# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Rix* [2014] QCA 278 |
| PARTIES: | **R**<br>**v**<br>**RIX, Ashley Darren**<br>(applicant) |
| FILE NO/S: | CA No 51 of 2014<br>DC No 271 of 2013<br>DC No 1121 of 2013 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 7 November 2014 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 21 August 2014 |
| JUDGES: | Muir and Gotterson JJA and Ann Lyons J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Grant leave to appeal against sentence.**<br>**2. Appeal allowed.**<br>**3. Set aside all sentences imposed on 21 February 2014 at the District Court at Brisbane.**<br>**4. Sentence the applicant to the following terms of imprisonment, all to be served concurrently:**<br>**Count 1 on Indictment 871 of 2013 – 6 years' imprisonment;**<br>**Count 2 on Indictment 871 of 2013 – 5 years' imprisonment;**<br>**Count 1 on Indictment 1121 of 2013 – 9 years' imprisonment;**<br>**Count 2 on Indictment 1121 of 2013 – 5 years' imprisonment;**<br>**Count 3 on Indictment 1121 of 2013 – 9 years' imprisonment;**<br>**Count 4 on Indictment 1121 of 2013 – 5 years' imprisonment; and**<br>**Count 5 on Indictment 1121 of 2013 – 9 years' imprisonment.**<br>**5. Declare that in respect of each of Counts 1, 3 and 5 on Indictment 1121 of 2013, the applicant is convicted of a serious violent offence.** |

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant and complainant resided in the same unit complex – where soon after the complainant moved in, the applicant invited the complainant to his unit for drinks – where the applicant's friend propositioned the complainant for sex on behalf of the applicant – where the complainant refused – where upon returning to her own unit the complainant found the applicant cowering inside the shower – where the complainant walked the applicant back to his unit – where later that night the applicant broke into the complainant's unit – where the applicant attempted to hide his identity by putting on an accent – where the applicant raped the complainant orally, vaginally and anally – where the applicant went to take a shower – where the complainant ran out of the unit and informed the authorities – where the police located the applicant the following morning at his mother's residence – where the applicant was charged with entering a dwelling by night by means of a break with intent to commit an indictable offence and rape – where the applicant pleaded guilty to all counts – where the applicant was sentenced to a total of 11 years' imprisonment – where the applicant submitted at sentencing that he had no recollection of his offending – where the sentencing judge inferred that the applicant did have a recollection – whether the finding on the applicant's memory loss had an adverse consequence for the applicant with respect to the sentencing considerations of remorse and rehabilitation

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant had served overseas with the Australian Army – where the applicant had been suffering from undiagnosed Post-Traumatic Stress Disorder ("PTSD") – where the applicant's condition led to substance abuse, particularly alcohol – whether the sentence imposed reflected the applicant's military service or PTSD

*Evidence Act* 1977 (Qld), s 132C
*Penalties and Sentences Act* 1992 (Qld), s 9, s 161A, s 161B

*Porter v McCollum* 558 U.S. 30 (2009), distinguished
*R v Gaerlan* [2014] QCA 145, cited
*R v Goodger* [2009] QCA 377, cited
*R v Mallie* [2000] QCA 188, cited
*R v Mawson* [2007] NSWSC 1473, cited
*R v Newton* [2008] QCA 248, cited
*R v Price* [2004] QCA 10, cited

COUNSEL: P J Callaghan SC for the applicant
J A Wooldridge for the respondent

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

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

[2] **GOTTERSON JA:** On 11 June 2013 in the District Court at Brisbane, the applicant, Ashley Darren Rix, was convicted on pleas of guilty to one count of entering a dwelling by night by means of a break with intent to commit an indictable offence thereby committing an offence against ss 419(1), (2) and (3)(a) of the *Criminal Code* (Qld) ("the Code") (Count 1) and one count of rape thereby offending against s 349 of the Code (Count 2). These were the two counts on Indictment No 871 of 2013 dated 15 April 2013. This indictment was substituted for a seven count indictment, Indictment No 91 of 2013 which had been presented on 23 January 2013 following a full hand up committal hearing on 8 November 2012.

[3] Sentencing of the applicant was listed for 1 August 2013. On that day, Indictment No 1121 of 2013 dated 1 August 2013 containing a further five rape counts (Counts 1 to 5 inclusive) was presented. These were the other five counts from the discontinued Indictment No 91 of 2013. After the applicant was convicted on pleas of guilty to each of those five counts, submissions on sentence were received from the prosecutor.

[4] Counsel for the applicant on sentence tendered a report of Dr Jonathan Mann, a general and forensic psychiatrist, dated 21 April 2013,[1] and a report by Dr Dean Isherwood, a consultant psychiatrist, dated 10 July 2013.[2] Dr Isherwood was the applicant's treating psychiatrist. A request was made by the applicant's counsel for an adjournment in order to obtain a further report from Dr Isherwood. The purpose of the further report was to address an issue which had arisen during the sentence hearing, namely, whether the applicant's claimed lack of recollection of the offending was a genuine one. The sentence hearing was further adjourned on 9 August 2014 at the request of the applicant's counsel, this time for the purpose of obtaining a report from "an independent forensic psychiatrist" on that issue. At the resumed sentence hearing on 21 February 2014, the applicant's counsel tendered a report of Dr Michael Beech, a psychiatrist, dated 26 November 2013.[3]

[5] Upon completion of the submissions, the applicant was sentenced as follows:

Indictment No 871 of 2013

Count 1 – 8 years' imprisonment
Count 2 – 6 years' imprisonment

Indictment No 1121 of 2013

Count 1 – 11 years' imprisonment
Count 2 – 6 years' imprisonment
Count 3 – 11 years' imprisonment
Count 4 – 6 years' imprisonment
Count 5 – 11 years' imprisonment.

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1 Exhibit 7; AB88-95.
2 Exhibit 6; AB81-87.
3 Exhibit 8; AB97-107.

[6] All sentences are to be served concurrently. Some 226 days pre-sentence custody were declared to be time already served. The offences the subject of Counts 1, 3 and 5 on Indictment No 1121 of 2013 were declared to be serious violent offences.

[7] On 21 March 2014, the applicant filed an application for leave to appeal against sentence.

**Circumstances of the offending and their impact**

[8] For each count, the complainant was LKC. It was her dwelling that was the subject of the break and enter count. A Schedule of Facts[4] was tendered by the prosecutor at the sentence hearing. A summary of the events which it records follows.

[9] The complainant, who was then 19 years old, moved into a unit at Clarence Street South Brisbane on 16 July 2012. The applicant resided in another unit in the same complex. He offered to help her carry the refrigerator into her unit. On Saturday 21 July 2012, the applicant invited the complainant over for a drink. They drank wine and were joined by a friend of the applicant, Jake Stoops. At about 10 pm they walked to a bottle shop to buy further supplies, returned and continued drinking.

[10] The complainant had three or four glasses of wine altogether. At one point when the applicant had left the room, Stoops told her that she should have sex with the applicant. Stoops did that because the applicant had told him that he needed sex that night and had asked Stoops to "talk him up" to the complainant. The complainant told Stoops that she was not interested. She fell asleep at the applicant's unit, woke up, collected her belongings and returned to her unit. She locked the front door and went to bed.

[11] The complainant then got up to get her mobile phone. She heard a noise in her shower and found the applicant cowering inside. She walked him back to his unit and put him in his own bed. She returned to her unit and closed the door but forgot to lock it. About five minutes later she heard knocking on the front door. She opened it and saw the applicant. He told her that he did not want to go to bed and that he had no friends. She told him she had work in the morning and needed sleep. Again, she walked him back to his unit and put him to bed. She returned to her unit but forgot to activate the deadlock on the front door. She went to bed.

[12] Later, the complainant heard what sounded like keys in the front door. She picked up her mobile phone to call 000. She saw a shadow at the bedroom door. She asked the intruder (who was the applicant) who he was. He did not answer (Count 1 on Indictment 871). She yelled at him to leave the unit. She began to call 000 but he then knocked the mobile phone out of her hand. She started screaming. The applicant lay on the bed and put his hand on her mouth and his forearm on her throat. She bit his hand. He put on an Indian accent and told her that he had a gun and that he would shoot her and her family. He made her stand up, walk to the front of the bed, and get down on her knees. He pulled down his tracksuit pants and demanded that she put his penis in her mouth. She begged him not to make her do that. He repeated his threat to shoot her. She complied with his request. When she tried to desist, he pulled her head towards him and forced his penis into her mouth (Count 2 on Indictment 871).

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4 Exhibit 3; AB65-70.

[13] The applicant forced the complainant back on to the bed. He pulled her underwear off and moved his head between her legs. He told her to lie face down and lay on top of her. She begged him not to go further. He told her to put "it" in. She refused, he became angry, and he again put his forearm against her throat. She relented and placed his penis in her vagina. He thrust his penis in and out about six times (Count 1 on Indictment 1121). He made comments by which he insinuated that he was a Punjabi man.

[14] The applicant then told the complainant to come to the end of the bed. He pushed her down on her knees. She asked him by his first name not to make her repeat what he had previously demanded she do. He denied that he was "Ashley" and told her to put "it" in. She put his penis in her mouth again. He then put his penis in and out of her mouth several times (Count 2 on Indictment 1121). After that he grabbed her by the shoulders and lifted her up.

[15] The applicant told the complainant to go to the corner of the bed and lie on her stomach. She did so. He placed a pillow between her face and the bed. He told her to put "it" inside which she did. She referred to him by his first name. He continued to deny that he knew who Ashley was. This act of intercourse was painful to the complainant. She asked him to stop. He told her to be quiet. He pulled his penis out before placing it back in her vagina. Having done that, he pushed his thumb into her anus and kept it there for a couple of minutes. The penile penetration of the vagina was the subject of Count 3 and the penetration by the thumb of the anus was the subject of Count 4.

[16] The applicant then withdrew his penis from the complainant's vagina and pushed it into her anus (Count 5 on Indictment 1121). She begged him to stop and he told her to be quiet. He did withdraw and then lay on the bed next to the complainant.

[17] Some conversation between them ensued. She resisted his attempts to kiss her. He would not leave when she asked him to do so. She tried to be nice to him in the hope that he would leave. He continued to deny that he was "Ashley". She repeated her request that he leave. He said that he needed his joggers. He did not want her to turn on the light to find them and he pulled the drawstring on his hooded top tight. She told him to go into the bathroom so she could turn on the bedroom light to find the joggers. He did so, half closing the bathroom door. At that point the applicant spoke in his normal voice which she recognised.

[18] When the complainant turned on the light, she picked up her mobile phone. The applicant was watching from the bathroom and he moved and grabbed it from her. He said he would not leave until he had his shoes, keys and phone. She went to look for them in the bedroom. There she picked up her iPad and started to type "HELP" on Facebook. When the iPad made a noise, the applicant entered the room and snatched it from her. Eventually, he let her turn on the light to look for his items. She then saw the applicant's face clearly in the light.

[19] After further exchanges, the applicant became angry. He ordered the complainant to sit on the floor. She complied. He then went into the bathroom, turned on the shower and pulled the shower curtain across. The complainant quickly ran out of the unit. She was unable to raise a response from the neighbours. She then ran towards the Mater Hospital. She found a security guard and called for help, telling him that she had been raped. He drove her to the emergency department at the hospital. Her mother and police were contacted.

[20] Police attended at the complainant's unit. They found the front door wide open. One of the louvers next to the door had been removed and another one of them bent. The applicant's finger prints were detected around about the door. Police located the applicant that morning at his mother's residence. He had just showered there.

[21] Medical examinations identified the applicant's DNA in the complainant's high vagina, low vagina, vulva and rectum. She had some injuries to her vaginal area, injuries to her lip and a scratch to her leg.

[22] The offending has had very significant adverse consequences for the complainant. They were detailed in a Victim Impact Statement dated 1 August 2013[5] which was tendered at the sentence hearing. Apart from the physical injuries which were painful in themselves but fortunately appear not to have resulted in permanent disability, the complainant has continuing anxiety in her work in retail in approaching strangers and she is fearful when she sees males of a similar build and complexion to the applicant's. Her relationship with her partner has been put under pressure and she cannot enjoy sexual intercourse freely. She feels terrible for the worry, guilt and sadness that her mother has suffered as a result.

[23] A statement by the applicant's then girlfriend to which reference was made without objection during the sentencing submissions, recorded that at 5.47 am on the morning of Sunday 22 July 2014, the applicant called her. He told her that he had had a fight with Stoops and asked her to come and pick him up at the local shops. She did so. He said that he did not want to go back to his unit because Stoops would probably still be there. She could smell that he had been drinking. She drove him to her residence where he showered and changed. The applicant then dropped his girlfriend at work and went to his mother's residence.[6]

**The applicant's personal circumstances**

[24] The applicant was 26 years old at the time of the offending and 27 years old at the date of sentence. He had committed a number of offences over the decade preceding his sentence. They were all dealt with in the Magistrates Court, usually by the imposition of a fine. None of them involved sexual offending.

[25] The applicant had an attention deficit hyper activity disorder which hampered his learning. He left school at 16 years of age. He worked on construction sites until he enlisted in the Australian Army in 2007 when he was 20 years old. He was an infantry soldier/rifleman stationed at various military bases. He was posted to Afghanistan in 2009 where he saw active weapons fire, witnessed other soldiers being injured and was buffeted by explosions of improvised explosive devices close at hand. His replacement while he was on leave was killed in action for which he felt guilt. His tour in Afghanistan lasted about nine months. During that time, he was treated for depression.

[26] It appears that the applicant was discharged from the army in 2010 or 2011. Thereafter, he had several different types of employment. By the time of the offending, he had begun an apprenticeship as a mechanic. According to Dr Isherwood, after leaving the army, the applicant became an episodic user of synthetic drugs such as amphetamines and ecstasy. He progressed to alcohol abuse and binge drinking over

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5 Exhibit 4; AB71-73.

6 AB26 LL17-30.

the 12 months immediately prior to the offending. Dr Isherwood regarded the applicant's drinking on the night of the offending as typical of his binge drinking.

[27] All three psychiatrists consider that the applicant suffers from a Post-Traumatic Stress Disorder ("PTSD"). Dr Isherwood describes it as having had a delayed onset secondary to the applicant's experiences as a combat soldier in Afghanistan. The condition existed but was undiagnosed at the time of the offending. His poly-substance abuse was a secondary development to the PTSD. Dr Beech described the degree of the applicant's PTSD as being "moderately severe".

[28] Dr Beech also referred to a witness statement of Jake Stoops that had been provided to him. In it, Stoops confirmed that he and the applicant had engaged in a drinking game on the night of the offending. They drank cans of Bundaberg rum and bottles of wine. By 1 or 2 am, the applicant was slurring his words and repeating himself. Stoops left the unit at about that time.

**Sentencing remarks**

[29] The learned sentencing judge described the evidence of the offending as presenting "a strong Crown case". He referred to aggravating features of the applicant's conduct: that the complainant was vulnerable in her home alone; that the offending occurred over a prolonged period; that there was a degree of determination on the applicant's part and a lack of concern for the complainant's psychological, emotional or physical well being; and that the applicant attempted to conceal his true identity. Reference was also made to the continuing impact of the offending for the complainant.

[30] His Honour dealt separately with the contentious issue of whether the applicant had no memory of the offending. As to that he said:

> "… I have taken into account the contents of the reports of the various psychiatrists, particularly Dr Beech. And I accept that Dr Beech has identified a clinically plausible cause, if your memory loss is found to exist. But he of course was not able to rule out a feigned claim of loss of memory. In that regard, that is the function of the court, taking into account all relevant considerations. Those relevant considerations, particularly, involve the phone call that you made to your girlfriend that morning, telling her that you had had an argument with Mr Stoops, which was a lie, and that you did not want to be at your place because he was there. Again, it is something you knew to be factually incorrect. Your girlfriend noticed that you sounded upset, or seemed upset when she spoke or saw you that morning. You showered when you went to her place. You then went to your mother's place shortly thereafter. Police arrived reasonably early that morning, and found that you had just got out of the shower at your mother's place. And I infer that those showers were an attempt to remove any incriminating evidence of the offences from your body.
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> Those matters, in particular, do not sit consistently with your claim, or your claimed amnesia regarding this event. Of course, there is also the consideration that the offences were carried out in a calculated manner, over a prolonged period of time.
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> You exhibited, during the course of the events, a realisation that you should hide your true identity to escape detection. And, in all the

> circumstances, I am not satisfied that you have a memory loss of the event. In fact, I am, on the evidence, quite satisfied that you do recall what occurred that night."[7]

[31] The finding that the applicant did recall what occurred led the learned sentencing judge to note the comments made in *R v Newton*.[8] Keane JA regarded a feigned lack of recollection of offending by the offender in that case as evidencing a failure to accept responsibility for his crime. That was a special concern that warranted sentencing on "a footing which will afford adequate protection to the community against an offender whose failure to acknowledge his responsibility gives no reason for optimism as to his prospects of rehabilitation".[9] Fryberg J regarded the persistence in the false claim of memory loss as casting doubt upon the offender's claim to be remorseful.[10] The learned sentencing judge continued:

> "Notwithstanding the qualifications as announced by their Honours in that decision, I nevertheless accept that you are remorseful for your behaviour and I accept that you are ashamed and disgusted by what you did, which might well be the reason for your feigned lack of memory. But it is nevertheless a relevant consideration for the reasons their Honours spoke of. …"[11]

[32] The learned sentencing judge took into account the applicant's early pleas and the absence of prior similar offending on his part. His Honour said that he also noted the contents of the reports of the three psychiatrists and then moved to the topic of the applicant's PTSD and substance addiction. As to them, he said:

> "I accept that at the time of this offending, you suffered from an undiagnosed post-traumatic stress disorder, which in turn had led you to a substance addiction or abuse problem, particularly alcohol. That post-traumatic stress disorder arose as a consequence of your time as a soldier in the Australian Army during a nine month tour of Afghanistan, where you witnessed traumatic events. Dr Isherwood is of the view that you require considerable assistance to overcome that stress disorder, although you have embarked upon the first steps towards your rehabilitation in that regard. I note that you have a reasonably good work history and, of course, that you were a member of the Australian Defence Force for a number of years and saw active service in Afghanistan, during which you witnessed those traumatic events.
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> And as I say, I note that you have taken some tentative steps down the road towards your rehabilitation, as evidenced, at least in part, by your reduction of alcohol intake to a considerable extent prior to your incarceration but post the commission of these offences. I note that you had a difficult upbringing and that you were subject to domestic violence or witnessed incidents of domestic violence and that you were bullied whilst at school. I also take into account the contents of the reference tendered on your behalf, which tends to suggest you still have some positive and good personality features about you. As I say, general deterrence is a significant consideration.

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7 AB58 L29-AB59 L4.
8 [2008] QCA 248.
9 At [32].
10 At [38].
11 AB59 LL17-21.

> Dr Isherwood was of the view that you presented as a low risk of re-offending if not intoxicated and that might well be the case but it would seem that that is a very big if as things presently stand and will require considerable work into the future…"[12]

[33] His Honour then made orders which he said took into account all of the matters to which he had referred and the comparable decisions which had been cited to him.

**Grounds of appeal**

[34] At the hearing of the appeal, the applicant was granted leave to substitute the following as the grounds of appeal against sentence:

> "1. The learned sentencing judge erred in the way he approached the applicant's submission that he lacked any memory of the offending.
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> 2. The learned sentencing judge erred in failing to adequately acknowledge and engage with the significance of the applicant's post-traumatic stress disorder, which was functionally relevant to the sentencing process in that:
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> 2.1 there was a direct connection between it and the applicant's military service and this of itself warranted its identification as a significant factor in mitigation of penalty and an identifiable reduction to the sentence imposed; and
>
> 2.2 the link between the disorder and the applicant's abuse of alcohol, and the link between alcohol abuse and the offence were particularly relevant to any assessment of the applicant's culpability and prospects for rehabilitation."

[35] The applicant submits that he should be re-sentenced as follows:

> Count 1 on Indictment 871 – 6 years' imprisonment
> Count 2 on Indictment 871 – 5 years' imprisonment
> Count 1 on Indictment 1121 – 9 years' imprisonment
> Count 2 on Indictment 1121 – 5 years' imprisonment
> Count 3 on Indictment 1121 – 9 years' imprisonment
> Count 4 on Indictment 1121 – 5 years' imprisonment
> Count 5 on Indictment 1121 – 9 years' imprisonment,
> all terms of imprisonment to be served concurrently.

[36] A significant consequence of a head sentence of nine years is that none of the offences of which the applicant has been convicted would be a serious violent offence unless the discretion under s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld) is exercised to declare them to be so. The applicant further submits that in his case, no such declaration or declarations should be made. In absence of any serious violent offence declaration, he would have to serve no more than four and a half years' imprisonment in order to become eligible for parole. That is considerably shorter than the seven years and two months approximately which he would have to serve to become eligible for parole in the event that a head sentence of nine years'

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12 AB59 L27-AB60 L3.

imprisonment was imposed and any of the offences for which it was imposed was declared to be a serious violent offence.[13]

[37] I now turn to consider each of these grounds.

**Ground 1**

[38] For the applicant, it is submitted that it is "questionable" that it was open to his Honour on the evidence to be satisfied that the applicant did recall what occurred that night. A second aspect to this ground is the submission that his Honour's reasoning involved a contradiction. The applicant argues that by citing *Newton* the learned sentencing judge approached the matter on the footing that the applicant's feigned memory loss of offending gave no reason for optimism as to his prospects of rehabilitation and put in doubt his claim of remorse. The applicant suggests that his Honour's stated approach is "irreconcilable" with his acceptance that the applicant was remorseful.

[39] As to the first aspect, at sentence the prosecutor stated that the Crown did not accept as correct the allegation of fact to be made on behalf of the applicant that he did not recall the offending itself.[14] Later, defence counsel referred to the issue as one that the learned sentencing judge would have to resolve with reference to s 132C of the *Evidence Act* 1977 (Qld).[15]

[40] In developing argument on this aspect, the applicant refers to Dr Isherwood's opinion that his reported "significant amnesia" would be "consistent with a period of derealisation/dissociation secondary to intoxication, but also contributed to by his longitudinal problems of insomnia and sleep deprivation". Dr Isherwood regarded the issue as being "certainly clouded as dissociation and psychogenic amnesia are found in PTSD".[16] Nevertheless, he thought that in the applicant's case, an amnesic episode was more likely to be secondary to an organic cause, in his case alcohol intoxication.[17]

[41] Dr Beech thought that any such episode was more likely to be the result of an alcoholic blackout rather than dissociation. He described an alcoholic blackout as being a "specific phenomenon with dense amnesia during a drinking episode when at the time outward behaviour perhaps seemed little disordered".[18] He, as did Dr Isherwood, also associated alcohol abuse with PTSD symptoms arising from exposure to traumatic experiences on military service.[19]

[42] However, the psychiatric evidence did not venture definitive expert opinion as to whether the applicant's claimed lack of memory of the offending was genuine or not. In his report, Dr Beech referred to an addendum report prepared by Dr Isherwood dated 7 August 2013 which was not tendered.[20] In that report Dr Isherwood apparently canvassed the possibility the applicant was "malingering with the conscious feigning of amnesia for some secondary gain". Dr Beech himself

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13 *Penalties and Sentences Act* s 161A.
14 AB25 LL45-47. The applicant did not himself give evidence that he had no memory of the offending.
15 AB46 L45.
16 Exhibit 6 p 5; AB85.
17 *Ibid*.
18 Exhibit 8 p 11; AB107.
19 *Ibid*.
20 Exhibit 8 p 4; AB100.

observed that there was "no way to categorically separate out a feigned memory loss from an alcohol-induced blackout".[21]

[43] The remarks made by the learned sentencing judge stressed that it was for him to make a finding as to the genuineness of the applicant's claimed memory loss. It clearly was his role to make such a finding and the applicant does not contend otherwise. That task did not require his Honour to accept or reject any expert psychiatric evidence on that issue since there was none. Moreover, it was open to his Honour to have regard to the applicant's undisputed immediate post-offending conduct as relevant to whether, in the aftermath of the offending, the applicant had a recollection of it. It is significant that the applicant has not attempted to show error on his Honour's part in drawing from that conduct an inference that the applicant did in fact have a recollection of the offending. In my view, the applicant has not established that the finding which incorporates that inference is flawed.

[44] With regard to the second aspect to this ground, it is, I think, a misreading of his Honour's sentencing remarks to regard him as having approached the matter on the footing that the applicant's claimed remorse was dubious or that there were no grounds for optimism concerning his rehabilitation. In referring to *Newton*, his Honour was giving due acknowledgement to what, in that case, had been seen by members of the Court to be implications of the feigned lack of memory on the part of that offender. Those implications arose not only from the feigned lack of memory itself but also from the additional aggravating circumstances that the offender had fled from police who came to interview him and had falsely denied involvement in the offending when he was interviewed.

[45] Whilst his Honour was apparently alive to the possibility that similar implications might arise for the applicant's case, he evidently did not regard *Newton* as requiring him to approach the matter on the footing that they necessarily did arise either in the manner or to the degree that they did in that case, or at all. He considered both remorse and prospects of rehabilitation, made findings favourable to the applicant that he was remorseful and that he had taken first steps towards rehabilitation and sentenced on the basis of those findings. Thus the adverse finding on the memory loss did not have adverse consequences for the applicant with respect to the sentencing considerations for which it might have had relevance, remorse and rehabilitation.

[46] For these reasons, the applicant has failed to establish this ground of appeal.

**Ground 2**

[47] This ground of appeal is centred upon the applicant's undiagnosed PTSD. The learned sentencing judge acknowledged that the applicant suffered from the disorder both before and at the time of the offending and that it had led to "substance addiction or abuse problems, particularly alcohol". The applicant submits that despite this acknowledgement, his Honour failed to reflect in the sentence either the active military service origins of the PTSD or the moderating influence on the assessment of the applicant's culpability and prospects of rehabilitation which was appropriately attributable to his PTSD-linked abuse of alcohol at the time of the offending.

[48] In both written and oral submissions, counsel for the applicant referred to the decision of the Supreme Court of the United States of America in *Porter v McCollum.*[22]

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21 *Ibid.*

22 558 U.S. 30 (2009).

There, the court unanimously granted certiorari with respect to a decision of the Eleventh Circuit Court of Appeals which, in effect, affirmed the upholding by the Florida Supreme Court of a finding by a post-conviction court in 1995 that the penalty phase of Porter's trial in 1988, which followed upon his conviction of two counts of first-degree murder, had not miscarried for deficiency on the part of counsel. Porter had been sentenced to death on one of the convictions.

[49] Porter had experienced a childhood history of abuse. He had a history of alcohol abuse and mental unhealth. He was a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean war. His combat service left him a traumatised, changed man. None of those matters were raised by his counsel at the penalty phase hearing. In particular, the court observed, the moving description given by Porter's commanding officer of those two battles was only a fraction of the mitigating evidence his counsel failed to discover or present during the penalty phase hearing. The significance of this failure was described by the court as follows:

> "The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with Williams, his crimes, and almost nothing else. Had Porter's counsel been effective, the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability'."[23]

[50] In the US Supreme Court it was held that the Florida Supreme Court had unreasonably discounted the evidence of Porter's military service which had been presented at the post-conviction court hearing and had erred in affirming that court's ruling that Porter had not satisfied the onus on him of establishing a probability sufficient to undermine confidence in the outcome of his penalty phase hearing.

[51] The court made a concluding reference to the long tradition in the United States of according leniency to veterans in recognition of their service, especially for those who fought in the front line as Porter had. Their Honours continued:

> "Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter."[24]

[52] The applicant also referred to statutory provisions in US state jurisdictions which require a court when sentencing to have specific regard for whether an offender is suffering from a mental illness induced by military service.[25]

[53] Drawing upon the decision in *Porter* and these legislative provisions, counsel for the applicant urged this Court to adopt as a principle of sentencing in Queensland that "PTSD arising from military service, as a matter of course, be specifically identified as a factor in mitigation" of sentence. For the reasons which follow, I am not prepared to adopt a principle which would require that PTSD originating from military service, of itself and without regard for its relevance to the offending or the

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23 At p 12.

24 At p 14.

25 *Ohio Revised Code* s 2929.12(F); *California Penal Code* s 1170.9(a) and *Minnesota Statutes* s 699.115 Subd 10. In some instances, the requirement is limited to mental illness which is relationally connected with the offending.

offender's rehabilitation, be regarded as a mitigating factor in sentencing. The principle now urged upon this Court could have that outcome.

[54] Several significant considerations align against the recognition of such a principle. Firstly, the governing principles in s 9 of the *Penalties and Sentences Act* 1992 (Qld) do not recognise a medical condition originating from active military service as, of itself, constituting a relevant sentencing consideration.

[55] Secondly, and importantly, in instances in Queensland and comparable jurisdictions where an offender's PTSD, suffered as a result of active military service, has been recognised on sentencing, what has attracted recognition has not been the mere fact of the condition or its origin, but rather the relevance to the offender's culpability for the offending, the need for deterrence and the prospects of rehabilitation, that the condition itself or its symptoms or *sequelae* may have.

[56] In *R v Mawson*,[26] Adams J of the Supreme Court of New South Wales, in the course of sentencing an offender on a plea of guilty to manslaughter, made allowance on the following basis for a military service-originated condition:

> "[41] In my view also, Mr Mawson's sentence should be moderated to some degree because of his war service, that had such a catastrophic effect on him. His mental unwellness not only substantially affects Mr Mawson's criminal culpability but also makes it inappropriate to take into account any significant degree of general deterrence. So far as personal deterrence is concerned, I am satisfied that his prospects of rehabilitation are good and it is most unlikely that he will offend in this way again."

[57] More recently, this Court in *R v Gaerlan*[27] allowed an appeal against sentence for drug trafficking in order to accommodate the impact of new evidence. The military service-related condition and its link to the offending addressed by the new evidence is summarised in my reasons for judgment in that case as follows:

> "The new evidence to which I have referred consists of a recent affidavit of Mr Robert Zemaitis, a psychologist to which is attached his report dated 20th of May 2014 and an affidavit of the applicant sworn on the 20th of May 2014. Mr Zemaitis has assessed the applicant's psychological state over three sessions during 2013 and 2014, most recently in March this year. He is of the opinion that the applicant at the time of the offending was suffering from a post-traumatic stress disorder chronic, a PTSDC, and that he continues to suffer from it. This condition is a consequence of exposure to extremely traumatic experiences during his overseas service.
>
> Mr Zemaitis says that, in his many years of experience in treating soldiers who have returned from deployment suffering from significant disorders such as PTSD, he has observed that it was not unusual for ex-military members to use alcohol and other substances such as amphetamines to help cope with their various symptoms as they struggled to adapt to life away from the military. He expresses the view that the applicant's decision to undertake the Sydney trip

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26 [2007] NSWSC 1473.

27 [2014] QCA 145.

> and engage in the offending was out of character for him. It reflected a lack of clear thinking. It was symptomatic of deterioration of his cognitive functions at the time resulting from his efforts to cope with the severe impact of his symptoms of PTSDC and also associated depression. In addition, Mr Zemaitis noted that the applicant is an intelligent person with significant insight into his condition. He is motivated towards counselling for further treatment for it. Mr Zemaitis considers that, if the applicant undergoes appropriate treatment, he is at minimal risk of re-offending."[28]

Following that summary, the observation is made that by revealing the link between the offender's psychological state and the offending, the evidence had an impact upon the criminality of the latter.[29]

[58] The approach in *Mawson* and *Gaerlan* is consistent with the approach taken more broadly in circumstances where a psychiatric abnormality falling short of insanity has been found to be a cause of, or a factor contributing to, criminal conduct. That approach is reflected in the acceptance by this Court in *R v Goodger*[30] that "… generally speaking, a mental disorder short of insanity may lessen the moral culpability of an offender and so reduce the claims of general or personal deterrence upon the sentencing discretion".

[59] Whilst I would reject the principle urged by the applicant, I readily accept that it was appropriate and necessary here for the applicant's sentence to reflect, in a meaningful way, the relevance of his PTSD to his offending, the need for deterrence and his prospects of rehabilitation. Ground 2.2 specifically raises as an issue whether that occurred in the applicant's case.

[60] The applicant was drunk at the time of the offending. He told Dr Mann that he had consumed about 20 standard drinks of alcohol. His drunkenness at the time was an instance of the alcohol abuse which was linked to his PTSD. His offending was, it is said, "out of character".

[61] As the last of the passages from the sentencing remarks set out above reveals, the learned sentencing judge referred to the undiagnosed PTSD and the linked alcohol abuse. However, he did not identify the applicant's drunkenness that night as an emanation of the alcohol abuse. Nor did he refer to the relevance of the drunkenness to the applicant's culpability for the offending or to the need for general or personal deterrence in his case. It is not otherwise apparent from the remarks that his Honour did take its relevance for those purposes into account or that, if he did, how he took them into account.

[62] The inference to be drawn is that that matter was not properly taken into account. The conclusion that follows is that there was an error in the sentencing for failure to take into account a relevant consideration. This ground of appeal must succeed for that reason.

**Disposition and re-sentence**

[63] In view of the success of Ground 2, the application for leave to appeal against sentence must be allowed, the sentences set aside and the applicant re-sentenced.

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28 At p 4.

29 *Ibid.*

30 [2009] QCA 377 at [21].

[64] Neither this Court nor the learned sentencing judge were informed of a sentence for similar offending in Queensland by an offender who suffered from undiagnosed PTSD attributable to active military service and resulting in alcohol abuse. We were informed that there is none. It is sufficient for present purposes to refer to two cases to illustrate the kind of sentence imposed for this type of offending absent the condition that the applicant has.

[65] In *R v Mallie*,[31] the offender was sentenced to an effective sentence of 10 years' imprisonment for burglary, stealing, two counts of assault occasioning bodily harm, sexual assault and rape. He claimed the sentence was manifestly excessive. He broke into the 37 year old complainant's home whilst her husband was away. He violently assaulted her and raped her. He then punched her again four or five times. The complainant was able to chase him from the house and eventually obtain assistance. She was severely emotionally affected by the offending. The offender was 22 years old at sentence and 20 years old at the time of the offending. He pleaded guilty to an ex officio indictment. It was noted that the case against him was overwhelming. He was affected by amphetamines and alcohol when he committed the offending and claimed to have no recollection of it. He had committed no further offences whilst at large in the community. In refusing the offender's application for leave to appeal against sentence, this Court noted that sentences for this type of offending tended to fall between 10 and 14 years' imprisonment.

[66] In *R v Price*,[32] in which *Mallie* was considered, the 29 year old offender pleaded guilty to burglary in the night with violence, rape, serious assault and stealing. He had broken into the home of the 66 year old complainant and physically attacked her by repeatedly punching her with "great force" before he "pulled her underpants away from her vagina and pushed her legs apart and tried to insert his penis". He then desisted and left the house. The offender pleaded guilty, showed "some remorse" and had some previous history of offending including a sentence of imprisonment, but had no convictions for sexual offending. He was sentenced to 12 years' imprisonment for the rape and to shorter concurrent periods of imprisonment on the remaining counts.

[67] These cases suggest that in order to make meaningful allowance for the moderating influence of the applicant's PTSD-linked alcohol abuse on the assessment of his culpability, the need for personal deterrence and his prospects of rehabilitation, a head sentence of less than 10 years ought to be imposed. I would accept the submission on behalf of the applicant that he should be re-sentenced as follows:

> Count 1 on Indictment 871 – 6 years' imprisonment;
> Count 2 on Indictment 871 – 5 years' imprisonment;
> Count 1 on Indictment 1121 – 9 years' imprisonment;
> Count 2 on Indictment 1121 – 5 years' imprisonment;
> Count 3 on Indictment 1121 – 9 years' imprisonment;
> Count 4 on Indictment 1121 – 5 years' imprisonment; and
> Count 5 on Indictment 1121 – 9 years' imprisonment.

[68] As noted, it is submitted for the applicant that a serious violent offence declaration not be made pursuant to s 161B(3) in respect of any of the offence. In support of the submission, reference is made to the approach taken in *Mawson* of favouring a longer period of supervision on parole for a PTSD sufferer over imprisonment for an extended period of time.

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31 [2000] QCA 188.
32 [2004] QCA 10.

[69] Against that submission is what, in my view, is the predominating consideration here. The applicant's offending was horrific and persistent. It exploited the complainant's vulnerability and has impacted adversely upon her. By any measure, the offending was very serious and it was very violent. It was aggravated by a threat to shoot the complainant and her family. I consider that this is a compelling case for making declarations that in respect of the offences the subject of Counts 1, 3 and 5 on Indictment 1121, the applicant is convicted of a serious violent offence.

**Orders**

[70] I would propose the following orders:

1. Grant leave to appeal against sentence.
2. Appeal allowed.
3. Set aside all sentences imposed on 21 February 2014 at the District Court at Brisbane.
4. Sentence the applicant to the following terms of imprisonment, all to be served concurrently:
   Count 1 on Indictment 871 of 2013 – 6 years' imprisonment;
   Count 2 on Indictment 871 of 2013 – 5 years' imprisonment;
   Count 1 on Indictment 1121 of 2013 – 9 years' imprisonment;
   Count 2 on Indictment 1121 of 2013 – 5 years' imprisonment;
   Count 3 on Indictment 1121 of 2013 – 9 years' imprisonment;
   Count 4 on Indictment 1121 of 2013 – 5 years' imprisonment; and
   Count 5 on Indictment 1121 of 2013 – 9 years' imprisonment.
5. Declare that in respect of each of Counts 1, 3 and 5 on Indictment 1121 of 2013, the applicant is convicted of a serious violent offence.

[71] **ANN LYONS J:** I agree with the reasons of Gotterson JA and the orders he proposes.