SUPREME COURT OF QUEENSLAND

CITATION:	*R v Turnbull* [2013] QCA 374
PARTIES:	**R** **v** **TURNBULL, Gary Une** (applicant)
FILE NO:	CA No 52 of 2013 DC No 3394 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2013
JUDGES:	Gotterson and Morrison JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the application for leave to appeal against sentence.** **2. Allow the appeal against sentence.** **3. Set aside the sentences of 16 years, 20 years and 20 years' imprisonment imposed on counts 5, 8 and 10 respectively on 7 June 2002 and substitute sentences of 10 years, 13 years and 13 years on counts 5, 8 and 10 respectively.** **4. Otherwise confirm the orders then made.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where applicant granted extension of time in which to apply for leave to appeal against sentence – where applicant pleaded guilty to ten count indictment – where applicant sentenced to 16 years, 20 years and 20 years for three counts of rape to be served concurrently – whether sentence manifestly excessive – whether learned sentencing judge gave sufficient consideration to the plea of guilty *Penalties and Sentences Act* 1992 (Qld), s 13(1)

R v Atwell [2000] QCA 266, cited
R v Barclay [1999] QCA 457, cited
R v Breckenridge [1966] Qd R 189, cited
R v Buckley [2008] QCA 45, considered
R v Burley; ex parte Attorney-General (Qld) [1998] QCA 98, considered
R v CAJ [2009] QCA 37, cited
R v Colless [2011] 2 Qd R 421; [2010] QCA 26, considered
R v Corrigan [1994] 2 Qd R 415; [1993] QCA 417, cited
R v Dargin [2013] QCA 20, considered
R v Delgado-Guerra; ex parte Attorney-General (Qld) [2002] 2 Qd R 384; [2001] QCA 266, cited
R v Edwards [2004] QCA 20, considered
R v Hussein & Hussein [2006] QCA 411, cited
R v King [1995] QCA 77, cited
R v Mahony & Shenfield [2012] QCA 366, cited
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Robinson [2007] QCA 349, considered
R v Spoehr [2003] QCA 412, cited
R v Tomlin [1995] QCA 177, cited
R v Wark [2008] QCA 172, considered
R v Watcho (1998) 104 A Crim R 300; [1998] QCA 331, cited

COUNSEL: A M Nelson for the applicant (pro bono)
G Cummings for the respondent

SOLICITORS: Alexander Law for the applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

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

[2] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Applegarth J. I agree with what his Honour has said, and the orders proposed.

[3] **APPLEGARTH J**: On 19 June 2013 the Court, constituted by the Chief Justice, Gotterson JA and Mullins J, granted an extension of time to apply for leave to appeal against three sentences for rape on the ground that they are manifestly excessive. The three sentences and other sentences were imposed in the District Court at Brisbane on 7 June 2002 after the applicant pleaded guilty to each charge on a ten count indictment. The three sentences were imprisonment for 16 years (count 5), 20 years (count 8) and 20 years (count 10).

[4] The applicant's case is that, given the circumstances of his offending and his age at the time the offences were committed, the starting point or range for the offending ought to have been 15 to 16 years. His timely pleas of guilty should have been reflected in a discount reducing the head sentence to 12 to 13 years. Although the learned sentencing judge referred to the applicant's pleas of guilty it is not apparent what discount was given for them.

[5] The applicant has now served substantially more than 12 years' imprisonment (including a total of 358 days pre-sentence custody for the period from 15 June 2001 to 7 June 2002). This means that save for counts 5, 8 and 10 he has fully served the sentences imposed for each count on the indictment. It is necessary, however, to refer to these concurrent sentences because the course of his offending conduct and its escalating nature were taken into account in arriving at the head sentences of 20 years. The ten counts on the indictment to which he pleaded guilty relate to four episodes and four different victims. It is convenient to set them out in a table:

Count	Date of Offence	Nature of Offence	Sentence
1	6 October 1998	Sexual assault	5 years
2	6 October 1998	Assault occasioning bodily harm	3 years
3	21 January 2001	Assault with intent to rape	8 years
4	21 January 2001	Attempted rape	8 years
5	11 May 2001	Rape	16 years
6	11 May 2001	Robbery with aggravation	12 years
7	15 June 2001	Assault with intent to rape	12 years
8	15 June 2001	Rape	20 years
9	15 June 2001	Sexual assault with aggravation	12 years
10	15 June 2001	Rape	20 years

Counts 1 and 2 : 6 October 1998

[6] Counts 1 and 2 occurred at a railway station at approximately 6 pm when the applicant approached and followed a woman who had alighted from the train. He grabbed her around the throat. There was a struggle in which her necklace broke and her clothing was torn. During this the applicant came in to contact with her breast. The applicant was scared off by her screams and ran away. He was chased by two men who caught up with him, a struggle ensued and the applicant got away. The applicant caught a taxi home and police used this to trace him. He was subsequently arrested and granted bail, but absconded by fleeing interstate.

Counts 3 and 4 : 21 January 2001

[7] Counts 3 and 4 occurred at approximately 4.45 am when the applicant followed a woman into a suburban shopping centre. The applicant grabbed her around the neck with considerable force making it difficult for her to breathe. He pushed her behind a tank and made her remove the bottom half of her clothing and bend over. When a couple walked by the woman called for help and the applicant ran away.

Counts 5 and 6 : 11 May 2001

[8] Counts 5 and 6 occurred at approximately 7.45 pm when the applicant followed a woman who was walking home from work. He hit her on the back of the head knocking her down and took her handbag. The woman followed him to a school tennis court and demanded the return of her bag. The applicant hit her in the eye, knocked her down and threatened to kill her. The applicant forced her to another area of the school where he hit her head against a wall, forced her to masturbate him and raped her. His bloodied victim was concussed. Following the attack the applicant rifled through her handbag looking for money.

Counts 7, 8, 9 and 10: 15 June 2001

[9] Counts 7 to 10 occurred at about 6 am when the applicant followed a woman from the Roma Street Transit Centre towards the Barracks area at Petrie Terrace. He

grabbed her from behind pressing a rounded piece of wood against her throat. He used the piece of wood to repeatedly strike her on the head fracturing her jaw. He hit her on the thigh and pushed the end of the piece of wood into her stomach. He dragged her to some bushes where he removed her clothing and unsuccessfully attempted to penetrate her with his penis. He sucked on the complainant's breast and forced her to masturbate herself and him. He forced her to fellate him, licked her genitals and then penetrated her with his penis. Two women saw the applicant hitting the woman with the piece of wood and notified police. The applicant was chased and caught.

Applicant's antecedents

[10] The applicant was born in 1974, so was 24 when he first offended in 1998 and 26 or 27 at the time of the offending in 2001. He was raised by his mother and could not recall ever having any contact with his father. He left school during Year 12 and gained employment. He left his home in Charleville at the age of 18 and came to Brisbane, after which he worked mainly as a DJ in nightclubs. He started using illicit drugs at 17.

[11] He established a close relationship with a woman with whom he lived for two and a half years. They had a son. However, the relationship ended in 1999 and the applicant was unaware of the whereabouts of his ex-girlfriend or son.

[12] The applicant had a minor criminal record including one count of unlawful use of a motor vehicle at aged 17. Before these offences he had no history of sexual or violent offending.

The course of proceedings

[13] There were full hand-up committal hearings in August and November 2001. In December 2001 the applicant's legal representatives indicated that a plea was likely. The matter was listed as a plea and the prosecution accepted that his guilty pleas were timely. That said, the prosecution submitted that there was overwhelming evidence of guilt, including DNA evidence.

Submissions upon sentence

[14] The prosecutor submitted that the extent of the applicant's criminal conduct and its psychological impact on his victims placed it in "the worst category of rapes". It was said to warrant a sentence in the vicinity of 20 years to life imprisonment, notwithstanding the pleas of guilt and the applicant's lack of relevant criminal history. The prosecutor submitted that the dominant feature in the sentence "has to be punishment, deterrence and protection of the community." Reference was made to two cases of serial rapists: *R v Burley; ex parte Attorney-General (Qld)*[1] and *R v Atwell*.[2]

[15] Counsel for the respondent upon the sentence distinguished those cases as being more serious and submitted that the applicant had better prospects of rehabilitation than the offender in *Burley*. The last two incidents were said to be the most significant ones and the ultimate submission was that the head sentence would fall within the bounds of 15 to 20 years, and the applicant was entitled to credit for his guilty pleas.

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1 [1998] QCA 98.

2 [2000] QCA 266.

Sentencing remarks

[16] The learned sentencing judge said that he took into account the applicant's timely plea of guilty, but did not say how he did so. He mentioned that the victims had been saved the trauma of giving evidence in court about the offences.

[17] The applicant was described as a "dangerous sexual predator," and the judge expressed the opinion that there was a substantial risk of the applicant committing similar offences on release from prison. He continued:

> "It is not necessary to say that these offences are of the worst type. It is sufficient to say that they are very serious offences and there is an escalating pattern of violence and more harm may have been inflicted but for the fact that your activities were interrupted on a number of occasions."

Before imposing concurrent sentences the judge concluded that important factors "must be retribution, deterrence and the protection of society from [a] person who has shown a dangerous propensity to violence." The applicant was declared to be a serious violent offender.

Applicant's submissions

[18] The applicant submits that the appropriate starting point or range for the offending ought to have been 15 to 16 years, based upon what was said in *R v Robinson*.[3] In that case Keane JA (with whom Holmes JA and Jones J agreed) stated:

> "The decision of this Court in *R v Edwards* [2004] QCA 20 provides support for the view that a mature adult offender, with a history of serious sexual violence which has resulted in lengthy terms of imprisonment, who is found guilty after a trial of multiple rapes must expect a sentence in the range between 15 and 20 years in order to protect the community from him."[4]

Counsel for the applicant emphasises that he was not a mature offender, and had not previously been before a court for any violent offending. He stood to be sentenced on a timely, even early, plea of guilty. Although the plea of guilty was mentioned it did not result in any apparent discount of the sentence that would otherwise have been imposed.

[19] Reliance is placed upon the observations of members of this Court in *R v Wark*.[5] In that case McMurdo P stated:

> "Early pleas of guilty by way of an *ex officio* indictment are an important mitigating factor, especially in cases of this sort. The complainant has been saved the further trauma of giving evidence, both at committal and at trial. The community has been saved very considerable expense. Early *ex officio* pleas of guilty are also encouraging signs that offenders, in admitting their wrongdoing, are taking the first steps towards rehabilitation."[6]

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3 [2007] QCA 349 at [27].
4 [2007] QCA 349 at [27].
5 [2008] QCA 172.
6 [2008] QCA 172 at [6].

After considering a number of comparable cases the President concluded:

> "A discount in this case of but two or three years on a 15 or 16 year sentence does not provide sufficient recognition of, or encouragement to, offenders like the appellant to admit their wrongdoing at an early stage by pleading guilty to an *ex officio* indictment. This was an appealable error warranting this Court's intervention."[7]

The other members of the Court also concluded that a reduction of the head sentence from what would have been merited, in the range of 15 to 16 years had the matter gone to trial, to 13 years did not make adequate allowance for the plea of guilty.[8]

[20] The applicant submits that the initial formulation of the head sentence should have been at the lower end of the range in *Robinson* and that there should have been an appropriate discount for the early plea of guilty, reducing the head sentence to one of 12 or 13 years.

Respondent's submissions

[21] The respondent submits that there is no apparent error in the remarks of the sentencing judge. The sentences imposed are said to be within the appropriate range, having regard to the total criminality of the applicant's offending.

[22] Emphasis was placed in oral submissions upon the escalating nature of the offending from what was described as "a fairly low level, clumsy effort" in 1998 to the violence associated with the June 2001 episode. Counsel for the respondent questioned whether the appropriate range was between 15 and 20 years, as indicated in *Robinson*. *Burley* was said to be comparable, despite the offender in that case being assessed as presenting a high risk of re-offending.

[23] Counsel for the respondent did not suggest that no discount was given for the applicant's pleas of guilty, and acknowledged that if appropriate account had been taken of them then the sentencing judge's starting point must have been 25 years or life imprisonment. Counsel could not point to any case where sentences of 25 years or life had been imposed for similar offending, but argued that the circumstances of this case were "unique."

Taking the guilty pleas into account

[24] Section 13(1) of the *Penalties and Sentences Act* 1992 (Qld) required the sentencing judge to take the guilty pleas into account. Section 13(1)(b) does not oblige a sentencing judge to reduce the sentence that would have been imposed had the offender not pleaded guilty.[9] However, when the benefits to the system of administration of justice and to victims are considered one would expect a reduction in sentence unless good reasons existed not to do so,[10] and for those reasons to be stated. Absent a good reason to not reduce the sentence, an early or timely plea of guilty should reduce the sentence that would have been imposed had the offender not pleaded guilty:

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7 [2008] QCA 172 at [9].

8 [2008] QCA 172 at [20] per Mackenzie AJA; at [55], [56] per Cullinane J.

9 *R v Corrigan* [1994] 2 Qd R 415 at 416.

10 *R v Mahony & Shenfield* [2012] QCA 366 at [52] which confirms that there may be occasions where it is appropriate to offer no reduction to an otherwise appropriate sentence by reason of a guilty plea.

> "It is obviously desirable for a sentencing court to state specifically how it is reducing a sentence when it purports to do so. If an appeal is subsequently brought and it is contended that the sentence imposed is excessive because there has been no sufficient reduction made, the question whether there has, in truth, been a reduction at all and also whether the reduction is sufficient will be considered by the appeal court."[11]

[25] In this matter the sentencing judge did not say that, whilst taking the applicant's guilty pleas into account, he declined to reduce the sentence that would have been imposed had he not pleaded guilty and the matters had gone to trial. The prosecutor did not invite the sentencing judge to not reduce the sentence on account of the guilty pleas. There is no suggestion that the sentence was reduced by the imposition of a more favourable parole eligibility date since the relevant sentences triggered a serious violent offender declaration and a mandatory non-parole period of 80 per cent.[12]

[26] In the circumstances, one cannot assume that a discount was not applied from a notional starting point in excess of 16 years (for count 5) and in excess of 20 years (for counts 8 and 10).

[27] A discount of some years was appropriate for what was acknowledged to be timely pleas of guilty in accordance with the principles stated in *Wark* and earlier authorities. If the 20 year sentences made adequate allowance for the pleas of guilty alone then it would mean that in arriving at 20 years, the judge must have started from a term substantially exceeding 20 years.[13] The starting point would have been in the order of 25 years. As noted, counsel for the respondent could not point to any comparable case to support such a starting point. To say that the circumstances of this case were "unique" does not remove the need to compare the applicant's offending and his circumstances with the conduct and circumstances of offenders in broadly comparable cases.

[28] A review of comparable cases leads to the conclusion that the sentences were manifestly excessive if adequate allowance was made for the guilty pleas.

Comparable cases

[29] The applicant's submissions cite numerous cases, but it is unnecessary to refer to the details of all of them.[14] A number of the cases are dated and relate to offences which were committed prior to the enactment in 1997 of legislation providing for serious violent offender declarations which require a person against whom such a declaration has been made, such as the applicant, to serve at least 80 per cent of their sentence before being eligible for parole. A number also pre-date the enactment of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) which

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11 *R v Corrigan* [1994] 2 Qd R 415.

12 *Penalties and Sentences Act* 1992 (Qld), s 161B.

13 cf *R v Colless* [2011] 2 Qd R 421 at 433 [39].

14 *R v Delgado-Guerra; ex parte Attorney-General (Qld)* [2002] 2 Qd R 384; *R v Tomlin* [1995] QCA 177; *R v King* [1995] QCA 77; *R v Wark* [2008] QCA 172; *R v Barclay* [1999] QCA 457; *R v Edwards* [2004] QCA 20; *R v Robinson* [2007] QCA 349; *R v Atwell* [2000] QCA 266; *R v Watcho* [1998] QCA 331; *R v Burley ex parte Attorney-General (Qld)* [1998] QCA 98; *R v Breckenridge* [1966] Qd R 189; *R v Buckley* [2008] QCA 45; *R v Hussein & Hussein* [2006] QCA 411; *R v Dargin* [2013] QCA 20; *R v Colless* [2010] QCA 26.

permits certain orders to be made for the protection of the community against a person who presents an unacceptably high risk of committing a serious sexual offence.

[30] In the passage earlier quoted from *Robinson* a range of between 15 and 20 years is stated in respect of a mature adult offender with a history of serious sexual violence which has resulted in lengthy terms of imprisonment who is found guilty after a trial of multiple rapes.

[31] Robinson was convicted after a trial of six counts of rape, one count of burglary, one count of deprivation of liberty and one count of stealing. He was sentenced to concurrent terms of imprisonment of 16 years on three of the rape counts and 10 years' imprisonment on the other three. He had entered the complainant's home in the early hours of the morning and raped her several times, including through unprotected penile-vaginal intercourse. He was the carrier of Hepatitis C and, fortunately, the complainant did not contract the disease. No weapon was used and the complainant did not suffer any significant physical injuries.

[32] Robinson was 33 years old at the date of the offences and 36 when he came to be sentenced. He had a bad criminal history including a conviction for rape in 1989 to which he was sentenced to 12 years' imprisonment. That rape offence had been committed when he was only 18 years of age, after which he had spent most of his adult life in prison. His re-offending indicated the failure of the earlier sentence to personally deter him and emphasised the need for a very lengthy sentence in the interests of protecting the community.

[33] In identifying a range of between 15 and 20 years for such a case in order to protect the community, Keane JA derived support from *R v Edwards*.[15] Edwards was sentenced to 15 years' imprisonment on three counts of rape and 10 years' imprisonment for one count of attempted rape. Like Robinson, he had a bad criminal record. He was aged 33. The multiple rapes which he committed in December 1999 took place after he broke and entered the home of the complainant, who was then pregnant. The circumstances of his offending were shocking. His victim was degraded. She was threatened and forced to submit to vaginal intercourse, demands for oral sex and attempted anal intercourse. Before leaving the complainant's home Edwards threatened the complainant that if she told anyone he would return and kill her and her family. An application for an extension of time within which to appeal against sentence was dismissed on the grounds that the sentences were justified and that there was no reasonable prospect of success in an appeal against sentence.

[34] Regard to other authorities does not call into question the range of 15 to 20 years stated in *Robinson* for offences of serious sexual violence after a trial of multiple rapes by a mature adult offender with a history of serious sexual violence.

[35] *R v Wark*,[16] to which reference has already been made, concerned an offender who was 51 years old at the time of sentence. He pleaded guilty in respect of five counts of rape and was sentenced to 13 years' imprisonment. He offered a lift to the complainant, a woman in her 30s, and persuaded her to accompany him to his home on a rural property. He prevented her from leaving and inflicted violence upon her,

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15 [2004] QCA 20.

16 [2008] QCA 172.

striking her twice about the head with a piece of wood, grabbing her by the hair and dragging her inside. The rapes included forced oral sex on him and inserting an object into her anus. The applicant threatened to keep the complainant at his home. She feared throughout that she would be killed, but was able to escape.

[36] This Court had regard to comparable cases including *Robinson*,[17] *R v Barclay*[18] and *R v Spoehr*[19] in which there had been a similar level of violence and degradation over a period of time. The sentencing judge was said not to have erred in concluding that the range for the type of offending in *Wark* was 14 to 16 years' imprisonment. That range was said to be necessarily below the range referred to in *Robinson*, notwithstanding the brutal and degrading treatment of the complainant with features that could be described as sadistic. The applicant in *Wark* was entitled to a significant discount by reason of his plea of guilty and, on appeal, a term of 12 years' imprisonment was substituted.

[37] More serious offending than that of the applicant can be found. *R v Buckley*[20] is such a case. Buckley was sentenced for five counts of rape, one count of burglary, one of indecent assault and one of grievous bodily harm. Originally an indefinite sentence was imposed, and after the matter was remitted to this Court he was imprisoned for 22 years for each offence of rape. The offences took place on three separate episodes over a nine month period. One was committed on a young woman who was walking home alone. She was choked and forced to an area where she was anally and vaginally raped, causing her major anal trauma and other less serious genital injuries. The applicant threatened to kill her at the end of the assault. The second series of assaults were committed against a 67 year old woman in her bedroom, who the applicant attempted to sodomise. The third set of offences were committed on a 15 year old girl who was attacked as she walked home at around 1 am. She was knocked to the ground and suffered a fractured femur. Notwithstanding this, she was raped vaginally and anally. Each of the offences were described as "protracted and accompanied by the infliction of severe pain on the terrified victim."

[38] The applicant in *R v Dargin* was convicted after a trial on two counts of rape against one complainant in 2006 and six counts of rape on a second complainant in 2009.[21] The applicant, who was aged 43, was sentenced to imprisonment for 14 years in respect of the first victim (who was aged 15) and 18 years' imprisonment in respect of the rape of his second victim. The rapes had a profound effect on their victims, adversely affecting them in their education, employment and relationships. One victim was diagnosed as suffering from post-traumatic stress disorder. The Court confirmed what had earlier been said in *Colless* that the task of the judge was "to assess the gravity of the aggregation of the applicant's conduct".[22]

[39] *R v Burley* involved a serial rapist.[23] The offender was seventeen and a half when he committed his first rape, and 18 at the time of the others, with no previous criminal convictions. The offences included rape or attempted rape on four

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17 [2007] QCA 349.
18 [1999] QCA 457.
19 [2003] QCA 412.
20 [2008] QCA 45.
21 [2013] QCA 20.
22 [2013] QCA 20 at [35].
23 [1998] QCA 98.

different women over a period of eight months. All the offences involved violence or threats of violence accompanied by the use of a knife, as well as degrading and painful treatment of his victims which, in at least one instance caused physical and disabling injury which might prove to be permanent. His victims suffered deep emotional and psychiatric harm. An assessment by a forensic psychologist indicated that the risk of future offending was "quite high". The offender pleaded guilty to 28 charges contained in two indictments and the effective head sentence was imposed for each of the three rapes committed on the last of his victims. A sentence of 16 years' imprisonment was increased to 20 years upon an Attorney-General's appeal.

[40] The offences were committed before the 1997 amendments which provided for serious violent offender declarations. Considerations of protection loomed large. The members of the Court differed about the respondent's prospects of rehabilitation and the risk that he posed of future sexual violence. Fitzgerald P considered that the protection of the community was a material consideration, as was the propensity of the respondent to re-offend. McPherson JA concluded that the Court was not in a position to reach any reliable opinion on the degree of risk that might exist after the respondent had served his non-parole period and received treatment. Shepherdson J concluded that the sentencing judge erred in assuming that there was some prospect of the respondent's rehabilitation.

[41] The circumstances of the offender in *Burley* and the nature of his offences make that case a more serious one than this. Although the offender was somewhat younger, his pattern of offending suggested sexual sadism, and his relative youth did not entitle him to particular leniency. It was questionable whether intervention in custody would overcome his sadistic sexual impulses and reduce his high risk of re-offending.

[42] All of the offences in *Burley* involved violence and threats of violence accompanied by the use of a knife. In this case the applicant used a weapon in the form of a rounded piece of wood to commit offences on 15 June 2001. Burley committed "three planned, systematic and deliberate rapes and one attempt to commit rape and associated offences." He threatened to kill each victim. He obtained contact details of some of his victims, and in the case of one victim threatened to locate her girls and have sex with them. Each victim was terrorised and one suffered a knife wound to her hand which caused a permanent disability and required surgery.

[43] *R v Colless*[24] was a successful appeal against sentence by a 28 year old who pleaded guilty to attacks upon 11 women, including five rapes and a number of attempted rapes over a 27 month period. He was originally sentenced to 25 years' imprisonment. He was sentenced on the basis that he was a "serial rapist who engaged in a course of conduct in which [he] violently and sexually attacked and terrorised a large number of victims". The victims felt violated and degraded. The applicant was assessed as having prospects of rehabilitation after undertaking a sexual offender's treatment program.

[44] This Court noted that previous appellate authority did not provide any definitive assistance in determining the appropriate penalty. It is unnecessary to review the authorities canvassed in that case, some of which involved a higher degree of brutality and placed them in a worse category to *Colless* and to this case.

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[24] [2011] 2 Qd R 421.

[45] Notwithstanding the gravity of Colless' offending against a substantial number of complainants over a prolonged period (27 months), that his offending would have continued had he not been apprehended and the offending's serious adverse consequences for multiple victims, there were substantial mitigating circumstances. These included co-operation with the authorities, his pleas of guilt and remorse. This Court concluded that inadequate allowance had been made for these mitigating features and set aside the 25 year sentences as manifestly excessive. Colless was sentenced to 16 years' imprisonment on each of the rape counts, which required him to serve 12.8 years in custody before any entitlement to apply for parole arose.

[46] Upon the hearing of this application counsel for the respondent sought to distinguish this case on the basis that its factual circumstances differed from other cases of multiple rape and that usually "the offenders are quite linear in what they do." Here the applicant's conduct escalated in seriousness and there was said to be an "increase in sophistication".

[47] There was nothing sophisticated about the applicant's criminal conduct. Even the final, brutal rape was not particularly sophisticated in its planning or execution. The offending did escalate in its violence. The relevance of this escalation is that it suggests that if the applicant had not been arrested on 15 June 2001 then his offending might have continued and become even more violent. In response to the respondent's escalation argument, counsel for the applicant correctly observed that somebody who starts out and remains savage or who starts out and remains entirely degrading may have been linear but was "linearly bad." *Burley* is an example.

[48] In arriving at an appropriate sentence there are no tools by which a court can precisely calibrate the violent and degrading nature of multiple rapes that occur over a protracted period against one or two victims and compare that conduct with offences of the present kind over a longer period. There is no arithmetic in comparing a case where there are a large number of complainants over a prolonged period (for example *Colless* where there were 11 complainants over a period of 27 months) with the three episodes of attempted rape and rape that occurred against three complainants in this case in the first half of 2001. The offending conduct on each occasion must be considered along with all of the circumstances. Multiple rapes committed over the period of a day or two against one victim may call for greater punishment than rapes committed against separate complainants over a long period. A comparison between *R v Colless* and the horrific case of *R v Mahony & Shenfield*[25] illustrates the point.

[49] Account must be taken of the number of episodes and the number of victims because a serial rapist without a prior criminal history is in some respects similar to a rapist who has previously been sentenced for rape and served that sentence. One difference is that in the latter case there is a strong case for a protective sentence because the previous sentence has not been effective to personally deter the offender.

[50] In this case the repetitive nature of the offending conduct elevated the appropriate penalty. An appropriate head sentence needed to reflect the applicant's overall criminal conduct, its escalation and its effect, both physical and psychological, on his victims. This case might be said to have somewhat unique facts. But no case is the same as another, and each case of rape that was cited may be said to have its

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25 [2012] QCA 366.

own, somewhat unique facts. In each case violence and degradation was inflicted on victims. The idea of a victim in a public place being preyed upon and sexually assaulted is disgusting. So too is the conduct of a rapist who breaks into a victim's home and, in secrecy, commits the same or similar attacks.

[51] In a case of multiple offences where concurrent sentences are to be imposed, each sentence must reflect the circumstances of the offence and the subjective circumstances of the offender. The sentence for later offences takes account of the earlier offending conduct and the head sentence takes account of the offender's overall criminal conduct.

[52] Counsel for the applicant notes that unlike some other cases, including *Robinson*, the applicant had not been before the Court previously for any violent offending. He had not been sentenced and received the punishment and treatment required to deter him from offending again and to rehabilitate himself. However, the applicant had been arrested in 1998 and charged with sexual assault and assault occasioning bodily harm. That encounter with the criminal justice system was not sufficient to deter him from offending again in 2001.

[53] Having regard to the applicant's offending conduct and his personal circumstances, a head sentence of between 15 and 20 years was appropriate before account was taken of the timely pleas of guilt. Such a range is reflected in *Robinson*. The applicant was much younger than the mature adult offenders whose sentences were considered in *Robinson*, *Edwards* and other cases of multiple rape where the offenders had previous convictions for serious sexual violence. Still, the history and escalating nature of his sexual violence required a head sentence within the range of 15 to 20 years had the matter gone to trial.

[54] It was appropriate to impose the head sentence on the last rape offences because they were the most violent and permitted account to be taken of the applicant's previous conduct.

[55] Whilst the applicant was older than Burley at the time his offences were committed, *Burley* was a more serious case. As noted, it involved the use of a knife on each occasion and the commission of seven rapes. Burley's offences were committed at a time which did not allow for the making of a serious violent offender declaration. However, that legislation had been passed when the Court of Appeal considered *Burley* and its passage was apt to reinforce the importance of a sentence that adequately protected the community from any propensity of Burley to re-offend. Depending upon the risk of re-offending that was assessed after Burley had served a substantial part of his sentence he might have been eligible for parole after serving 10 years. When regard is had to the fact that Burley committed seven rapes whilst armed with a knife and apparently had poorer prospects of rehabilitation than the applicant, it is difficult to see why an appropriate sentence was one which meant the applicant was not even eligible for parole until having served 16 years, some six years longer than Burley's non-parole period.

[56] The fact that the applicant would be subject to a serious violent offender declaration and not eligible for parole until having served 80 per cent of his sentence needed to be taken into account in arriving at a head sentence that was just in all the circumstances.[26]

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[26] *R v McDougall* [2007] 2 Qd R 87 at 95-96 [18].

[57] The head sentence of 20 years that was imposed upon the applicant is at the top of the range discussed in *Robinson* for cases of a mature adult offender with a history of serious sexual violence who is found guilty of multiple rapes after a trial.

[58] The sentences of 20 years imposed upon the applicant after account was taken for his timely pleas of guilty suggest that the sentencing judge adopted a starting point of around 25 years or possibly more. Such a starting point cannot be justified for a case in which the sentencing judge correctly found did not involve offences of the worst type. The sentences cannot be justified by reference to comparable cases. They were manifestly excessive. The application should be granted and the appeal against sentence allowed.

[59] The issue then is the appropriate sentences on counts 5, 8 and 10. The applicant's submission that the head sentence following a trial would have been 15 to 16 years does not adequately reflect the totality of the applicant's offending and the violence inflicted by him, particularly upon his final victim. If the matter had proceeded to trial then an appropriate head sentence for the final rapes would have been 17 years. An appropriate discount to reflect his pleas of guilty was four years, resulting in sentences of 13 years on counts 8 and 10. An appropriate sentence on count 5, which took account of the applicant's earlier offending, his plea of guilty and other relevant circumstances would have been ten years.[27] The sentence of 16 years imposed on count 5 was manifestly excessive.

[60] I would propose the following orders:

1. Allow the application for leave to appeal against sentence.
2. Allow the appeal against sentence.
3. Set aside the sentences of 16 years, 20 years and 20 years' imprisonment imposed on counts 5, 8 and 10 respectively on 7 June 2002 and substitute sentences of 10 years, 13 years and 13 years on counts 5, 8 and 10 respectively.
4. Otherwise confirm the orders then made.

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[27] cf *R v CAJ* [2009] QCA 37 at [21] – [25].