# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Lotoaniui* [2013] QCA 71 |
| PARTIES: | **R**<br>**v**<br>**LOTOANIUI, Daniel Taneila**<br>(applicant) |
| FILE NO/S: | CA No 277 of 2012<br>DC No 948 of 2012<br>DC No 973 of 2012<br>DC No 1445 of 2012 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 5 April 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12 March 2013 |
| JUDGES: | Margaret McMurdo P and Holmes JA and Douglas J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The application for leave to appeal against sentence is granted.**<br>**2. The appeal is allowed.**<br>**3. The sentences imposed on counts 1, 6, 8, 9, 11, 12, 14, 17, 18 and 21 on Indictment No. 973 of 2012 and count 1 on Indictment No. 948 of 2012, are set aside and instead sentences of eight and a half years imprisonment are substituted on all those counts.**<br>**4. These offences are declared to be serious violent offences.**<br>**5. The appeal is otherwise dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to multiple offences contained in two indictments, including 11 counts of armed robbery, two of which were in company and one of which was in company with personal violence – where the applicant was sentenced to 10 years imprisonment for the armed robbery offences and for lesser concurrent terms of |

imprisonment for all remaining offences, with a declaration that the armed robberies were serious violent offences – where the armed robbery offences were committed while the applicant was on parole for a number of property offences – where the sentencing judge was therefore required to order that his 10 year sentence be served cumulatively on the previously imposed term of three years imprisonment for the property offences pursuant to s 156A *Penalties and Sentences Act* 1992 (Qld) – where the applicant contends that the sentencing judge wrongly found the appropriate range for the armed robbery offences to be 10 to 12 years imprisonment – where the applicant contends that the sentence is manifestly excessive, taking into account the cumulative nature of the sentence – whether the sentencing judge wrongly determined the appropriate sentencing range – whether the sentence of 10 years imprisonment for the armed robbery offences was manifestly excessive, having regard to the cumulative nature of the sentence

*Penalties and Sentences Act* 1992 (Qld), s 156A

*Mill v The Queen* (1988) 166 CLR 59; [1988] HCA 70, cited
*R v Brown* [2003] QCA 372, considered
*R v Kapitano* [2012] QCA 288, considered
*R v Keating* [2002] QCA 19, considered
*R v Matthewson* [2001] QCA 4, considered
*R v Rose* [2002] QCA 134, considered
*R v Tilley; ex parte Attorney-General (Qld)* [2002] QCA 144, considered

COUNSEL: E Wilson SC for the applicant
B Merrin for the respondent

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

[1] **MARGARET McMURDO P:** The applicant pleaded guilty in the District Court at Brisbane on 20 September 2012 to multiple offences contained in two indictments. All the offences occurred between 4 and 26 September 2011. The longer indictment contained 21 counts: armed robbery in company with personal violence (count 1); breaking and entering premises and stealing (count 2); unlawfully using a motor vehicle to facilitate the commission of an indictable offence (count 3); three counts of stealing (counts 4, 7 and 16); two counts of entering premises and stealing (counts 5 and 13); armed robbery in company (count 6); eight counts of armed robbery (counts 8, 9, 11, 12, 14, 17, 18 and 21); receiving stolen property with a circumstance of aggravation (count 10); attempted armed robbery (count 15); entering premises with intent to commit an indictable offence (count 19); and dangerous operation of a vehicle (count 20). The shorter indictment contained one count of armed robbery in company (count 1) and one count of assault occasioning bodily harm in company (count 2). He was also convicted but not punished for four minor summary offences.

[2] He was sentenced to 10 years imprisonment on counts 1, 6, 8, 9, 11, 12, 14, 17, 18[1] and 21) on the longer indictment and on count 1 on the shorter indictment, and to lesser concurrent terms of imprisonment on all remaining counts.

[3] About 18 months earlier on 20 May 2011, he was sentenced for an assortment of property offences to three years imprisonment with an order that he be released on parole on 20 July 2011. He committed his most recent offences about six weeks later. The primary judge was therefore required to order that his 10 year sentence for his most recent offences be served cumulatively on the three year term of imprisonment imposed on 20 May 2011: see s 156A *Penalties and Sentences Act* 1992 (Qld). The applicant contends that the 10 year sentences were manifestly excessive, especially taking into account his early plea of guilty, cooperation with the authorities and the effect of the accumulation of his sentences. The parties now agree that the applicant's present fulltime discharge from custody date is 16 August 2023 and that his parole eligibility date is 19 January 2020. As he was arrested on 26 September 2011, since his arrest on these counts he will have served almost 12 years before his fulltime discharge and almost eight years and four months before he is eligible to apply for parole.

[4] Before discussing the competing contentions of the parties, it is helpful to give context by outlining the applicant's unimpressive criminal history and the details of the many and often serious offences he has most recently committed.

**Antecedents**

[5] The applicant was 27 at the time of his offending and 28 at sentence. He has an extensive criminal history in both Queensland and New South Wales commencing with a stealing offence before a New South Wales Children's Court when he was but 11 years old. Sadly his offending steadily escalated, with many more appearances for property and driving offences as a juvenile, despite having the benefit of supervision and assistance with drug and alcohol issues. He was first convicted in Queensland in the Inala Magistrates Court in July 2001 for minor drug offences. His convictions for property offences continued to mount and in the Brisbane District Court in April 2002, he was placed on a good behaviour bond for 18 months. He then returned to New South Wales where his convictions for property offences continued through 2002 when he was placed on 12 months supervision. In 2003, he was sentenced to periods of 12 and eight months imprisonment for property offences. Later that year he returned to Queensland and was convicted of further property offences and sentenced to four months suspended imprisonment. In February 2004, he was sentenced in New South Wales to four months suspended imprisonment for larceny and in July that year to six months imprisonment for another property offence and to an effective term of 12 months imprisonment with a nine month non-parole period for an assortment of further property offences. Concerningly, in November 2005, he was sentenced for common assault to eight months imprisonment with a four months non-parole period and fined for yet another property offence. Returning to Queensland in 2006, he was

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[1] The judge is recorded as sentencing twice on count 18 and not at all on count 16. It is not clear whether this is a transcription error but the applicant does not contend anything turns on it. The indictment and verdict and judgment record notes that sentences of 10 years imprisonment on count 18 and one years imprisonment on count 16 were imposed. This clearly reflects the primary judge's intention.

convicted and fined for property offences committed in 2003 and an assault committed in 2001. He continued to commit minor property, drug and street offences in Queensland during 2006 and 2007. In September 2008, he was sentenced in New South Wales to 12 months imprisonment with a non-parole period of nine months for three counts of common assault. I have already noted his convictions in May 2011 which resulted in imprisonment.

**The circumstances of the offending**

[6] The circumstances of the offences contained in the longer indictment are as follows. At about 3.47 am on 4 September 2011, an employee at an Upper Mount Gravatt convenience store heard the door bell ring and saw the applicant outside, wearing a beanie and sunglasses. The employee pressed the buzzer and the applicant and a juvenile co-offender, T, entered. T held a knife and the applicant said "Give me some money". T said something like "Open the till otherwise I will stab you". The employee complied. T pushed him and demanded cigarettes. The applicant emptied the till and took cigarettes. When asked to open the second till, the employee said he did not know how because he did not have a key or password. When asked for the change drawer, he said he did not have its key. The applicant told the complainant to open the door. T said "Don't do anything otherwise I will stab you". Both offenders ran off. The incident was captured on CCTV footage. The applicant's DNA was found in a mixed profile on a paper towel at the store. (Count 1)

[7] Three days later, the applicant and T broke into another complainant's car in Graceville. The complainant returned and saw the applicant inside his car and T at the open door, looking in. He yelled out. The offenders fled on foot and the complainant chased them. They dropped the purse of the complainant's partner. Police arrested them in different nearby streets. (Count 2)

[8] On about 9 September, the applicant took a blue 2001 Holden Commodore sedan (count 3) and stole a handbag and other items including $600 cash which were not recovered (count 4). When police found the car, another complainant's wallet was found in it. This wallet had disappeared from the complainant's workplace on 18 September 2011. The wallet was returned together with her credit cards and cash. (Count 10)

[9] The applicant committed count 5 when he entered that complainant's hairdressing salon at Eight Mile Plains on 11 September 2011, opened the till, stole $1,000 and ran outside. CCTV footage showed him walking away from the area and putting money into his wallet. The stolen money was not recovered.

[10] On 14 September 2011, the applicant and an unknown man went into an Asian supermarket at Upper Mount Gravatt at about 7.50 pm. The applicant was wearing a bucket hat and sunglasses. He showed the complainant a steak knife and said "Give me the money … Open, open". She opened the till and gave him $1,000 and another $160 from a coin bag. The unidentified man told her to pull the drawer out of the till but as she did not know how, he pulled it out. Both then left. The incident was captured on CCTV footage. The money was not recovered. (Count 6)

[11] The applicant was captured on CCTV footage stealing 30 litres of petrol worth over $50 on 16 September 2011 at a Woodridge service station. (Count 7)

[12] Also on 16 September 2011, again wearing a bucket hat and sunglasses, the applicant walked into a convenience store at Slacks Creek. He showed the complainant a knife, said "Open the till", grabbed the notes and ran outside. (Count 8)

[13] The following day, the applicant, wearing a hat but apparently no sunglasses, walked into a take-away food store at Moorooka at 9.50 pm. The complainant had closed but not locked the front door and was counting the takings. He told the applicant the store was closed but the applicant walked behind the counter holding a knife with a 10 cm blade and said "Give me all your money, is this all your money, is there anything else?" The complainant handed over the money he was counting. The applicant leant forward and grabbed more from the till. The applicant picked up a black case and asked what was in it. When the complainant did not respond, the applicant threw the bag on the bench. He handed a plastic bag to the complainant and told him to give him all the money. The complainant tipped the contents of the till into the plastic bag. The applicant then left the store with the money. The incident was captured on CCTV. (Count 9)

[14] On 19 September 2011, the applicant entered a convenience store at Holland Park, at about 10.15 am. He pointed a small pocket knife at the complainant and shouted "Money, money. Open the till. Open the till, quick, quick!" He grabbed $200 in $10 and $20 notes from a table next to the till, and again demanded that the complainant open the till. The complainant refused, kicked out and chased him outside. He drove off in the car the subject of count 3. The $200 was not recovered. (Count 11)

[15] At about 2.45 pm that day, the applicant entered a convenience store at Forest Lake wearing a hat and sunglasses holding a knife and said "Give me the money". The complainant opened the till and put the cash drawer on the counter. He grabbed the notes and asked for a plastic bag. He told her to put the coins in the bag and she complied. He grabbed the bag and walked quickly from the store. The incident was captured on CCTV footage. The stolen $800 was not recovered. (Count 12)

[16] That evening at about 7.30 pm, the applicant was at the bar area of the gaming room of a tavern in Richlands with his girlfriend. When staff walked away he went behind the counter, opened the till, removed $1,400 and left. The incident was captured on CCTV footage. The stolen money was not recovered. (Count 13)

[17] Two days later, at about 9.05 am, he entered a convenience store at Rochedale wearing a bandana. He demanded money whilst holding a 20 cm long knife and directed the complainant to open the till. He removed all the cash and also took cigarettes and the complainant's Apple iPhone. The complainant and others chased him into the car park. The incident was captured on CCTV footage. The stolen money, cigarettes and the complainant's iPhone were not recovered. (Count 14)

[18] At 7.30 pm that evening, the applicant entered a pizza shop at Camira holding a knife. He demanded that the complainant open the till and give him the money. As the cash drawer opened, the complainant's father said "What money, there is no money for you", picked up a utensils tin and walked towards the applicant who ran from the store. The father threw the utensils tin at the applicant and he and the complainant chased him to the car park where he drove off in the car the subject of count 3. (Count 15)

[19] On 25 September 2011 at about 7.30 pm, the applicant stole a complainant's handbag which was on the ground beside her while she was dining at an Eight Mile Plains' restaurant. (Count 16)

[20] At about 8.00 pm, the complainant and a co-offender, Fifita, entered a convenience store at Yeronga. The applicant produced orange scissors, held them towards the complainant, said "Open up the till" and grabbed the notes. He told the complainant to open a second till. When the complainant said he could not, the applicant threw a chocolate bar at him. The complainant apologised and repeated that he could not open this till. The applicant then returned to the first till and took the coins. He drove off in the vehicle the subject of count 3. The stolen money was not recovered. (Count 17)

[21] At about 10.00 am the following day, the applicant entered a Birkdale bakery armed with a small knife. The complainant ran to the back room. The applicant followed and took a cloth money bag containing $440 from a table and a black bag belonging to the bakery owner. The money and black bag were not recovered. (Count 18)

[22] At about 11.30 am that day, the applicant crouched down in a shop at Birkdale near the cash register with his hands on the sides of the cash drawer. When the complainant confronted him, he claimed to be looking for Superglue and left the store. (Count 19)

[23] At about 4.00 pm that day, the applicant was driving the vehicle the subject of count 3 when he clipped the complainant's vehicle. The complainant followed him but the applicant did not pull over. He drove dangerously at speeds of 100 kph in a 60 kph zone for some distance. Other vehicles had to brake to avoid a collision. (Count 20)

[24] At about 7.45 pm that evening, the applicant entered a Sunnybank bottle shop armed with a knife which he was flicking from side to side. He said "Do you want to open up the cash drawer?" and "Hurry up". The complainant activated the alarm. The applicant said something like "Don't you press that fucking button." He took all the notes from the till but left the coins. He asked where the rest of the money was. He took the complainant's handbag but she retrieved it, saying "That's my bag". He took the change tin and walked out of the store with $1,780, none of which was recovered. The incident was captured on CCTV footage. (Count 21)

[25] The offences contained in the shorter indictment occurred during the same time period as those in the 21 count indictment. On 6 September 2011 at about 12.40 pm, the applicant and T entered an adult shop at Chermside. They watched a DVD for about 10 minutes, left about five minutes later and returned after about 10 minutes. T was wearing bike gloves. He said "Give me your money". The complainant asked if he was serious. T replied "Yeah, I'm fucking serious, I've got a fucking gun, I'm gonna shoot you in the fucking head". The complainant was scared and stepped back. T stated "Open the fucking till". The complainant activated her personal alarm. T asked her what she was doing and ripped the alarm from her hand. T and the applicant tried unsuccessfully to open the till. They ran towards the entrance taking the alarm with them. (Count 1)

[26] At about 1.05 pm, the complainant, who worked at a nearby real estate office, was walking towards the toilet block when he saw the applicant and T enter the adult

shop. When he heard the alarm, he opened the shop door and saw the applicant and T running towards the entrance. He closed the door but was unsuccessful in preventing them from leaving. The applicant elbowed him across the forehead. The offenders pushed past him and ran through the car park. He suffered a cut to his forehead. (Count 2)

**The sentencing process**

[27] The prosecutor at sentence emphasised the applicant's poor criminal history and that he committed this spate of serious offending after being on parole for about six weeks. He had been in custody since his arrest on 26 September 2011 and was serving the balance of his earlier sentence for which his fulltime release date was 19 July 2013. The most serious offences were the 11 armed robberies, some of which were committed in company and with personal violence. The total loss from the armed robberies was $6,221.95. The complainant in count 1 of the shorter indictment provided a victim impact statement stating that she had developed severe anxiety and depression since the offence and had to leave her much-loved role as assistant manager in the adult shop. She had been diagnosed with post-traumatic stress disorder and had lost 15 kg; she was now clinically anorexic. A year after the incident, she was still unable to work and was receiving psychotherapy. The prosecutor conceded that the applicant had indicated a very early guilty plea to all counts. General and personal deterrence were important factors in exercising the sentencing discretion. She contended, however, that the appropriate sentencing range to reflect the totality of the offending was between 10 and 12 years imprisonment. As the sentence had to be imposed cumulatively, it was appropriate to sentence at the lower end of that range, namely, 10 years. In making that submission, she relied on two cases, one of which was *R v Matthewson*.[2]

[28] Defence counsel at sentence submitted that, as the sentence must be cumulative, a head sentence of between eight to nine years imprisonment should be imposed with a declaration that the robbery offences were serious violent offences. The applicant's criminal history revealed a long-standing drug dependence. He used the proceeds from the present offences to buy heroin. He returned to drug use whilst on parole because he was distressed at his inability to have contact with his four year old daughter. Since his current incarceration, he has studied information technology and undertaken a small business course. Whilst a sentence of 10 years would ordinarily be the starting point for offending of this kind, because the sentence must be cumulative on a sentence expiring in July 2013, a sentence of about eight years should be imposed to avoid a crushing penalty.

[29] The primary judge noted that the offences occurred over a 22 day period and that the most serious were the 11 counts of armed robbery, three of which were committed in company. The applicant's size made him physically intimidating. One victim impact statement confirmed the devastating effects of his actions on others. He committed these offences after being released on parole for only six weeks. He had prior convictions for property offences and offences of violence, although these were less serious than the present offending. *Matthewson* was very similar but the applicant's offending was even more serious as it involved more armed robberies, an attempted armed robbery, a dangerous operation of a motor vehicle and other offending. The applicant had a drug problem and was under

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[2] [2001] QCA 4. The sentencing judge rightly considered the other case was not helpful.

financial stress at the time of his offending, but the prosecution rightly submitted that a 10 to 12 year sentence was appropriate. Given the cumulative nature of the sentence to be imposed, it should be at the lower end of that range.

**The contentions in this application**

[30] Counsel for the applicant contended that the prosecutor at sentence led the judge into error by stating that the sentencing range was between 10 and 12 years. It was between eight and 12 years. *Matthewson* was less serious, but the requirement that the applicant's sentence must be imposed cumulatively meant that a lesser penalty than the 10 years imposed in *Matthewson* was apposite here. This submission, counsel contended, was supported by this Court's decisions in *R v Keating*,[3] *R v Brown*[4] and *R v Rose*.[5]

[31] Counsel for the respondent contended that the sentence imposed was an appropriately stern penalty and not manifestly excessive. It was supported by this Court's decisions in *R v Tilley; ex parte A-G*[6] and *R v Kapitano*.[7]

**The comparable cases**

[32] Before discussing those contentions, it is useful to discuss the cases relied on by the primary judge and counsel.

[33] In *Matthewson*, the applicant pleaded guilty to an *ex officio* indictment containing eight counts of armed robbery, two of which were in company and one attempted armed robbery. He was sentenced to 10 years imprisonment. He also pleaded guilty to nine burglary-type offences, stealing from a person and two stealing offences for which he was sentenced to lesser concurrent terms. The value of the stolen property exceeded $30,000 and property damage was almost $4,000, none of which was repaid. He was addicted to heroin at the time and cooperated with the authorities. He was 30 at sentence with a criminal history for relatively minor drug convictions and offences of dishonesty. In 1999, however, he was imprisoned for 15 months with a non-parole period of five months for property offences. He was released in August 1999 and began to re-offend shortly afterwards. He committed some of the most recent offences whilst on bail. This Court determined that although the 10 year sentence was lengthy, it was not manifestly excessive.

[34] In *Keating*, the applicant pleaded guilty to seven counts of armed robbery, two counts of attempted armed robbery and one count of unlawful use of a motor vehicle with a circumstance of aggravation, all committed over a nine day period when he was 23 years old. He was also convicted of common assault and two counts of fraud. His robberies targeted small businesses. Keating armed himself with a syringe full of blood. No actual violence was used and where resistance was offered he left without obtaining money. He was addicted to heroin. He had a lengthy criminal history, although not for robbery. This Court considered the appropriate range was between eight and 10 years imprisonment with a declaration that the offences were serious violent offences. As he had been in presentence

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3 [2002] QCA 19.
4 [2003] QCA 372.
5 [2002] QCA 134.
6 [2002] QCA 144.
7 [2012] QCA 288.

custody for eight months for another offence committed in the same spate of criminal activity, this Court reduced his sentence from eight to seven and a half years imprisonment with a declaration.

[35] In *Rose*, the applicant was 41 and on parole when he committed 10 robberies, eight of which were armed and one of which was armed robbery with personal violence, an attempted armed robbery and nine lesser counts. He used a syringe filled with blood to threaten his victims. He netted over $30,000 and inflicted more than $6,000 property damage, most of which was not repaid. He had a very extensive criminal history. He was sentenced to 10 years imprisonment for the offences of armed robbery with personal violence and armed robbery of a bank, and to nine years concurrent imprisonment on the other robberies which were perpetrated on small businesses and a railway station. This sentence was to be served cumulatively upon a sentence then being served but this Court was unable to ascertain precisely what effect this had. After referring to *Matthewson* and *Keating*, this Court determined the 10 year sentence was not manifestly excessive.

[36] In *Tilley*, the Attorney-General appealed against Tilley's eight year sentence with a serious violent offence declaration for four counts of armed robbery, five counts of armed robbery with personal violence, fraud and unlawful wounding. He pleaded guilty. He was 34 when he offended and 35 at sentence with a substantial criminal history for minor offences and convictions for five counts of rape involving two victims for which he was sentenced to almost 12 years imprisonment. He was on probation for offences of dishonesty at the time he committed the nine robberies over 11 days on convenience stores and service stations whilst armed with either a knife or a screwdriver. Five offences involved personal violence and one victim was quite seriously injured when he grabbed the respondent's knife to defend himself. Tilley's behaviour and language was threatening and on occasions included death threats. Numerous complainants, one of whom was 68 years old, suffered psychological damage as a result of the offending. The robberies yielded only a little over $4,000, none of which was recovered. Tilley offended to obtain money to purchase heroin to which he was addicted. He had suffered spinal damage when he was eight years old resulting in permanent disability and intermittent pain. He was cooperative with police. He had rehabilitative prospects and had behaved in an exemplary manner since his most recent incarceration. If he remained drug free, his prospects of rehabilitation were reasonable. After referring to *Matthewson*, *Keating* and other cases, this Court concluded that, after allowing for the mitigating factors, the eight years imprisonment was manifestly inadequate and a sentence of 10 years imprisonment, which was at the bottom end of the range, should be substituted.

[37] In *Brown*, the applicant was 37 when he committed eight armed robberies. He pleaded guilty and was sentenced to nine years imprisonment. His offending was even more serious than the present applicant's in that his robberies were committed on financial institutions and on one occasion on a Flight Centre outlet in Brisbane city. They netted almost $40,000. He had an extensive criminal history commencing 21 years earlier for offences of dishonesty and assault and had served short periods of imprisonment. He had helped federal police in the arrest of an offender involved in sex tourism in Southeast Asia. This Court noted that the range for numerous armed robberies of this kind was between nine and 12 years. Brown's nine year sentence was towards the bottom of the range and not manifestly excessive.

[38] In *Kapitano*, the applicant pleaded guilty to three counts of armed robbery, three counts of attempted armed robbery, receiving stolen property with a circumstance of aggravation, dangerous operation of a motor vehicle with a circumstance of aggravation and five summary offences. He was sentenced to 12 years imprisonment on each armed robbery and attempted armed robbery and to lesser concurrent sentences on the remaining offences. He had an extensive criminal history for like offences. In May 2002, he was convicted of two counts of armed robbery in company, 10 counts of armed robbery, two counts of attempted armed robbery and one count of dangerous operation of a motor vehicle in a spree of offending in April and May 2001. His 13 year sentence was reduced to 11 years on appeal, primarily because of his cooperation with authorities. His sentence was transferred to New South Wales in April 2006 where he was dealt with for a further seven counts of armed robbery committed in April 2001, before the Queensland offences. He was sentenced to four years imprisonment to be served concurrently with the last four years of the transferred sentence with a parole eligibility date of 13 May 2011. He absconded from custody in New South Wales in March 2010 and within six days began committing the further offences in Queensland.

His most recent offending was robbing small businesses of modest amounts to obtain heroin. On one occasion he was armed with a plastic gun. On another, he claimed to have AIDS and armed himself with a syringe filled with dark red fluid. He was apprehended in a police pursuit in which he collided with another vehicle driven by a 78 year old woman, causing her and her two passengers minor injuries. His morphine and codeine blood levels indicated recent heroin use. He was then 38 years old. He pleaded guilty to an *ex officio* indictment.

He had been institutionalised following incarceration from a very young age. He would have to serve the sentence imposed on his most recent offending cumulatively upon the unexpired part of his sentence in New South Wales. His extensive criminal history meant that he had spent only 18 months of his adult life out of prison. A psychologist considered he was suffering from post-traumatic stress disorder with a poor prognosis and modest treatment goals. He had made progress, however, in fighting his heroin dependency and may be able to reform with future psychological and rehabilitative support. He had obtained a Diploma of Management and other educational certificates whilst in custody and had the support of a pastor. He had set up programs to assist young prisoners and worked for charity and for victims of crime. The prison services manager described him as "inspirational in his work and support" for other prisoners.

[39] After referring to cases including *Keating*, *Brown*, *Rose* and *Matthewson*, this Court determined that the 12 year sentences were manifestly excessive and substituted 10 year sentences.

**Conclusion**

[40] These cases demonstrate that the effective sentence of 10 years imprisonment was within the sentencing range taking into account the applicant's antecedents and the serious nature of his offending. The only questions are whether the range was correctly determined to be 10 to 12 years and whether, given its cumulative nature, the sentence of 10 years was manifestly excessive. As he has been in custody since his arrest on 26 September 2011, the effect of the sentence imposed is that he may have to serve almost 12 years imprisonment since his arrest on these charges (his

fulltime discharge date is 16 August 2023) and will have to serve a minimum of almost eight years and four months imprisonment (his parole eligibility date is 19 January 2020). Whilst it is true that this is entirely of his own making for committing such serious offences whilst on parole, a court should not impose a cumulative sentence which is unfairly crushing in its effect: *Mill v The Queen*.[8]

[41] Of the cases placed before this Court as comparable, the primary judge was referred only to *Matthewson*. Like the primary judge, I consider Matthewson's offending was broadly comparable. He and the present applicant had a similar criminal history and both re-offended shortly after their release from prison. Matthewson also committed further offences on bail. Although this applicant had 11 rather than eight armed robbery offences, Matthewson's offending was more effective, yielding a greater sum of money, none of which was repaid. Matthewson, unlike this applicant, was not serving his 10 year sentence cumulatively. I do not consider that *Matthewson* establishes that a 10 year sentence was the bottom of the appropriate sentencing range in the applicant's case.

[42] *Keating* is also of limited assistance. Keating was sentenced for seven rather than 11 armed robberies of small businesses. He had a poor criminal history but he was only 23 years old when he offended. The seven and a half year term of imprisonment ultimately imposed on him was not cumulative. *Keating* provides some support for the contention that the bottom of the appropriate range in the present case, at least when the sentence was to be imposed cumulatively, was eight years.

[43] In *Rose*, the applicant was more than a decade older than the present applicant. He pleaded guilty to eight armed robberies, one armed robbery with personal violence, one robbery, one attempted armed robbery and an assortment of other property offences. Whilst he received an effective sentence of 10 years imprisonment, this was imposed only on the counts of armed robbery with personal violence and the armed robbery committed upon a bank. Courts ordinarily impose especially heavy deterrent sentences for offences against financial institutions. He was sentenced to nine years imprisonment on each of the armed robberies committed on small businesses. His 10 year sentence was to be served cumulatively upon a sentence he was already serving as he committed the armed robbery offences on parole. As *Rose* was even more serious than the present case, it suggests that a sentence of less than nine years was the bottom of the sentencing range applicable here.

[44] In *Tilley*, a sentence of 10 years imprisonment was said to be at the bottom end of the appropriate range in that case. Tilley was about seven years older than the present offender. Tilley's offending involved a greater degree of violence, both actual and threatened and, probably as a consequence, had a more detrimental impact on its many victims, one of whom was seriously injured defending himself. Importantly, his sentence was not served cumulatively. It suggests that the bottom of the appropriate range in the present case was somewhat less than 10 years.

[45] The applicant in *Brown* was a decade older than the present applicant when he committed multiple robberies on financial institutions. Brown's robberies were more professional than the present applicant, netting almost $40,000. As in *Rose*, the deterrent factor warranted an even heavier penalty than for the present offences.

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8 (1998) 166 CLR 59.

This Court did not place much weight on Brown's assistance to federal police in an unrelated matter. Brown's sentence of nine years imprisonment, which was towards the bottom of the range in that case, certainly suggests that a nine year sentence was not the bottom of the range in the present case.

[46] *Kapitano* is of much more limited assistance. He had a much worse criminal history and his offences were more extensive and more serious than the present applicant. On the other hand, he had made remarkable progress in his rehabilitation and was doing inspirational work to assist young prisoners to rehabilitate. All that can be said is that the 11 year sentence imposed there certainly does not demonstrate that the 10 year sentence in this case was at the bottom of the appropriate sentencing range.

[47] After careful analysis of these cases, I am persuaded of the correctness of the applicant's contention that the sentencing range was broader than the 10 to 12 years adopted by the primary judge. Her Honour was not referred to *Keating*, *Brown*, *Rose* and *Tilley*; cases which demonstrate that in the present case the range was indeed, as the applicant contended, from eight to 12 years imprisonment. The primary judge's acceptance that the sentencing range was between 10 and 12 years was central to the exercise of her Honour's sentencing discretion in determining the 10 year sentence. That error requires this Court to re-exercise the sentencing discretion.

[48] Accepting as I do that the range extended as low as eight years, it is appropriate to sentence towards the bottom end of that range taking into account the cumulative nature of the sentence to be imposed. There were, however, many serious features. At 27 when he offended, the applicant was not a youth. He had a significant criminal history which included some offences of violence. He had previously been imprisoned. He committed these offences whilst on parole and, as a result, his sentence must be served cumulatively. His offending spanned a 22 day period and was fuelled by a rampant heroin habit. No information was placed before the sentencing court about his rehabilitative prospects and very little was said about his antecedents. His criminal history, however, makes plain that he was before the courts as an 11 year old from which I would infer that he had a highly dysfunctional upbringing. The present armed robbery offences were particularly grave, made more so by their large number. At least one complainant has been seriously detrimentally affected. All that can be said in his favour is that he pleaded guilty and cooperated with the authorities. The offences, which were relatively unsophisticated, did not involve banks or financial institutions and did not yield significant profit. Bearing in mind the cumulative effect of the sentence to be imposed, I would order that he serve eight and a half years imprisonment. The nature and number of the armed robbery offences make it appropriate to declare those offences to be serious violent offences. This will mean that by his fulltime discharge date he will have served almost 10 and a half years imprisonment since his arrest on these charges. By the time he is eligible for parole on 19 July 2018 he will have served almost seven years imprisonment since his arrest. This is a salutary penalty and one which I consider gives proper recognition to the pertinent principles of personal and general deterrence whilst ensuring that any rehabilitative prospects of this still young man are hopefully enhanced whilst in custody and not completely crushed by a too distant parole eligibility date.

[49] I would grant the application for leave to appeal against sentence, allow the appeal, set aside the sentences imposed for the armed robbery offences, counts 1, 6, 8, 9, 11, 12, 14, 17, 18 and 21 on the 21 count indictment and count 1 on the two count indictment, and instead substitute sentences of eight and a half years imprisonment on all those counts. I would declare these offences to be serious violent offences. I would otherwise dismiss the appeal.

[50] ORDERS:

1. The application for leave to appeal against sentence is granted.

2. The appeal is allowed.

3. The sentences imposed on counts 1, 6, 8, 9, 11, 12, 14, 17, 18 and 21 on Indictment No. 973 of 2012 and count 1 on Indictment No. 948 of 2012, are set aside and instead sentences of eight and a half years imprisonment are substituted on all those counts.

4. These offences are declared to be serious violent offences.

5. The appeal is otherwise dismissed.

[51] **HOLMES JA:** I agree with the reasons of the President and the orders she proposes.

[52] **DOUGLAS J:** I also agree with the reasons of the President and the orders she proposes.