in the respondent having to return immediately to prison.

[120] As far as I am aware, that outcome can be achieved (where the period of imprisonment exceeds three years) only by imposing suspended sentences. Such sentences cannot be for longer than five years and involve no supervision of the respondent by a corrective services officer. The latter deficiency could be overcome to some extent by imposing a period of probation on one or more of the other charges. The absence of any evidence of a desire on the part of the respondent to reform his ways, his apparent lack of remorse, the absence of any evidence of significant prospects of rehabilitation and the respondent's age would ordinarily weigh against the imposition of probation, but in the present case it has some prospect of reducing the risk of the respondent's reoffending. That prospect would be enhanced if the probation contained requirements for the respondent to undertake an anger management course, to abstain from alcohol except as permitted by a probation officer and drugs except as prescribed, to submit to alcohol and drug testing and to undertake medical, psychiatric or psychological treatment as directed.

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[65] Such evidence would have been admissible: *Karazisis* at [114]; *R v Allpass* (1993) 72 A Crim R 561 at p 562. It was asserted in the respondent's outline of submissions that he had commenced a traineeship of some sort which would lead to full-time work.

[121] On balance (and I think the issue is finely balanced), that seems to me the proper sentence to impose. It can be imposed only if the respondent consents to probation and agrees to comply with the order[66], and that consent must follow an explanation to him of (among other things) the effect of the order.[67] If such consent is not forthcoming, the proper sentences would be those described above.[68]

Orders

[122] I would make the following orders:

(1) Appeal allowed;

(2) Direct that the solicitors for the respondent forthwith explain to him the matters set out in s 95 of the *Penalties and Sentences Act 1992* in relation to the probation order described in order 4(c).

If the respondent within seven days, in writing consents to, and agrees to comply with, the probation order described in order (4)(c):

(3) Set aside the sentences imposed on counts 3, 7 and 10;

(4) In lieu thereof

(a) sentence the respondent on count 3, to imprisonment for five years, suspended after serving 741 days for an operational period of five years, and

(b) sentence the respondent on count 7, to imprisonment for five years, suspended after serving 741 days for an operational period of five years, and

(c) on count 10, make a probation order for three years containing the requirements set out in Annexure A to these reasons;

If the respondent does not consent and agree as aforesaid:

(5) Set aside the sentences imposed on counts 3 and 7;

(6) In lieu thereof

(a) sentence the respondent on count 3 to imprisonment for five years, and

(b) sentence the respondent on count 7 to imprisonment for seven years, and

(c) fix 18 November 2012 as the respondent's parole eligibility date.

In either case:

(7) Direct that convictions be recorded on all counts in the indictment and all summary charges;

(8) Declare that the period of 741 days between 26 September 2008 and 6 October 2010 (the dates between which respondent was held in presentence custody) was imprisonment already served under these sentences and direct that the Sheriff advise the Chief Executive (Corrective Services) in writing of this declaration and its details;

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66 Section 96.

67 Section 95(1)(a) and (b).

68 Paragraph [111].

(9) Direct that the Registrar of the Court of Appeal amend the District Court order sheet under the heading "In relation to the remaining counts, on each count:" by deleting all words from "Suspended sentence" to "within a period of 5 years" and inserting in lieu the words "Sentenced to a period of 2 years imprisonment"; and that this amendment be reflected in the verdict and judgment record issued consequent upon this appeal.

Annexure A

REQUIREMENTS OF PROBATION ORDER

General requirements

1. The respondent -
   (a) must not commit another offence during the period of this order; and
   (b) must report to an authorised corrective services officer at Brisbane or at such other place as may be agreed by an authorised corrective services officer within two business days of the date of this order; and
   (c) must report to and receive visits from an authorised corrective services officer as directed by the officer; and
   (d) must take part in counselling and satisfactorily attend an anger management program and other programs, as directed by an authorised corrective services officer during the period of this order; and
   (e) must notify an authorised corrective services officer of every change of his place of residence or employment within two business days after the change happens; and
   (f) must not leave or stay out of Queensland without the permission of an authorised corrective services officer; and
   (g) must comply with every reasonable direction of an authorised corrective services officer.

Additional requirements

2. The respondent -
   (a) must not drink any alcoholic drink except as permitted in advance by an authorised corrective services officer, and must not take any drug except as prescribed by a medical practitioner, during the period of this order; and
   (b) must submit to random alcohol and drug testing as directed by an authorised corrective services officer; and
   (c) must forthwith consent in writing to the results of any such testing being provided to an authorised corrective services officer and to the Director of Public Prosecutions; and
   (d) must at his own expense
      (i) genuinely participate in and complete an anger management course as directed by an authorised corrective services officer;
      (ii) submit to medical, psychiatric or psychological treatment as directed by an authorised corrective services officer during the period of this order.