SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mahony & Shenfield* [2012] QCA 366
PARTIES:	**R** **v** **MAHONY, Rebecca Louise** (applicant) **R** **v** **SHENFIELD, Andrew Scott** (applicant)
FILE NO/S:	CA No 350 of 2011 CA No 351 of 2011 SC No 959 of 2011 SC No 959 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	22 October 2012
JUDGES:	Muir and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. For Mahony, refuse the application for leave to appeal against sentence.** **2. For Shenfield,** **a. Grant the application for leave to appeal against sentence;** **b. Allow the appeal to the extent of substituting a term of 18 years imprisonment for the term imposed at sentence;** **c. Otherwise affirm the orders made at sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicants were jointly charged with numerous offences including

thirteen counts of rape, making child exploitation material and torture – where the applicant Mahony was also charged with one count of attempted murder – where applicants pleaded guilty – where applicants sentenced to life imprisonment – whether the sentences imposed were manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 13(1)

Ibbs v The Queen (1987) 163 CLR 447; [1987] HCA 46, cited
Markarian v The Queen (2004) 228 CLR 357; [2005] HCA 25, followed
R v D [2003] QCA 547, cited
R v Daphney [2010] QCA 236, cited
R v Farrenkothen & Farrenkothen; ex parte A-G (Qld) [2003] QCA 313, considered
R v Hornby [1996] QCA 446, cited
R v Marshall [1993] 2 Qd R 307; [1992] QCA 155, cited
R v Perini; ex parte A-G (Qld) [2011] QCA 30, cited
R v Robinson [2007] QCA 99, cited
R v Suey [2005] NSWCCA 22, distinguished
Veen v The Queen [No 2] (1987) 164 CLR 465; [1988] HCA 14, followed

COUNSEL: S Ryan for the applicant, Mahony
R East for the applicant, Shenfield
A W Moynihan SC for the respondent

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

[1] **MUIR JA:** I agree with the reasons of Gotterson JA and with the orders he proposes.

[2] **GOTTERSON JA**: The two applicants were de facto partners. Mahony was at the time of the offences a 32 year old mother of four and Shenfield a 40 year old father of two. On 9 December 2011 they both pleaded guilty in the Supreme Court at Brisbane to 30 offences. After a sentence hearing which began that day, they were sentenced on 12 December 2011 as follows:

Counts	**Offence**	**Sentence**
5, 6, 7, 9, 11, 13, 14, 15, 16, 19, 20, 29, 30	Rape: s 349 Qld Criminal Code ("QCC")	Imprisonment for life
3, 4, 10, 17, 22, 24	Indecent treatment of a child under 16: s 210(1)(A) QCC	10 years imprisonment with a Serious Violent Offence (SVO) declaration
18	Indecent treatment of a child under 16 (procure to commit): s 210(1)(B) QCC	10 years imprisonment with SVO declaration

1	Taking a child for immoral purposes: s 219(1) QCC	8 years imprisonment with SVO declaration
21	Making child exploitation material: s 228B(1) QCC	8 years imprisonment
2	Deprivation of liberty /unlawfully detain/confine	3 years imprisonment
8	Common Assault: s 338 QCC	3 years imprisonment
12	Stupefying in order to commit an indictable offence	14 years imprisonment with SVO declaration
23, 25, 26	Assault occasioning bodily harm while armed and in company: s 339(1)&(3) QCC	7 years imprisonment with SVO declaration
27	Torture: s 320A(1) QCC	12 years imprisonment with SVO declaration
28	Unlawfully wounding another	5 years imprisonment with SVO declaration

[3] In addition, the applicant Mahony, also pleaded guilty to a further count of attempted murder alleging an offence against s 306(a) QCC, for which she was sentenced to imprisonment for life. All terms are to be served concurrently.

[4] The applicants now seek leave to appeal against the life sentences imposed on them. In each case, the single proposed ground of appeal is that the sentence is manifestly excessive.

Circumstances of the offending

[5] The applicants' offending was against a 13 year old female complainant and was inflicted over a harrowing 15 hour period whilst the girl was held captive at their home. In describing the offending, the learned sentencing judge said:

> "The numerous perverse and perverted ways in which you degraded and abused this girl were horrific. This was not a nightmare for her; it was a living hell. What you did to her was evil … You dragged this child to stygian depths of sexual depravity, used her as an object for your own perverted gratification, damaged her physically, and have left her with mental scarring from which no person, let alone a child, should suffer. She will carry this with her for the rest of her life."[1]

[6] The complainant was subjected to unimaginable horrors with the learned sentencing judge opting not to dignify the abhorrent criminal acts by reciting their details. It is however the duty of this Court to recount some details of the offending in order to provide a basis for comparison for other courts in the unfortunate event that a comparably egregious case arises in the future. The following paragraphs contain a summary which outlines the offending.

[7] The applicants lived with their four month old daughter in a house in what is described as a rural or semi-rural community. Mahony is also mother to a second daughter of whom she shared custody. The complainant had frequently hosted Mahony's elder daughter for visits and sleepovers and the complainant had once

---

1 ARB p 69-70.

spent the night at the applicants' house. The applicants were drug users. They had both injected "speed" on the morning of the offending.

[8] On Friday 16 April 2010 at about 10.40 am Mahony sent the complainant a text message purporting to be from her elder daughter. The message invited the complainant to a sleepover that night. Arrangements were made with her by mobile phone and at about 4.00 pm Shenfield called the complainant on her mobile phone and told her that he was picking up Mahony's elder daughter at W and that they would meet the complainant at her house. At 4.40 pm Mahony sent Shenfield a text message reading, "Ive (sic) not picked her up yet but on my way there now". Mahony then went to the bottleshop and bought some alcohol and sent Shenfield another text message proclaiming, "Lots of people at the bottleshop oxox im really looking forward to tonight oxox".

[9] At approximately 5.00 pm Mahony alone collected the complainant from her home in C. Mahony is deaf so she handed the complainant a note reading

> "Good afternoon. I hope you won't mind driving to our home without LC. She goes to KH and I was working in EC all day. I didn't want to go and pick LC up then back here to pick you up. It's easier if we all just meet up at W or home".

The complainant's mother then let her daughter drive off in the car with Mahony under the impression she was meeting up with her friend for a sleepover.

[10] Mahony and the complainant arrived home around 5.30 pm and were met at the car by Shenfield. He took some alcohol out of the car and told the complainant to carry it inside the house. She complied and walked into the kitchen and placed the alcohol on the kitchen table. At this time, Shenfield approached the complainant from behind and held a butcher's knife to her throat. He told her that LC had not been at the house for a long time and that she wouldn't be there that night.

[11] The complainant naturally feared for her life. She told police she thought, "I hope you haven't killed her [Mahony's daughter] and they had a knife to my throat and I'm like I hope they don't kill me". The complainant wrestled with Shenfield, kicked and tried to grab the knife. Mahony intervened and grabbed the knife whilst Shenfield placed his hand over the mouth of the complainant as she was yelling and screaming. The knife was kept in the bedroom throughout the offending and was found by police by the bed the next day.

[12] Shenfield and Mahony took the complainant to their bedroom and threw her on the bed. Shenfield sat on top of her whilst Mahony tied up her feet so she could not kick. Shenfield then tied up the hands of the complainant. At some point Shenfield pulled the complainant's shorts off and grabbed scissors next to the bed and cut the complainants' underwear from her body. He also ripped the complainant's bra from her body, urinated on her underwear, and then stuffed them into the mouth of the complainant. He also tied a belt around her head to keep the underwear in her mouth.

[13] The complainant was forced to masturbate Shenfield. If she stopped moving her hand she was slapped and told, "I didn't tell you to stop you little slut." Every time she was slapped and hurt she was forced to say, "Thank you, daddy".

[14] The complainant was subjected to multiple digital, oral, vaginal and anal rapes by Shenfield without a condom. When the complainant vomited during one of the oral rapes Shenfield slapped her and yelled at her to keep going.

[15] Mahony repeatedly digitally raped the complainant and performed oral sex on her. She forced the complainant to perform oral sex on her. Mahony also raped the complainant by forcing her fist inside her vagina.

[16] The applicants orally and vaginally raped the complainant with an inflatable dildo which they repeatedly pumped up until it was, in the complainant's words, "really, really big and it really hurt…" before deflating the device and repeating the process. They forced chilli into the complainant's mouth and put chilli seeds inside her vagina with their hands as well as pouring nail polish remover over the complainant's genitals causing the area to sting.

[17] The applicants forced the complainant to insert a deodorant can into her vagina. They also inserted hot scissors and high heel shoes into her vagina. In addition they burnt the complainant's vaginal area with a lit cigarette and dripped hot candle wax over the complainant's arms, legs, breasts and genital area causing burns. The heated scissors were also used to slap the complainant's inner thighs causing linear vertical burn marks approximately 7 cm from the vaginal orifice.

[18] The complainant was beaten with her own shoes, slapped, punched in the face, and hit at least 30 times with a thin green branch covered with thorns. The complainant was left with at least 30 marks on her buttocks with a number of puncture wounds.

[19] Shenfield vaginally raped the complainant from behind whilst forcing the complainant to perform oral sex on Mahony. The complainant child said, "He just kept getting harder and harder until I was nearly in tears … and they're like cry all you want, bitch". Shenfield also orally raped the complainant whilst Mahony digitally raped the complainant.

[20] The applicants digitally raped the complainant at the same time, before Shenfield penetrated the complainant's vagina whilst Mahony simultaneously raped the complainant by placing her hand inside with Shenfield's penis. Both applicants then forced their fists inside the complainant at the same time. The complainant described herself screaming because it hurt so badly and that both the applicants' hands were covered in blood when they finally removed their fists. The applicants then forced the complainant to lick the blood from their hands and Shenfield's penis. They also rubbed the blood all over the complainant's body. Whenever the complainant child cried out in pain, the applicants laughed at her.

[21] The complainant was forced to urinate in a bucket in plain sight and when the bucket was overturned the applicants used the complainant's underwear to mop up the spilt contents before forcing the underwear into her mouth. The complainant was subjected to being the applicants' "nude toilet" with Mahony urinating in the complainant's mouth and on her hair. Mahony also urinated in a bowl and forced the complainant to lick up the urine from it whilst on her hands and knees. The complainant was menstruating at the time of the offences and was forced to lick her soiled sanitary pad.

[22] The complainant was stupefied with valium tablets and later, whilst blindfolded, she was forced to smoke a cigarette which contained traces of cannabis. The applicants

stabbed the complainant repeatedly with empty and water-filled syringes on her breasts, arms, legs, bottom and vaginal area. Mahony placed a syringe right through one of the complainant's nipples and when it started to bleed she wiped the blood on the complainant's face. A urine sample taken from the complainant indicated the presence of the Schedule One drugs Amphetamine and Methalamphetamine. It is accepted the syringes used were dirty having been used previously by the applicants to inject illegal drugs.

[23] During the ordeal the applicants produced child exploitation material in the form of 44 photographs and four short video films. These images depict the complainant with her hair tied up, make-up applied, a scarf in her hair and a short skirt belonging to Mahony around her waist. The complainant was photographed in various indecent poses. There are also photographic images of Shenfield penetrating the complainant with his penis in her mouth and vagina, and of Mahony digitally raping the complainant and forcing the scissors, dildo and various other objects into the complainant's vagina. The photographs taken also include images of needles being injected into the complainant's vagina and labia, and elsewhere on her body, of hot wax dripped over her body including the genital area, and of the complainant tied up and blindfolded with the word "WHORE" written on the front of her chest. Unsurprisingly the complainant can be seen to be visibly distressed in some of the photographs.

[24] When morning broke at about 4.30 am Shenfield and Mahony started arguing with one another. According to Shenfield, they argued because Mahony was becoming jealous of the attention Shenfield had paid to the complainant. They also argued because Shenfield wanted to let the complainant go but Mahony "wanted to shut her up" and did not want to let her go, "cause (sic) we'd get into trouble". Mahony asked Shenfield to help her kill the complainant. The applicants' baby woke up and Shenfield put her on the couch. The complainant picked up the baby and rocked her to sleep. Mahony was still angry and yelled at Shenfield. The complainant said "she went psycho" and when the complainant tried to calm her down Mahony yelled at her, "oh don't fucking talk to me I don't want to fucking talk to you". The complainant walked to the baby's room to place the now sleeping baby in her cot. When the complainant put the baby in the cot Mahony came into the bedroom and in the complainant's words, "come up behind me and wrapped rope around my neck and tried to kill me, like strangle me but I put my hands there like that so the rope wasn't tied. And then Andrew told her off for it and got the rope off me and stuff". The complainant suffered bruising to her neck with at least two apparent circumferential lesions caused by the rope around her neck.

[25] Just after 8.30 am the applicants put the complainant into the car and drove her back to her house. They arrived at approximately 9.30 am and dropped off the complainant across the road from her house. The complainant made an immediate complaint to her mother and a friend telling them, "They beat me, they raped me, they tied me up". The police were contacted and the complainant was taken to hospital.

[26] Neither the agreed statement of facts tendered at sentence nor the 31 counts listed on the indictment follow a strict chronological order. That is of no consequence for present purposes. As the Crown submitted at sentence, the factual details in each are largely based on the account of the complainant who, as a child of the tender age

of 13 years, was very distressed. She could not reasonably have been expected to provide an account which was chronologically correct with respect to every detail.

The applicants' personal circumstances

[27] Mahony is 33 years of age. She was 32 years old when she committed these offences. She has a criminal history which includes several entries for offences involving violence. Mahony was born deaf to two deaf parents and suffered privation and physical abuse from her parents. She was also raped at age 13 by five older boys and became a mother of two before she turned 20. She met Shenfield over the internet and embarked on a relationship marked by physical abuse and her becoming a user of amphetamines.

[28] Shenfield is 41 years of age. He was 40 years old when he committed these offences. He has a criminal history with numerous drug offences concerning cannabis as well as breaches of domestic violence orders which resulted in custodial sentences.

Sentences submitted for at first instance

[29] In relation to the offending by Mahony, the Crown's submission was that, notwithstanding the plea of guilty, the appropriate sentence was one of life imprisonment, but that if that submission were not accepted, then the appropriate range would be 22 to 25 years of imprisonment. Her counsel submitted that the range was 16 to 18 years.

[30] In the case of Shenfield, the Crown submitted that taking into account all of the factors including the plea of guilty, that he was not facing an attempted murder charge and that he had intervened in that offence, the appropriate sentence was one of 17 to 20 years imprisonment. His counsel acknowledged that a sentence within that range could properly be considered.

The sentencing remarks

[31] In determining the appropriate sentences, the learned judge made explicit reference to the observations of McHugh J in *Markarian v The Queen*[2] where, in criticising the "two-tier" approach, his Honour stated that a sentencing judge must instead:

> "…identif[y] all the factors that are relevant to the sentence, [discuss] their significance and then make a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence."[3]

[32] Basing his remarks on this, the learned sentencing judge here told the applicants:

> "the proper approach is for me to identify all the factors that are relevant to the sentences I am about to impose on you, discuss the significance of those factors, and make a value judgment as to what is the appropriate sentence given all the factors of the case."[4]

---

2 (2004) 228 CLR 357 at 377.

3 *Ibid.*

4 ARB p 69.

[33] He then proceeded to take into account the gravity of the offending, the victim impact statements tendered by the complainant and her mother, and the scale of the depravity which he found exceeded, often significantly, the offending in other cases to which he had been referred. The applicants' pleas of guilty were also acknowledged. However the learned sentencing judge noted that there was overwhelming evidence to prove the guilt of both applicants. He considered that the egregiousness of the offending was so heinous that neither of the applicants deserved to have their sentences reduced on account of the guilty pleas. He then detailed each applicant's antecedents and summarised each defence counsel's submissions on sentence.

[34] In relation to Mahony, his Honour referred to five factors which her counsel had submitted ought to be seen as warranting mitigation. They were: her pleas of guilty; a contention that she played a lesser role in the offending (which his Honour rejected); the need to achieve parity between the applicants' sentences; a submission that remorse and prospects for rehabilitation ought to be inferred from shame that she had suffered from committing the offences; and her personal circumstances of deafness and a troubled upbringing. He questioned the degree of mitigation that these factors warranted in the context of the depravity of the offending.

[35] In summarising submissions made on behalf of Shenfield, his Honour noted that his counsel had conceded that Shenfield's culpability was equal to that of Mahony with respect to the 30 counts on which they had been charged as co-offenders. He also outlined the circumstances of Mahony's attempted murder charge and Shenfield's involvement in causing Mahony to stop. He commented that: "…[a]t best for you, that displayed some vestigial flicker of humanity towards a victim whom you had so cruelly abused for the previous 15 hours. …"[5]

[36] His Honour then noted the lack of any psychiatric evidence before the Court to explain the applicants' conduct. He said that whilst the fact that both had ingested drugs might provide some explanation in part for what they had done, their drug taking certainly did not excuse it.[6]

[37] The learned sentencing judge was of the view that none of the matters advanced on behalf of the applicants in mitigation went "…close, either alone or in combination, to [outweighing] the significance of the gravity of [their] offending against this girl. …" He then described the offending in *R v Hornby*[7] and *R v Daphney*.[8] Categorising them as bad cases, he expressed the opinion that this case was "worse" and "much worse" respectively.

[38] In sentencing each applicant to life imprisonment, his Honour said:

> "[f]or the dreadful, unspeakable violations you committed against this child, each of you will be sentenced to life imprisonment, I think that any right-minded member of the community who knew the details of what you did to this child would be outraged if I imposed any lesser sentence on you."[9]

---

5 ARB 75.
6 ARB 75.
7 [1996] QCA 446.
8 [2010] QCA 236.
9 ARB p 76.

Sentencing for rape

[39] A person who rapes another is guilty of a crime for which the maximum penalty is life imprisonment.[10] The statement has been made in this Court that the imposition of life imprisonment for an offence other than murder, which is punishable by a mandatory life sentence, is exceptional.[11] The validity of that statement in the instance of rape offences in Queensland is demonstrated by several cases which were referred to in this appeal.

[40] In *R v Farrenkothen & Farrenkothen; ex parte A-G (Qld),*[12] a husband aged 38 to 39 years and wife aged 41 years respectively, pleaded guilty to a series of sexual offences across two indictments, committed upon two female complainants aged 10 years and four to five years. The latter was a lineal descendant of the female respondent.

[41] The offending involved locking the 10 year old complainant in a bedroom, handcuffing her wrists, tying her feet with rope and tying her around the neck and gagging her with what she called "sticking stuff". The child then endured oral rape, digital rape of her vagina and anus and three attempts at penile rape. A particularly disturbing feature is that the male respondent stupefied the complainant with Mersyndol in an attempt to relax her. He then digitally raped the complainant in order to break her hymen and attempt to effect penile penetration. The female respondent assisted in the offending by holding down the complainant and gagging the child with a pillow. At the time of the offending, police searching for the missing child called at the respondents' house on three occasions, as the child had last been seen playing with the respondents' 11 year old son. On all three occasions the respondents lied to police. On the second occasion the male respondent held the complainant in the shower room while the police carried out a search of the premises. The complainant was located on the third occasion when two officers exploring the back yard heard a voice calling out, "police, come up here" and saw a young person's head sticking out of an upstairs toilet window. It was the complainant.

[42] In relation to the four year old complainant, the male respondent was convicted of one count of anal rape and six of indecent treatment of a child under 12 with a circumstance of aggravation (which included digital penetration of the child's vagina) and the female respondent was convicted of three counts of indecent treatment of a child under 12 with a circumstance of aggravation. Her offending included using a vibrator on the child to facilitate penetration prior to the anal rape.

[43] This Court upheld an appeal by the Attorney-General increasing the male respondent's sentence from 14 to 17 years imprisonment, and the female respondent from 10 to 14 years imprisonment. de Jersey CJ remarked:

> "For these rapes in the overall context, life imprisonment could, in my view, have been warranted in the case of the male respondent but for the pleas of guilty. In saying that, I acknowledge there was in these cases a limit to the gratuitous violence." [13]

---

10 QCC s 349(1).

11 *R v Robinson* [2007] QCA 99 per Keane JA at [38].

12 [2003] QCA 313.

13 At p 13.

[44] In *R v Perini; ex parte A-G (Qld)*[14] the respondent pleaded guilty to one count of manslaughter, two counts of burglary with a circumstance of aggravation, two counts of interfering with a corpse and one count of burglary and stealing. He was sentenced to 13 years' imprisonment for the manslaughter, 12 and 10 years' imprisonment respectively for the aggravated burglaries and two years for each of the other offences. This Court allowed an Attorney-General's appeal and set aside the sentence of 13 years imprisonment for manslaughter and substituted instead a sentence of 18 years imprisonment.

[45] The offending involved the killing of a 76 year old woman who lived in the same assisted accommodation centre as the respondent. The offences occurred two days before the respondent was due to be evicted with the sentencing judge observing that the respondent intentionally killed the deceased at least partly to ensure that he had accommodation in jail. The circumstances of the killing involved substantial premeditation. In the afternoon, the respondent looked through the window of the deceased's unit and saw her reading. He then decided to kill her. He later gained access through an unlocked door which he had previously noted would be unlocked. He took with him a kitchen knife, a tie and socks. He attempted to strangle the deceased with the tie. When she screamed, he stuffed the socks into her mouth and secured them with the tie. He punched and "stomped" on her and stabbed her neck, leaving the knife embedded in the neck to a distance of about 12 centimetres. The deceased died of asphyxiation, with strangulation and wounding contributing causes. The respondent attempted unsuccessfully to sexually penetrate the deceased. He left and later returned, armed with pornographic material. He digitally penetrated the deceased, and masturbated, ejaculating over her body. Yet later again he returned looking for money, and then stole coffee and milk.

Were the life sentences manifestly excessive?

[46] In approaching this question, it repays to bear in mind the following observations of Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen [No 2]*:[15]

> "… [T]he maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibbs v. The Queen.*[16] That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."

[47] In my view, it is beyond question that the offending of each applicant falls within, and is not recognisably outside, the worst category of cases for which the maximum penalty for rape is prescribed. Its scale and depravity exceed significantly those in each of the other cases to which the Court was referred for comparative purposes. The offending in *Farrenkothen*, it was suggested, is closer that that in any of the others. In that case, the learned Chief Justice described the circumstances of offending as "stand[ing] graphically apart from the others to which [they had] been referred and indeed from the previous experience of this Court, so far as it [had

---

14 [2011] QCA 30.

15 (1987) 164 CLR 465 at 478.

16 (1987) 163 CLR 447 at 451; [1987] HCA 46.

been] historically recorded."[17] The learned sentencing judge described the offending in this case as "much worse" than that in *Farrenkothen*. I agree.

[48] In my view *Perini* cannot be seen as supporting a sentence less than life imprisonment for the offending in this case. There this Court increased the sentence to 18 years imprisonment and did so notwithstanding the respondent's mental health issues and the evidence that he intentionally killed the deceased to secure accommodation in jail. Here the conduct of the applicants was not attributable in any way to mental ill health.

[49] In what one might attribute to a frank assessment on the part of the applicants' counsel of the magnitude of the offending here, there was no serious challenge to the general proposition that the maximum penalty of life imprisonment was within range. Counsel concentrated their submissions on mitigating factors which they argued were insufficiently, or not, taken into account by the learned sentencing judge with a consequence that a manifestly excessive sentence was imposed in each case. It is convenient to consider these factors as they may apply to each applicant separately.

Mahony

[50] For Mahony, the submissions focused upon the utilitarian value of her ex-officio pleas of guilty in terms of savings to the community of costs and inconvenience and of sparing the complainant and her family from having to give evidence.

[51] The learned sentencing judge stated that the law required that he take the pleas into account in determining the appropriate sentence and that the law also conferred a discretion on him to reduce the sentence on account of the plea.[18] That statement is an accurate paraphrase of s 13(1) of the *Penalties and Sentences Act* 1992.

[52] In *R v D*,[19] this Court observed that s 13(1) "…clearly recognises that there may be occasions when it is appropriate to offer no reduction to an otherwise appropriate sentence by reason of the fact that the offender has pleaded guilty."[20] The decision in *R v Marshall*[21] was cited as authority for the proposition that there remains a discretion to impose the maximum penalty in cases in which the offender has pleaded guilty.[22] No challenge was made to these propositions by the applicants here.

[53] The learned sentencing judge declined to reduce the life sentences on account of the pleas. He stated that had the matter been tried, there would have been overwhelming evidence against the applicants and said that the "best thing" going for them was what the complainant and her family had been spared.[23]

[54] He concluded on the topic as follows:

> "But it is a factor which, in my view, is completely outweighed by the gravity of the offences you committed against her. What you did

---

17 At page 13 line 4.
18 ARB p 73 LL21-31.
19 [2003] QCA 547.
20 Per Chesterman J (McPherson JA and Mullins J concurring) at [40].
21 [1992] QCA 155; [1993] 2 Qd R 307.
22 Per Macrossan CJ at 311.
23 ARB p 71 LL35-52.

> to this girl was so bad that neither of you deserves to have your sentences reduced on account of having pleaded guilty."[24]

[55] This applicant levelled a criticism at his Honour's approach by submitting that the strength of the prosecution case is irrelevant to the question whether there ought to be a reduction in penalty to take into account of the utilitarian value of a plea of guilty. In my view, that criticism is not a valid one. The extent of the utilitarian value of a plea of guilty in a given case can be gauged by having regard to the extent of the savings of Court and judicial time, of costs of preparation of the prosecution case and of provision of legal aid that has occurred on account of the plea. For a case such as this one where there was not only the complainant's timely complaint but also medical evidence of her injuries and photographic and film evidence of their infliction by the applicants, the savings can expected to have been less than what they might reasonably be expected to be in a different case, for example, a complicated circumstantial one.

[56] I therefore do not regard the strength of the prosecution case as wholly irrelevant to the utilitarian value of an early plea. There are circumstances where, as here, it can have some relevance. In any event, it is obvious from his Honour's concluding remarks that the strength of the prosecution case was not determinative of, or a highly influential consideration in, his decision to make no reduction on that account. I am unpersuaded that his Honour erred in refusing to reduce the life sentence on account of the guilty pleas.

Shenfield

[57] For Shenfield, reliance was also placed upon the pleas of guilty. As for Mahony, and for similar reasons, I am of the view that no error was made in declining to make a reduction on that account. It was also submitted that no, or insufficient, weight was given to Shenfield's intervention in Mahony's attempt to murder the complainant and to his cooperation with police in making a timely statement. As to the latter, it may be noted that in the interview in which he made the statement, he disclosed the use of the thorny stick which the complainant had not mentioned and which became an additional count on the indictment.

[58] As mentioned earlier, his Honour disposed of the intervention by reference only to its display of a characteristic personal to Shenfield. He made no allowance for it. To my mind, an intervention of that kind has a societal dimension to it which warrants recognition in sentencing. Not to recognise it meaningfully risks giving rise to a popular belief at least, that there is no incentive given for intervention to prevent a death at the hands of a co-offender. There is good utilitarian purpose in encouraging a co-offender who is minded to intervene, to do so, rather than to refrain from doing so in the belief that there is nothing to be gained personally by it.

[59] In my view, a meaningful allowance should have been made for Shenfield's intervention in determining his sentence. That is not to say that an offender who has intervened may not deprive himself of the benefit of such an allowance by subsequent offending. The New South Wales Court of Criminal Appeal in *R v Suey*[25] held that a sentence imposed at first instance ought not be disturbed, despite new evidence that the applicant had prevented one of his co-offenders from raping

---

[24] ARB p 71 L57- ARB p 72 L6.

[25] [2005] NSWCCA 22.

the complainant with an object. In justifying the Court's reason James J stated at [39]:

> "The fact that the applicant stopped one of his co-offenders from attacking the complainant with a wheel brace merely prevented a further offence being committed against the complainant by a co-offender and did not mitigate the criminality involved in the offences for which the applicant was sentenced … [i]t … did not stem from any remorse on his party or from any empathy with the complainant. After this incident the applicant participated in the commission of further offences against the complainant."

[60] Shenfield's behaviour can be distinguished from that of the applicant in *Suey* in that he did not participate in further offending after he prevented Mahony from killing the complainant. During his police interview, Shenfield recounted that when he intervened he said to Mahony: "It's not her fault. You can't do this to her. We can't do anything to her because it's not her fault. It's mine." He also told police, "I recall as the drug started to wear off I started to feel worse and worse about what we were doing." This account and the absence of further offending suggest on his part some remorse for his conduct and empathy for the complainant. In contrast with the circumstances of *Suey*, neither the benefit from Shenfield's intervention nor the remorse and empathy that he appears to have felt were diminished by subsequent offending conduct towards the complainant.

[61] I am therefore of the opinion that the sentence imposed on Shenfield was manifestly excessive in that it failed to make allowance for his intervention and his cooperation with the police. I consider that a sentence of 18 years imprisonment would allow appropriately for those factors.

Disposition

[62] For these reasons, I would refuse Mahony's application for leave to appeal against sentence. However, I would grant Shenfield's application, allow his appeal and substitute a term of 18 years imprisonment.

Orders

[63] I would propose the following orders:

1. For Mahony, refuse the application for leave to appeal against sentence.
2. For Shenfield,
   (a) grant the application for leave to appeal against sentence;
   (b) allow the appeal to the extent of substituting a term of 18 years imprisonment for the term imposed at sentence;
   (c) otherwise affirm the orders made at sentence.

[64] **APPLEGARTH J:** I agree with the reasons of Gotterson JA and with the orders proposed by his Honour.