SUPREME COURT OF QUEENSLAND

CITATION:	*R v WAS* [2013] QCA 93
PARTIES:	**R** **v** **WAS** (applicant)
FILE NO/S:	CA No 186 of 2012 DC No 126 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	26 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2013
JUDGE:	Holmes and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant has leave to appeal against sentence.** **2. The appeal against sentence is allowed.** **3. The sentences imposed on 29 June 2012 are set aside, and in lieu thereof it is ordered that on each of the three counts the appellant is sentenced to six years' imprisonment, and that the date on which the appellant is eligible for parole is fixed at 28 February 2014.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – OTHER MATTERS – where the applicant was convicted on his own plea of guilty of two counts of rape and one count of administering a stupefying drug with intent to cause a criminal offence – where the learned primary judge sentenced the applicant on each count to seven years' imprisonment with a parole eligibility date fixed after serving two years and three months – where there was delay between the commission of the offences and the time of sentencing – whether the sentencing judge had applied the correct principles in sentencing the accused – whether the sentence was manifestly excessive *R v Gippo* [2012] QCA 232, cited *R v Gogouk* [2006] QCA 320, cited *R v HAK* [2008] QCA 30, cited

R v L; ex parte Attorney-General (Qld) [1996] 2 Qd R 63; [1995] QCA 444, cited
R v Pickup [2008] QCA 350, cited
R v Pryor [2007] QCA 232, cited
R v S; ex parte Attorney-General (Qld) [2003] QCA 361, cited

COUNSEL: T A Ryan for the applicant
B J Merrin for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Daubney J and the orders he proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Daubney J and with the reasons given by his Honour.

[3] **DAUBNEY J**: On 8 May 2012, the applicant was convicted, on his own pleas of guilty, of two counts of rape and one count of administering a stupefying drug with intent to cause a criminal offence. The offences were committed on 18 June 2006. On 29 June 2012, he was sentenced on each count to seven years' imprisonment, with a parole eligibility date fixed after serving two years and three months.

[4] The applicant has applied for leave to appeal against sentence. He contends that the sentence was manifestly excessive and, in particular, says that the learned sentencing judge failed to have proper regard to the lengthy delay between the commission of the offences and the time of sentencing.

Background

[5] The complainant was the applicant's former wife. They had been married in January 1998 and had two children. About two weeks before the commission of the offences, the applicant and the complainant decided to separate. The applicant continued to live in the family home. On the weekend of the offences, the applicant approached the complainant on several occasions to have sex with him. She refused. On the Sunday night of that weekend, 18 June 2006, the applicant cooked a meal for the complainant and their two children. The meal consisted of individual pies. He placed three crushed sleeping tablets into the complainant's pie – this medication had been kept in the home for legitimate medicinal purposes.

[6] The learned sentencing judge described the offending behaviour as follows:

> "On the last Sunday before you were to move out, you agreed to cook pies for her, yourself and the children for Sunday dinner. You put three Stilnox in the pie that you gave to your wife. The children were at home at the time. She became significantly disorientated. She recalls waking up in a bath, but has no recollection of how she got there. She said in fact that she used to habitually shower and not bath. She recalls being in her bedroom with you and of you raping her from behind, achieving penile penetration of her anus. She recalls some sort of implement, perhaps a finger, in her vagina.

> During the course of this conduct, she recalled you making obscene comments to her, such as, 'You're going to let other men fuck you like that, aren't you?', and, 'You like being fucked up the arse, don't you?' She later recalls also being vaginally penetrated by you in the kitchen of the home. She has some limited recall of the circumstances. She woke the next morning. Matters gradually came back to her, and during the course of that day she rang you. She said, 'I know what you did last night.' You replied to her, 'What are you on about?'"

[7] Despite counsel for the respondent in the hearing before this Court seeking to refer to all of the incidents which occurred in the bedroom as being a "transaction" which ought be viewed as comprising the offence of rape, it is clear enough that the offences for which the applicant was convicted were comprised of the following:

(a) The rape constituted by the anal penetration in the bedroom;

(b) The rape constituted by the vaginal penetration in the kitchen; and

(c) The administration of the sleeping tablets.

[8] The applicant and the complainant then separated for a period of some six months. They then had a reconciliation, during which they lived together for about 18 months. Their relationship finally ended in July 2008.

[9] A report by Mr Nick Smith, forensic psychologist, which was tendered at the sentence hearing, recorded:

> "30. Mr WAS admitted himself to The Prince Charles Hospital, in a suicidal state, that night after the index offence. He was kept in hospital for over a week, and then referred to Dr Moyle whom he saw for ongoing therapy and support, as well as a Psychologist, Dr Robert Dawson. Mr WAS was prescribed the anti-libidinal medication Androcur for one year in order to reduce hypersexuality, however he developed gynecomastia. He also described symptoms of anxiety and depression since he was charged, and had a further admission approximately three years after his first admission, in the context of the marriage ending."

[10] In 2009, the applicant commenced a relationship with another woman, whom he subsequently married. They have a young child together. The psychologist's conclusions included the following:

> "65. Mr WAS is a 38 year old, married, employed father of three. His two eldest sons are in the custody of his ex-wife, whilst he currently lives with his current wife and baby son on the Sunshine Coast. Mr WAS has a history of hypersexuality which may have it's [sic] origins in early exposure to abusive sexual behaviour within his family, and perpetuated by sexual experiences with his sister, a sexually exploitative older male, and then an 'adventurous' girlfriend when in his late teens. Mr WAS's high level of sexual desire led to difficulties in his first marriage, resulting in him agreeing to try Androcur as

a method of addressing the mismatch in sexual interest between he and his wife.

66. When Mr WAS's marriage appeared to be over, he attempted to prolong his departure, continuing to live in the same house and sleep in the same bed as his wife, whilst he was 'setting up' a newly rented unit. At the time of the offence, he claimed that he had missed the simple intimacy of cuddling his wife in bed, and that a desire for this on their last night together motivated his administering a stupefying substance to her. It is quite possible however that Mr WAS administered this substance with the intent of reducing her resistance to having sex with him.

67. If this is the case, then Mr WAS likely engaged in significant minimisation and justification of his actions at the time, in order to overcome any internal resistance to engaging in a behaviour that he knew was wrong. These cognitive distortions appear to have lasted only as long as it took for [the complainant] to remember what had happened and accuse him of raping her, as he immediately began to destabilise emotionally, becoming suicidal and presenting himself to hospital where he confessed to his actions of the night before. If indeed Mr WAS intended to have sex with his wife when he crushed a Stillnox [sic] tablet into her dinner, it would appear that he now recognises the wrongness of his actions and he appears to be very remorseful.

68. In terms of his own sexual functioning, Mr WAS described a reduction in his libido in recent years, quite possible due to his age, as well as a different attitude to sex, which he now describes having used as a coping strategy for dealing with stress and dysregulated mood, or other negative emotional states in the past. He reported now going surfing as a mood management strategy, in the place of seeking sexual interactions. He also reported having a stronger friendship with his current wife, Janet, and that he feels more able to be himself.

69. In terms of his risk of re-offending, this appears to be Low [sic]. The offence does not appear to be part of a larger pattern of sexual violence; there is a current absence of attitudes supporting or condoning sexual offending; there is also an absence of justification or avoiding taking responsibility for his behaviour; and there does not appear to be any significant or recent pattern of general criminality or anti-social attitudes. It would appear that the offence was situational rather than motivated by internal pro-offending beliefs; however if further evidence were to come to light of more extensive sexually abusive or violent behaviour, then this assessment would need to be revised."

[11] The applicant had a dated (1994 and 1995) criminal history for minor drug and driving offences. He had no history of committing sexual or violent offences, nor had he previously been sentenced to a term of imprisonment.

[12] The applicant was 32 years old at the time of the offending, and 38 years old when sentenced. He was in stable employment as the store manager for a kitchen and bathroom company.

[13] An indictment charging the applicant with one count of stupefying to commit an indictable offence and four counts of rape was presented on 30 January 2012. At that time, the matter was listed for trial in the week commencing 27 February 2012. The matter was reviewed on 1 February 2012, at which time the trial was delisted and the matter was listed for sentence on 30 April 2012.

[14] The matter was again reviewed on 3 April 2012. The applicant's representatives below clearly informed the Court that the matter would not be proceeding as a plea of guilty, because the sentence hearing which had been scheduled for 30 April 2012 was delisted and the matter was listed for trial in the week commencing 28 May 2012. A pre-trial hearing was listed for 30 April 2012, and directions were made for the exchange of submissions.

[15] When the matter came before the Court on 30 April 2012, however, the Court was informed that the matter would be proceeding to sentence. It was listed for sentence on 29 June, and for arraignment on 8 May 2012. On 8 May 2012, it was ordered that the trial for the week commencing 28 May 2012 be delisted. The applicant was arraigned on the one count of administering a stupefying drug to commit an indictable offence and two counts of rape. He pleaded guilty to those counts, and the allocutus was administered. The Crown then entered a nolle prosequi in respect of the other two counts of rape.

[16] The applicant then came before the learned sentencing judge on 29 June 2012 for sentence.

[17] The explanation given to the learned sentencing judge by counsel who appeared for the applicant below was that after the matter was originally listed for sentence, counsel came into possession of psychiatric evidence which necessitated further inquiries being made. This, according to the explanation, had the consequence of the applicant changing his initial plea from guilty to not guilty and the trial for May 2012 being listed. After further investigations on behalf of the applicant, the necessity for a pre-trial hearing fell away, and the applicant again indicated an intention to plead guilty at least in respect of the two counts of rape and one count of administering a stupefying substance. This history was of some relevance in the hearing before the learned sentencing judge, because the complainant's victim impact statement included specific reference to the fact that the applicant's decision "to change his plea on more than one occasion has also been an additional stressor, and has hampered my ability to continue on with my life".

[18] The victim impact statement speaks to the very significant psychological impact which the incident had on the complainant. It includes details of the counselling which the complainant commenced within a few days of the offences having been committed, the necessity for the complainant to take anti-depressant medication, and the significant effect that the incident has had on her study and personal life. For example, she said:

> "At times dealing with this rape was incredibly difficult, and as a result I began to self-harm and to drink heavily when my children were not with me. It's only been through intensive counselling, medication, self-care, and personal reflection that I was able to stop this sort of negative behaviour."

[19] The complainant concluded her victim impact statement, which was dated 20 June 2012, by saying:

> "To this day I have flashbacks, depression, anxiety, insomnia, fibromyalgia, nightmares, and difficulties in trusting people, particularly men. I cannot sleep without my door locked and have trouble feeling safe, even in my own home. I also have ongoing financial costs related to counselling and medication. Although I've worked extremely hard to put a lot of my past behind me, I have long-lasting emotional scars which I believe will never truly go away."

The sentence below

[20] After setting out details of the applicant's background and of the offending conduct, the learned sentencing judge expressed concern about the way in which the matter had originally been listed for sentence, but was then delisted and listed for trial. His Honour said that it seemed that the applicant's position at that stage was that the applicant may have wished to take advantage of a possible defence if that had arisen on review of psychiatric records, and said that this showed, in his Honour's view, something "less than fulsome contrition for your offending, as one might have expected, in view of your admission to the hospital".

[21] The learned sentencing judge said that these concerns about lack of contrition were somewhat heightened on a review of the psychologist's report. His Honour considered that the facts as set out in the psychologist's report strongly minimised the applicant's misconduct in the events of June 2006. His Honour viewed this understatement of matters to the psychologist as being conduct by which the applicant sought to minimise his offending conduct, but reflected an attitude which did not sit well with his professed remorse and contrition.

[22] The learned sentencing judge noted the statement by the psychologist that "it is quite possible, however, that Mr WAS administered this substance with the intent of reducing her resistance to having sex with him". His Honour found that this was in fact the case.

[23] His Honour referred to concerns that he held in the context of taking into account the fact that the applicant had pleaded guilty. He noted the saving in time and expense to the State, but also observed that "the usual contrition associated with such a plea is, as I say, in my view, less than fulsome". His Honour referred to the statements made by the complainant in her victim impact statement about the effect of the change of plea on her.

[24] The learned sentencing judge referred to the complainant's psychiatric injuries as "multi-dimensional", and said that the applicant's conduct would almost certainly cause very significant distress to anyone, particularly to someone going through a marital breakdown. His Honour said to the applicant: "In my view, your conduct was appalling."

[25] His Honour continued:

> "As I say, balanced against that is the fact that you have addressed the issues that seem to have somewhat confused your thinking, associated with what was said to be increased libido. For that extensive attempt at rehabilitation, you are to be given some credit. So, too, the delay in bringing this matter. The complaint to police was only made some five years after the offence was committed. In that time, you and she attempted a reconciliation. When that failed, you've moved on. You remarried. As I said your new wife and you have a young child, and that's a factor also to be taken into account, because the Court recognises that delay can bring about particularly [sic] hardship to people.
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> So, overall, those things perhaps balance each other out. There should be a reduction, in my view, in the amount of imprisonment you should serve before you are eligible for parole on account of those matters in your favour, but balanced against that is, as I said, my view that the contrition in your case has been somewhat less than fulsome."

[26] His Honour referred to cases to which he had been referred which suggested a range of six to eight years' imprisonment. His Honour particularly mentioned *R v Pryor*[1] and *R v HAK*[2]. He said that cases at the upper end of the range related to circumstances of rape, often where there had been a trial, and where there had been particularly brutal violence, while cases at about the middle of the range apply where there might be threats and somewhat lesser violence.

[27] The learned sentencing judge concluded:

> "In my view, your use of medication to overcome your wife's determination not to engage in sex can be compared with the use of threats or violence to overcome resistance. It's, as I say, for that reason that I think you gave your wife these stupefying drugs. Without them, almost certainly she would never have consented to your wishes. In my view, therefore, a [sic] appropriate sentence in this case is one of seven years' imprisonment."

[28] His Honour then turned to the question of parole eligibility. He referred to *R v Pickup*[3], noting that in that case the parole eligibility date had been set at a point halfway through a six year sentence. His Honour said he proposed allowing a parole release date at a significantly lesser proportional period, and set the parole eligibility date after the applicant had served two years and three months.

Discussion

[29] Counsel for the applicant submitted:

(a) The sentencing range of six to eight years adopted by the learned sentencing judge was too high;

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1 [2007] QCA 32.
2 [2008] QCA 30.
3 [2008] QCA 350.

(b) The offending, while serious, did not involve physical violence. This factor, in combination with the lack of relevant prior convictions, meant that the appropriate sentencing range did not extend beyond six years;

(c) His Honour did not give sufficient weight either to the fact of the 18 month reconciliation or to the applicant's rehabilitation, including his voluntary participation in psychiatric treatment;

(d) The learned sentencing judge's scepticism of the applicant's remorse led the judge to arrive at an excessive sentencing range;

(e) His Honour failed to take proper account of the fact that six years had elapsed since the offences were committed, and that in the meantime the applicant's life had changed considerably and he had demonstrated excellent prospects of rehabilitation.

[30] It was contended for the applicant, as it was below, that an appropriate head sentence would be five years' imprisonment with the sentence suspended after 18 months.

[31] The applicant referred the Court to *R v Pickup*[4], *R v Pryor*[5], *R v HAK*[6], and *R v Gippo*[7].

[32] Counsel for the respondent highlighted the serious aspects of the applicant's offending, pointing particularly to the fact that the applicant's conduct in using the sleeping tablets on the complainant was clearly premeditated. It was submitted that it was open to find that the applicant's planning and use of the drugs in order to render the complainant susceptible to the rapes was as serious as the use of violence on her.

[33] It was also submitted that his Honour was entitled to find that there were limits to the applicant's remorse.

[34] Counsel for the respondent referred the Court to *R v Gogouk*[8] and *R v S; ex parte Attorney-General (Qld)*[9].

[35] In *R v Pickup*, the applicant had pleaded guilty to three counts of rape. He had been living in a de facto relationship with the 20 year old complainant. The complainant had told the applicant that she no longer wished to be with him and commenced sleeping in a spare bedroom. When the complainant returned home from work one afternoon, she noticed that the applicant had been drinking. He offered her money for oral sex and anal intercourse. She refused. After she had showered and returned to her bedroom to get dressed, the applicant pushed her face down onto her bed and lay on top of her. He then left the room, and the complainant dressed herself and went into the lounge room where the applicant started to harangue her about the difficulties in their relationship. He later demanded sex from her, and the complainant repeatedly told him that she did not wish to participate. Despite these protests, the applicant lay on top of her and had vaginal intercourse with her. This

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4 [2008] QCA 350.
5 [2007] QCA 232.
6 [2008] QCA 30.
7 [2012] QCA 232.
8 [2006] QCA 320.
9 [2003] QCA 361.

was one count of rape. Shortly afterwards, the applicant pushed the complainant face down onto a bed, placed a pillow over the back of her head, and committed anal intercourse on her. When the complainant struggled and cried out in pain, the applicant told her to "shut up" and that if she stopped screaming and crying he would not replace the pillow. To bring her ordeal to an end the complainant told the applicant to "hurry up". To escape the pain of the anal intercourse, the complainant suggested that she fellate the applicant instead of his persisting in the anal intercourse. The applicant demanded that the complainant persist with the fellatio under threat that if she did not he would recommence anal intercourse. The conduct constituting the second count of rape concluded with the applicant ejaculating into her mouth. The third count of rape involved a prolonged incident in which the applicant had vaginal intercourse with the complainant while she was extremely distressed. The complainant made an early complaint of the offending. Shortly after the event, the applicant sent the complainant a text message acknowledging that his conduct was not okay, and that he was really sorry that it happened. His text message said: "There's no excuse and my reasoning for it doesn't warrant the crime."

[36] The offending in that case occurred in October 2005. In November 2003, the applicant had been sentenced to a term of imprisonment of three years, suspended after serving 166 days, for committing a malicious act with intent, wilful damage and common assault. On 3 May 2005, consequent upon a breach of the suspended sentence, it was ordered that the term of the suspended sentence be extended for six months to expire on 26 April 2007. It was further extended for a further two months on 27 December 2006. The applicant was sentenced to five years' imprisonment for each count of rape. He was also ordered to serve 12 months of the remaining term of nearly two and a half years of the suspended sentence. Each of the five year terms was ordered to be served concurrently with each other but cumulatively upon the 12 month term of imprisonment. The sentencing judge fixed a parole eligibility date at a point halfway through the total sentence of six years. The applicant sought, *inter alia*, leave to appeal against sentence.

[37] In respect of the rape sentences, Fraser JA, with whom McMurdo P and McMeekin J agreed, said that they were properly characterised by the sentencing judge as serious, despite the absence of more serious injury. At [30], Fraser JA said:

> "The applicant subjected the complainant to a degrading and intimidating experience. His offending was protracted and at times extremely painful and distressing to the complainant. The applicant callously inflicted that pain and distress. The complainant's victim impact statement revealed that she continued to experience emotional and psychological difficulties as a result of the applicant's offending. That was a predictable consequence of the applicant's offences, which were calculated to degrade and demonstrate the applicant's physical and emotional domination of the complainant."

[38] His Honour further noted the further aggravating feature of the rapes having been committed during the operational period of a suspended sentence.

[39] Fraser JA noted that the five year sentence for the rape offences was within the range submitted by the applicant's counsel, and that the order that that sentence be served cumulatively upon only one year of the partially suspended sentence

produced an overall sentence of six years, which was the overall sentence submitted to be appropriate by the applicant's counsel at sentence. Fraser JA said:

> "[34] The sentencing judge did not adjust what was otherwise the applicant's statutory entitlement to be considered for parole at the mid-point of the overall sentence. However in determining upon the overall sentence (which included only the moderate period of one years imprisonment in respect of the outstanding balance of the partly suspended sentence) his Honour expressly did give the applicant credit for the matters in his favour to which I have referred, including his plea of guilty."

[40] Fraser JA considered that the sentences imposed in that case were within the range suggested by previous decisions of the Court, and that it had not been demonstrated that the sentence was excessive.

[41] The present case has a serious element which was not present in *R v Pickup*, namely the use by the present applicant of the sleeping tablets to enable him to take sexual advantage of the complainant.

[42] *R v Pryor* was a case in which the appellant was convicted after trial of rape and assault occasioning bodily harm. He appealed against conviction and sought leave to appeal against sentence. The appellant and complainant in that case had been in a sexual relationship for a month or so, having met six months previously. One evening, the appellant violently assaulted the complainant, leaving her with black eyes and split lips. Later the complainant awoke to find the appellant had removed a tampon from her vagina. He then raped her. The complainant made a timely fresh complaint in respect of the rape. The appellant was sentenced to a term of seven years' imprisonment for the rape, with a serious violent offence declaration being made. As was noted by de Jersey CJ, with whom Williams and Jerrard JJA agreed, the application for leave to appeal against sentence in that case fastened on the addition of the serious violent offence declaration. In the circumstances of that particular case, it was considered that the making of the declaration rendered the seven year term imposed for the rape manifestly excessive, but removal of the declaration left the seven year term appropriate. It was ordered that the serious violent offence declaration be set aside, but the sentences imposed below were otherwise confirmed.

[43] In my view, the offending in *R v Pryor* was less serious than that involved in the present case, but note that the seven year sentence was imposed after a trial.

[44] In *R v HAK*, the appellant was convicted after trial of one count of burglary, one count of indecent assault with the circumstance of aggravation and two counts of rape. He was acquitted of a third count of rape. He was sentenced to eight years' imprisonment in respect of one of the rape counts and three years' imprisonment concurrently on the remaining counts. He appealed against conviction and sought leave to appeal against sentence. The subject incident occurred on 8 March 2006. The complainant knew the appellant, who had for several years been the complainant's sister's de facto husband. The appellant visited the complainant. He brought a number of cans of bourbon and cola with him, some of which he drank. He asked if he could have a shower. Later he entered the complainant's bedroom. When she came into the bedroom he told her, in a manner which she found

threatening, to take her pants off and get onto the bed. The complainant complied. The appellant opened the complainant's legs, licked her vagina (the indecent assault count), put his fingers in her vagina (the first count of rape), inserted his penis into her anus (the rape count of which he was acquitted, after a direction on accident) and penetrated her vagina (the remaining count of rape). After the incident, the appellant asked the complainant for $20, which she gave him, told her not to tell her sister, and left the unit.

[45] After examining the facts of the case in further detail, and referring to comparable cases, Holmes JA, with whom Muir JA and Mackenzie AJA agreed, said:

> "[37] In the present case, the offences were committed on a complainant of some physical and mental frailty (apart [from] her psychiatric condition, she suffered from cardiac and respiratory problems and diabetes). On the other hand, the appellant was on her premises by permission; it was not a case of surreptitious or forced entry by an unknown intruder at night. Although the actual penetration caused some injury to the genital area, there was no other violence or force used during the sexual assault, and no weapon was involved. The appellant had no history of sexual offences, or apart from a single common assault, of offences of violence. On the whole, it seems to me that the case lacks the more serious aggravating features which would warrant a sentence of eight years imprisonment."

[46] The Court therefore set aside the head sentence of eight years which had been imposed below, and substituted a sentence of seven years' imprisonment.

[47] I consider the rapes in the present case to be at least as serious as those in *R v HAK* (which was a sentence after trial), but observe that the overall offending in the present case was more egregious because of the use of the sleeping tablets to subdue the complainant.

[48] In *R v Gippo*, the appellant was convicted after trial of three counts of rape, and acquitted of one count of unlawful deprivation of liberty. On two of the counts of rape he was sentenced to four years' imprisonment, and on the third count of rape he was sentenced to six and a half years' imprisonment. It was ordered that he be eligible for parole after having served three years. He appealed against conviction and sought leave to appeal against sentence. The appellant and the complainant had been in a sexual relationship and, while they did not live together, had two young children. The complainant described their relationship as one in which the appellant was aggressive, violent and controlling. She determined to end the relationship, and applied for a domestic violence order in late October 2008. The first rape occurred in February 2009, seven days after the birth of their younger child, when the appellant forced the complainant to fellate him. The second rape occurred later on the same occasion, when the appellant again forced the complainant to fellate him. The third incident occurred about a month later, when the appellant attended at the complainant's home. After asking her for sex, the appellant held the complainant down on the bed, flipped her over so that she was lying on her stomach, held her down, removed her underwear, and put his penis inside her vagina. This was the third count of rape on which the appellant was convicted. The complainant made early complaint of the rape, reporting the incident to her brother and sister in law the following day.

[49] In relation to the application for leave to appeal against sentence in that case, it was contended that the head sentence of six and a half years with parole eligibility after three years was manifestly excessive. The appellant in that case was aged between 44 and 45 at the time of the offences and was 47 when sentenced. He had a criminal history between 1992 and 2009, including some for violence, and a conviction for attempted rape in 1992. The appellant had spent 163 days in presentence custody which could not be the subject of a declaration as time served under the sentence.

[50] McMurdo P, with whom Gotterson JA and Douglas J agreed, considered that the appellant's offending was serious and persistent and had had significant detrimental consequences for the complainant. Her Honour considered in the circumstances of that case, that a head sentence in the range of six to seven years' imprisonment was appropriate, with a reduction to five and half to six and a half years' imprisonment to reflect the presentence custody in respect of which a declaration as time served could not be made. The Court held that the sentence imposed by the sentencing judge in that case was within the appropriate range.

[51] *R v Gogouk* was quite a different case to the present. In that case, a jury found the applicant guilty of rape, and he was sentenced to six years and seven months' imprisonment with a declaration that he had committed a serious violent offence. The offending in that case occurred late one evening in the Queen Street Mall. The complainant had fallen asleep on a bench, and when she woke up the applicant was vaginally raping her. The applicant had been born in Sudan and was aged about 26 at the time of the offending. His parents had both been killed in the civil war in Sudan, and the applicant grew up mostly as an orphan. He suffered physical abuse and deprivation from an early age and was witness to terrible violence. He was first recruited into an army at the age of 12 and over the ensuing years he worked as a labourer until he was captured and tried and convicted as a traitor and sentenced to death. He subsequently escaped before coming to Australia as a refugee at the age of 25. After arriving in Australia, he lived in hostels and was unable to find work. He was illiterate, had limited English skills, had no occupational skills, and abused drugs and alcohol. The sentencing judge in that matter noted that the applicant had served some 17 months in presentence custody which could not be declared time served and reduced what otherwise would have been an eight year term of imprisonment by that period of 17 months, ordering imprisonment for six years and seven months with a serious violent offence declaration. The question for the Court of Appeal was whether an effective head sentence of eight years with a serious violent offence declaration was manifestly excessive. Margaret Wilson J, with whom McPherson and Holmes JJA agreed, observed that the applicant's crime was opportunistic and brazen. Her Honour said that, abhorrent as the applicant's crime was, it did not involve physical violence, actual or threatened, apart from the rape itself. Her Honour said that, on the facts of that case, she could see no warrant for imposing a jail sentence of eight years together with a serious violent offender declaration. Leave to appeal against sentence was granted, and a sentence was substituted which had the effect of the applicant serving eight years (including the undeclarable presentence custody) and being eligible for parole after serving half of that eight years (i.e. including the 17 months in custody before the original sentence was imposed). There was no declaration of a serious violent offence.

[52] *R v S; ex parte Attorney-General (Qld)* was an Attorney-General's appeal against sentence. The respondent had pleaded guilty to one count of procuring a sexual act by coercion, one count of entering a dwelling with intent with a circumstance of

aggravation, and one count of rape. He was sentenced to an effective term of six years' imprisonment with a recommendation for post-prison community-based release after two years. The Attorney-General appealed, contending that the sentence was manifestly inadequate because it failed to adequately reflect the gravity of the offence. The complainant in that case was the respondent's 23 year old de facto wife and the mother of their three young children. The respondent had a short criminal history involving some relatively minor drug matters and a previous conviction for assault occasioning bodily harm. The de facto relationship between the complainant and the respondent had ceased after six years, and the respondent was subject to a domestic violence order. His efforts to renew the relationship were unsuccessful. He visited the complainant regularly to see their three children and would often stay at her home for some hours. On the evening in question, he arrived for such a visit, bringing with him a tub of ice cream and a box of ice cream cones. The complainant and the three children all had an ice cream cone. The complainant and the respondent also smoked some marijuana. At about 6 pm, the respondent made more ice cream cones for the children and the complainant. When she neared the end of her ice cream cone, the complainant tasted something bitter and crunchy and threw the remainder of it into the bin. The ice cream cone was later found to contain a hypnotic sedative. Later that night, after the children had been put to bed, the respondent came into the complainant's bedroom and told her he wanted to make love to her one more time as he was leaving town. Despite her protests, he forced himself on her and finally succeeded in achieving vaginal penetration. He told the complainant that he had contracted a sexually transmitted disease and that she should now go to a doctor. The complainant made an immediate report to the police, who attended the following day.

[53] In the course of her reasons for judgment in that case, McMurdo P, with whom Jerrard JA and Philippides J agreed, noted that a plea of guilty in offences of this type is a significant mitigating factor. It was held, however, that in that case, the respondent had benefitted for the mitigating circumstances twice – first, by a reduction of the head sentence and second in an early recommendation for post-prison community-based release, with the effect that the sentence ultimately imposed was, because of the very serious aspects of it, manifestly inadequate. It was considered that this was so, despite the plea of guilty and promising prospects of rehabilitation. The Court allowed the appeal against sentence and substituted a sentence of seven years' imprisonment with a recommendation for post-prison community-based release after two and a half years.

[54] In terms of comparable sentences, the decision to which I have just referred, in my respectful view, is most apposite to the circumstances of the present case. The applicant's criminal conduct was, to adopt the word used by the learned sentencing judge, appalling. The fact that the applicant used stupefying drugs in order to abuse his then wife sexually was a circumstance which not only spoke to his premeditation and pre-planning, but added to the seriousness of the rapes to which he subjected her. It is hardly surprising that the complainant has suffered serious emotional and psychological consequences. In those circumstances, I do not consider that it can be said that a head sentence of seven years' imprisonment was out of the appropriate range as a starting point in the present case.

[55] There was, however, a particular mitigating factor in the present case, namely the considerable period of time which had elapsed between the offending and the matter being reported by the complainant, with the applicant then being charged and ultimately pleading guilty.

[56] In *R v L; ex parte Attorney-General*[10], this Court said:

> "It is difficult to see why lapse of time between commission of an offence and sentence should be a mitigating factor in sentence unless that delay has resulted in some unfairness to the offender. There are two obvious cases in which that will be so and in which, consequently, it has been said that that unfairness should mitigate the sentence which should otherwise be imposed."

[57] The Court then went on to describe the second of those circumstances as follows:

> "The second is where the time between commission of the offence and sentence is sufficient to enable the Court to see that the offender has become rehabilitated or that the rehabilitation process has made good progress."

[58] As has already been noted, some six years elapsed in the present case between the offending and the date of sentence. During that time, the applicant and complainant were reconciled and lived together again for some 18 months. After their final separation, the applicant formed a new relationship, has married and has a new family. Importantly, he voluntarily underwent extensive psychiatric treatment, which included medication, for the purposes of addressing his sexually excessive behaviour. Whilst the learned sentencing judge referred to and acknowledged these matters, it is my respectful view that insufficient weight was accorded to them specifically in mitigation.

[59] In all the circumstances, when one has regard specifically to those mitigating factors, I consider that the sentence of seven years' imprisonment was excessive. Whilst I consider that seven years' imprisonment was an appropriate starting point for the purposes of the sentencing exercise, the sentence should have been moderated specifically to take account of the mitigating factors of delay and rehabilitation to which I have just referred. In my view, an appropriate sentence for each of the offences in the present case would be one of six years' imprisonment with the applicant's parole eligibility date to be set after having served 20 months (i.e. 20 months from his imprisonment on 29 June 2012). The setting of the parole eligibility date at that point gives adequate recognition to his pleas of guilty and the other mitigating factors, including his lack of any relevant prior convictions.

[60] Accordingly, I would order:

1. that the applicant have leave to appeal against sentence.

2. that the appeal against sentence be allowed.

3. that the sentences imposed on 29 June 2012 be set aside, and in lieu thereof it be ordered that on each of the three counts the applicant be sentenced to six years' imprisonment, and that the date on which the applicant is eligible for parole be fixed at 28 February 2014.

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[10] [1996] 2 Qd R 63 at 66.