SUPREME COURT OF QUEENSLAND

CITATION:	*R v Goodwin; Ex parte Attorney-General (Qld)* [2014] QCA 345
PARTIES:	**R** **v** **GOODWIN, John William** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 150 of 2014 DC No 731 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2014
JUDGES:	Fraser JA and Mullins and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Sentences varied by removing the parole eligibility date.** **3. The orders imposed by the sentencing judge are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where respondent pleaded guilty 125 counts of recording in breach of privacy, 13 counts of burglary by breaking, in the night, six counts of sexual assault, three counts of burglary and stealing, one count of burglary, one count of making child exploitation material, two counts of indecent treatment of a child under 12, one count of observation in breach of privacy, one count of distributing child exploitation material and one count of possessing child exploitation material – where the respondent was sentenced to eight years imprisonment for each count of burglary by breaking, in the night and lesser concurrent sentences for each of the other offences, with eligibility for parole after serving two years and eight months – where the

ground of appeal was manifest inadequacy – where there was a lack of comparable sentences – whether the sentences were unreasonable and plainly unjust

Criminal Code (Qld), s 210, s 352, s 669A

Barbaro v The Queen (2014) 88 ALJR 372; [2014] HCA 2, considered
Everett v The Queen (1994) 181 CLR 295; [1994] HCA 49, considered
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, considered
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, considered
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, considered
R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, considered
R v GAE; ex parte A-G (Qld) [2008] QCA 128, considered
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, considered
R v Melano; ex parte Attorney-General [1995] 2 Qd R 186; [1994] QCA 523, considered
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, considered
R v Nuttall; Ex parte Attorney-General (Qld) [2011] 2 Qd R 328; [2011] QCA 120, considered
R v Sagiba; ex parte A-G [1999] QCA 468, considered
R v Ungvari [2010] QCA 134, considered

COUNSEL: A W Moynihan QC, with S J Bain, for the appellant
J J Allen for the respondent

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

[1] **FRASER JA:** Under the sentence imposed in the District Court the respondent was imprisoned for eight years with eligibility for parole on 1 June 2015, when the respondent will have served two years and eight months in prison. For the reasons given by Mullins J, the Attorney-General's appeal against sentence should be allowed, the orders made in the District Court should be varied by setting aside the order fixing a parole eligibility date on 1 June 2015, and otherwise the orders made in the District Court should be confirmed. As Mullins J has explained, the respondent will now not be eligible for parole until after he has served four years of the effective sentence of eight years imprisonment.

[2] Neither party was able to refer to any truly comparable sentencing decision. The respondent fastened upon that fact and argued that the sentencing judge's discretion was broader than in cases in which there were comparable sentencing decisions. Because I was a party to two of the decisions cited by the respondent in support of that submission, I propose to express my own reasons for rejecting the submission, even though I consider that in this respect my reasons do not differ from Mullins J's reasons.

[3] The respondent cited *R v GAE; ex parte Attorney-General (Qld)*.[1] In that case there were also no comparable sentencing decisions. In agreeing with Holmes JA's reasons favouring dismissal of the appeal against sentence, I cited (at [27]) *R v Melano; ex parte Attorney-General (Qld)* [1995] 2 Qd R 186 at 189 for the proposition that "[t]he sentencing judge had an extremely wide discretion as to the appropriate sentence in this exceptional case". At the cited passage in *R v Melano; ex parte Attorney-General (Qld)* the Court (Fitzgerald P, Davies JA and Lee J) stated that a sentencing judge generally "has an extremely wide discretion to be exercised within the limits of the principles which are applicable". My reasons did not support any broader proposition. Similarly, there was no support for the respondent's proposition in Douglas J's conclusion in *GAE* at [31] that he found it difficult to justify a sentence in the range for which the Attorney-General contended even "[i]f there is more scope for this Court to establish an appropriate sentencing range where no comparable case has come before us".[2]

[4] The respondent also relied upon *R v Nuttall; Ex parte Attorney-General (Qld)*.[3] In that case, Chesterman JA and I agreed with the reasons given by Muir JA. After referring to Street CJ's comments in *R v Jackson and Hakim* that where there was "no perceivable sentencing pattern" from comparable cases there was "[i]nevitably… a wide discretionary field open to a sentencing judge",[4] Muir JA stated that the absence of comparable sentencing decisions "makes it more difficult for an appellate court to conclude that the sentence imposed fell outside permissible bounds".[5] That statement may have been intended to convey no more than that an absence of comparable sentencing decisions made the sentencing process more difficult for sentencing judges and appellate courts.

[5] In *R v Jackson and Hakim*, Street CJ was in dissent in the Attorney-General's appeal against sentence in *Jackson*. In my respectful opinion, if his Honour's statement is to be understood as conveying that the absence of comparable sentencing decisions enlarges the sentencing discretion (as opposed to simply making it more difficult to identify the appropriate sentence), that statement is not reconcilable with recent High Court decisions. It is necessary to mention only *Barbaro v The Queen; Zirilli v The Queen*, in which the High Court concluded that past sentences do not mark the outer bounds of a sentencing judge's permissible discretion,[6] and that a sentencing judge who is properly informed about the facts, relevant sentencing principles, and comparable sentences "will have all the information which is necessary to decide what sentence should be passed…".[7] Comparable sentences assist in understanding how those factors should be treated, but they are not determinative of the outcome and they do not set a "range" of permissible sentences. Whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences but by reference to all of the factors relevant to sentence. Because sentencing involves a case-by-case synthesis in which past sentences may be used only as guidelines and are not determinative, there can be no underlying range of available sentences for a particular case which may be narrowed or broadened over time by subsequent sentencing decisions. Whilst the

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1 [2008] QCA 128.
2 [2008] QCA 128 at [31] – [33].
3 [2011] 2 Qd R 328.
4 *R v Jackson and Hakim* (1988) 33 A Crim R 413 at 434 (Street CJ), quoted at [2011] 2 Qd R 328 at 346 [69].
5 [2011] 2 Qd R 328 at 346 – 347 [70].
6 (2014) 88 ALJR 372 at 379 [41].
7 (2014) 88 ALJR 372 at 379 [38].

absence of comparable authorities is likely to make the already demanding task of arriving at the just sentence according to law yet more difficult, it does not leave open a wider range of permissible sentences than otherwise would be the case. The respondent's submission should therefore not be accepted.

[6] **MULLINS J:** On 23 May 2014 the respondent pleaded guilty in the District Court to 125 counts of recording in breach of privacy committed on various dates between 7 December 2005 and 9 February 2010, 13 counts of burglary by breaking, in the night, six counts of sexual assault, three counts of burglary and stealing, one count of burglary, one count of making child exploitation material (CEM), two counts of indecent treatment of a child under 12, one count of observation in breach of privacy, one count of distributing CEM (on 8 November 2011) and one count of possessing CEM (on 17 September 2012).

[7] On each of the counts of burglary by breaking in the night and burglary, the respondent was sentenced to eight years' imprisonment. On each count of sexual assault, indecent treatment, making CEM and distributing CEM, he was sentenced to four years' imprisonment. He was sentenced to imprisonment of three years for possession of CEM and each count of burglary and stealing and imprisonment of two years for each count of recording in breach of privacy and observation in breach of privacy. All sentences were concurrent and a parole eligibility date was set on 1 June 2015, after serving two years and eight months or one-third of the effective head sentence. A declaration was made in respect of the 598 days spent in pre-sentence custody between 2 October 2012 and 22 May 2014.

[8] The Attorney-General appeals against the sentences pursuant to s 669A(1) of the *Criminal Code* (Qld) on the ground of manifest inadequacy.

The circumstances of the offending

[9] The respondent came to the attention of Task Force Argos when he transmitted CEM from his computer to a Russian website. The police attended at the respondent's residence on 17 September 2012 and seized his computers and data storage devices. The respondent provided authority to police to access his email and other online accounts. The album of images that had been sent to the Russian website contained indecent images of a female child (the eight year old complainant). The respondent denied taking indecent photographs. He admitted to police there would be CEM on the laptop and the hard drives. During examination of the computer hard drives police located a folder containing 52 subfolders of "peeping Tom" style voyeuristic images and videos of people (mostly women) in their homes who were unaware of the recordings. The subfolders were titled by names, roads and suburbs on the northside of Brisbane.

[10] The police executed a further search warrant for the respondent's home on 2 October 2012. They located a purse with cards belonging to the complainant of count 152. Other items stolen by the respondent were also seized. The respondent voluntarily attended the police station for a record of interview during which he identified the videos he had taken and about which he still had knowledge and then drove around with the police to help identify the victims depicted in the videos.

[11] The respondent recorded most of his offending. The majority of the recordings were made by peering through windows and gaps in blinds and curtains. If he was spotted outside a window, he did not return to that house, but that did not stop him from offending elsewhere.

[12] Where the respondent made the recording from outside the house, he was charged with recording in breach of privacy. That covers counts 1 to 8, 39 to 41, 64 to 82, 86 to 94, 101 to 108, 112 to 118, 124 to 131, 134 to 137, and 139 to 144. It also covers counts 42 to 63 and 110 which relate to a group of complainants at the same address. Where the respondent broke into the house to make the recordings, he was charged with burglary by breaking in the night, in addition to the recordings in breach of privacy.

[13] One of the houses was visited on 14 occasions and the offences are the subject of counts 27 to 38, 83, 84 and 109. There were two adult women complainants in the house whose various activities were videoed, including one where one woman was asleep and the respondent must have been in the house. On another occasion in October 2006, one of the complainants reported that someone had been in her room during the night and poked her on the bottom. That is the subject of count 84 (sexual assault).

[14] Another house was visited on 12 occasions and the respondent gained entry to the premises on 10 of those occasions. The offences committed are the subject of counts 9 to 26, 85, 95 to 100 and 111. There were four sexual assaults (counts 11, 14, 26 and 100) committed against the daughter who was aged between 14 and 18 years over the period of the offending. Count 11 relates to the respondent touching the daughter on her buttocks, anus and vagina while taking the videos that are the subject of count 10. Count 14 relates to the respondent touching the daughter on her buttocks, genitals and breasts while taking the videos the subject of count 13 and touching her foot with his penis. Count 26 relates to the respondent touching the daughter on her buttocks while taking the video which is the subject of count 25. Count 100 concerns the incident when the daughter woke up to find the respondent on top of her with his penis in her face. She screamed and her father chased the respondent outside, but was unable to catch him. Count 99 is the burglary that relates to the incident that was the subject of count 100. Count 111 is another burglary committed on or about 4 July 2007 when the daughter woke up during the night and saw the respondent in her bedroom and the police were called.

[15] A cousin, aged 25 years, of the daughter of the house is the complainant for counts 97 and 98. She was sleeping in the same room as the daughter and there are 40 videos taken that are the subject of counts 96 and 97 that go back and forth between the daughter and her cousin. The daughter is the complainant for the recording in breach of privacy offence which is the subject of count 96 that shows the respondent was unsuccessful in moving the blanket covering the daughter, but the video then shows him masturbating while the daughter sleeps. Count 97 relates to the videoing of the cousin sleeping and shows the respondent masturbating above her head and also shows the respondent uncovering the cousin to reveal her breast and stomach. He then lifts up the top of her pants and zooms the camera to show the top of her pubic hair. He also touches her inside her pants, on her stomach and belly button and her breasts and nipples. The sexual assault which is count 98 relates to the respondent's conduct in respect of the cousin which is seen on the videos that are the subject of count 97.

[16] The burglary that is count 120 relates to the entry into the house on 17 January 2009 where the eight year old complainant lived. On the same night the complainant committed the recording in breach of the privacy offence which is count 119. Count 121 is the offence of making the CEM that relates to the 15 still images the

respondent took on 17 January 2009 of the eight year old complainant wearing her underpants. Count 122 (indecent treatment of a child under 12) is based on these 15 still images of the eight year old complainant. The images include close ups of her genital area and buttocks and the respondent has pulled aside her pants to expose her vagina and anus. Count 123 is another offence of indecent treatment of a child under 12 relating to the same eight year old complainant which concerns the touching of the complainant by the respondent to take those images. Count 153 (distributing CEM) relates to the posting of the folder of images of the eight year old complainant on the Russian website and the provision by the respondent of the password to at least one person.

[17] There was one burglary (count 132) where the respondent stole the electronic photographs stored on the complainant's laptop. He visited that house eight times and there is an associated count 133 of recording in breach of privacy for videos that show the complainant getting dressed in her room. Count 145 is recording in breach of privacy for recording the first complainant's mother on the toilet and getting undressed and in and out of the shower. There are further counts (146 to 151) of recording in breach of privacy in September 2009 relating to the first complainant.

[18] The one count of observation in breach of privacy (count 138) concerns an incident where the male complainant was in the bathroom of his house and looked up to see a digital camera at the window being held up by a person. He yelled at the person and the camera disappeared.

[19] There was one burglary (count 152) that did not involve any sexual offence or recording in breach of privacy.

[20] Count 154 (possessing CEM) relates to the extensive collection of CEM on the respondent's hard drives seized by the police. In relation to the videos, based on the usual categorisation, there were 354 category 1 videos, 181 category 2 videos, 71 category 3 videos, 511 category 4 videos and 42 category 5 videos. In relation to the still images, there were 151,013 category 1 images, 1,643 category 2 images, 968 category 3 images, 1,218 category 4 images and 116 category 5 images. (The usual categorisation of CEM is that category 1 applies to no sexual activity, category 2 applies to sexual activity child non-penetrate, category 3 applies to sexual activity adult non-penetrate, category 4 applies to sexual activity adult/child penetrate, and category 5 applies to sadism/bestiality.)

The respondent's antecedents

[21] The respondent was born in 1972 and was 41 years old when sentenced. He has a prior criminal history in New South Wales that was dated, but did contain two offences of entering enclosed lands related to graffiti. He was dealt with in the Brisbane District Court on 30 November 2007 for six charges of stealing from a locked receptacle for which probation of six months was ordered.

The sentencing remarks

[22] During the sentencing submissions, the prosecutor noted that the only offences in respect of which a serious violent offence declaration could be made were the counts of sexual assault and the indecent treatment of a child under 12, but the learned sentencing judge indicated that he would not be persuaded they were serious violent offences.

[23] The sentencing judge described the principal nature of the offences as voyeuristic, but also observed that "the offences themselves extended far beyond voyeuristic activity." The sentencing judge noted that the respondent's admissions made on the first occasion the police seized his computer equipment were partial, as were the admissions made on the second occasion the police executed a search warrant at the respondent's house. The respondent did not make admissions about the indecent assaults or the indecent dealing. The extent of the respondent's violation of the complainants' privacy was enormous, both in terms of the number of victims and the type of violation. There were 59 identified complainants and five unidentified complainants. There were 38 separate dwellings involved in the offences. The respondent returned to a number of those dwellings on a number of separate occasions.

[24] It was an aggravating feature that the respondent distributed the CEM he made to the Russian website. It was an additional feature that the respondent was in possession of a large volume of CEM, apart from what he had made, which included examples of extremely serious conduct committed on children somewhere in the world.

[25] The sentencing judge explained:

> "It seems to me here that in view of the extent and nature of your offending, that it is appropriate to deal with you by setting a global sentence in relation to the burglary offences, and I exclude from that the burglary offences which involved actual theft. There are three counts of burglary and stealing where you actually stole property from premises, some of which property was discovered at a later stage in your possession. I've taken into account the victim impact statements. It's clear that these offences have had a substantial impact on not only those women who have provided victim impact statements, but on all of the victims here. It was a gross invasion of privacy, and it's clear that it has had a substantial emotional impact on the victims. It seems to me here, considering the large number of homes that were invaded and the whole scale invasion of the privacy of those people, that a significant sentence should be imposed in relation to the burglary offences."

[26] The sentencing judge noted the psychologist's report that indicated the respondent had a traumatic and abusive childhood and witnessed acts of violence committed on family members and noted the respondent's depression after being rejected by the army and most offending occurred during periods of unemployment, when the respondent became addicted to viewing internet pornography and collecting it. The sentencing judge referred to the psychologist's report noting "the complex causes of voyeurism and opines that such a condition is difficult to treat". The sentencing judge then stated:

> "I note Mr Perros' opinion that you are a low to moderate risk of reoffending, and when one considers the extent of this offending, then I accept that, although I note that he has not undertaken any specific psychological evaluation of the risk of your reoffending."

[27] The sentencing judge accepted as correct the submission of the Crown that the respondent's offending was predatory behaviour and that issue of protection of the community in the future is an appropriate consideration in imposing the sentence.

The appellant's submissions

[28] The appellant accepts that there was no error of principle in the sentencing judge's decision to impose a global sentence. The nub of the appellant's argument is that the sentence does not reflect the overall criminality of the offending and is inadequate in the sense that it is "unreasonable or plainly unjust": *Hili v The Queen* (2010) 242 CLR 520 at [58]-[60]. The sentence fails to adequately reflect the enormity and seriousness of the offending and give proper weight to deterrence, denunciation and protection of the community. The offending was premeditated and struck at the complainants' privacy and security in their own homes. It was particularly concerning that the respondent entered private homes at night and committed sexual offences against sleeping victims, including a child. The CEM offences added significantly to the overall criminality.

[29] The appellant acknowledges that the burglary offences did not have a circumstance of aggravation that brought them within Part 9A of the *Penalties and Sentences Act* 1992 (Qld) (the Act) and it was not permissible to increase the sentence on any one of the offences to which Part 9A could apply in order to engage Part 9A. The appellant argues, however, that without resorting to artifice the sentencing judge could have found the circumstance of any one of the sexual offences in the context of the prior offending deserved a sentence of five years or more of imprisonment or ordered that the sentences for the sexual offences be served consecutively, so the period exceeded five years and engaged Part 9A of the Act. The appellant relies on *dicta* in *R v Sagiba; ex parte A-G* [1999] QCA 468 to support a sentence of five years for one of the sexual assaults.

[30] The alternative approach for which the appellant contends is that there was good reason to postpone the eligibility for parole to ensure the sentence is proper: *R v Assurson* (2007) 174 A Crim R 78 at [22] (per Williams JA) and at [26]-[29] (per Keane JA).

The respondent's submissions

[31] Apart from the offence of possessing CEM, the respondent had ceased his offending of his own volition before the first police search of his residence. The offence of distributing CEM occurred on 8 November 2011 and the last offence of burglary (count 152) occurred on 4 January 2011. None of the other offences occurred later than 9 February 2010.

[32] The fixing of the head sentence of eight years, the decision not to structure the sentences so as to permit the exercise of the discretion to declare any of the sexual offences a serious violent offence, and the fixing of the parole eligibility date after one-third of the head sentence, were decisions within the proper exercise of the sentencing discretion. Given the lack of comparative cases, the sentencing judge was faced with a difficult task and had an extremely wide discretion as to the appropriate sentence. It is more difficult to establish that the sentence is manifestly inadequate in the absence of comparative decisions: *R v GAE; ex parte A-G (Qld)* [2008] QCA 128 at [19] and [27], *R v Melano; ex parte Attorney-General* [1995] 2 Qd R 186, 189, and *R v Nuttall; ex parte Attorney-General* [2011] 2 Qd R 328 at [69]-[70].

[33] The respondent's ultimate submission was that the effective sentence imposed by the sentencing judge was not one that could be shown to be manifestly inadequate.

The absence of comparable sentences

[34] In view of the respondent's argument based on the lack of comparable sentences, it is necessary to consider the effect on both the sentencing judge and the appeal court of the absence of comparative decisions for the respondent's offending. Comparable sentences assist in promoting consistency in the application of the principles of sentencing, as the comparable sentences provide guidance to the sentencing judge and stand "as a yardstick against which to examine a proposed sentence": *Hili* at [53]-[54] and *Barbaro v The Queen* (2014) 88 ALJR 372 at [41].

[35] The plurality in *Barbaro* restated the process of sentencing at [34]:

> "Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not be broken down into some set of component parts. As the plurality said in *Wong v The Queen*, '[s]o long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform' (original emphasis)." (*footnotes omitted*)

[36] See also *Markarian v The Queen* (2005) 228 CLR 357 at [27] and [37].

[37] The lack of comparable sentences may deprive the sentencing judge of the assistance of "the yardstick" for testing the proposed sentence, but it does not preclude the sentencing judge from otherwise finding the relevant facts for the purpose of the sentencing, weighing up the relevant factors relating to the offence and the offender, and applying the principles of sentencing found in the relevant legislation and the common law, in order to reach the appropriate sentence for that offending. The sentencing judge may very well find the exercise of the discretion to be more difficult, in the absence of, and without the usual assistance afforded by, comparable sentences, but as a matter of principle the sentencing judge will have available sufficient material from the evidence adduced on the sentence and the relevant law to undertake the well defined process of sentencing.

[38] The facts of *GAE* were unusual and there was a lack of similar cases. It was observed by Holmes JA at [19] that "the sentencing judge was faced with a difficult task in arriving at a proper sentence". That did not preclude the court undertaking the task on the appeal by the Attorney-General of considering the adequacy of the sentence for the offending: at [21], [27] and [33].

[39] The respondent's counsel relies on *Melano* at 189 where the Court of Appeal referred to the "extremely wide discretion" of the sentencing judge "to be exercised within the limits of the principles that are applicable." That statement in *Melano* was made in the context of the court considering the proper approach to an appeal under s 669A(1) of the *Code* after the decision of the High Court in *Everett v The Queen* (1994) 181 CLR 295: *Melano* at 188-189. *Melano* confirmed at 189 that s 669A(1) of the *Code* should be applied consistent with the established principles relating to an appeal against discretion set out in *House v The King* (1936) 55 CLR 499, 504-505. The approach in *Melano* to an appeal against sentence by the Attorney-General

remains authoritative: *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [60] and [62].

[40] The passage relied on by the respondent from *Melano* deals with the general proposition that sentencing involves the exercise of the discretion by the sentencing judge that is extremely wide within the limits of the applicable principles. It is not a statement that deals with any effect on the exercise or nature of the sentencing discretion of the absence of comparable sentences or in any way modifies the application of the principles relating to an appeal against the sentencing discretion set out in *House*.

[41] The offender in *Nuttall* was convicted after trial of five counts of official corruption and five counts of perjury. His sentences were made cumulative on an existing term of imprisonment and the Attorney-General appealed against sentence on the basis of manifest inadequacy. There were only two comparable sentences relied on by both parties in respect of the corruption offences.

[42] Muir JA (with whom Fraser and Chesterman JJA agreed) stated:

> "[69] In determining an appropriate sentence, the sentencing judge had no sentencing guide available to him on which he could base his judgment. As Street CJ remarked in *Jackson*:
>
> > 'There is accordingly no perceivable sentencing pattern reflecting the accumulation of judicial wisdom deriving from multiple instances of sentencing decisions. Inevitably this imports a wide discretionary field open to a sentencing judge.'
>
> [70] It may be said also that the absence of guidance as to an appropriate sentence afforded by comparable sentences makes it more difficult for an appellate court to conclude that the sentence imposed fell outside permissible bounds.
>
> [71] The following discussion by McHugh J in *Everett v The Queen* identifies the breadth of the sentencing discretion and the limited circumstances in which interference with it is justifiable on Crown appeals:
>
> > 'If a sentencing judge imposes a sentence that is definitely below the range of sentences appropriate for the particular offence, the case can be regarded as falling within the rationale for conferring jurisdiction in respect of Crown appeals. It can be regarded as sufficiently exceptional to warrant a grant of leave to appeal to the Crown even if no question of general principle is involved. Such cases, however, are likely to be rare. Defining the limits of the range of appropriate sentences with respect to a particular offence is a difficult task. What is the range in a particular case is a question on which reasonable minds may differ. It is only when a court of criminal appeal is convinced that the sentence is definitely outside the appropriate range that it is ever justified in granting leave to the Crown to appeal against the inadequacy of a sentence. Disagreement

> about the adequacy of the sentence is not enough to warrant the grant of leave. Sentencing is too inexact a science to make mere disagreement the criterion for the grant of leave to appeal against the inadequacy of a sentence. The requirement of leave gives rise to the inference that Parliament intended that something more than mere error was to be the criterion of the grant of leave'." (*footnotes omitted*)

[43] Muir JA then at [72] concluded that there was an inadequacy in the sentences which demonstrated error, relying in [73] and the following paragraphs on the two comparable sentences and the analysis of the offending conduct and the other relevant factors.

[44] What was said by Muir JA at [69] and [70] did no more than refer to the difficulty which both a sentencing judge and an appeal court may find in their respective tasks in the absence of comparable sentences as a yardstick, but neither task was impossible and, as Muir JA's judgment shows, the court on appeal in *Nuttall* proceeded to undertake the usual appellate review of sentences on the ground of manifest inadequacy, despite the shortage of comparable sentences. Any such perceived difficulty does not alter the nature of the task of the respective courts. It remains accurate to refer to the extremely wide discretion of the sentencing judge (but constrained by the application of relevant sentencing principles), whether or not there are relevant comparable sentences.

Are the sentences manifestly inadequate?

[45] Because of the multiple offending and variety of offending, there were a number of courses open to the sentencing judge in determining the sentences and their structure. The sentencing judge chose to follow the course endorsed in *R v Nagy* [2004] 1 Qd R 63 at [39] and [66] by selecting the burglaries (other than the three burglary and stealing offences) as the most serious category of offences committed by the respondent and imposing a sentence of eight years for each of these burglaries to reflect the overall criminality of the respondent and lesser concurrent sentences for the other offences.

[46] The issue is therefore whether the effective sentence of imprisonment of eight years with an eligibility for parole date fixed after serving one-third of the head sentence is manifestly inadequate in all the circumstances.

[47] The distinguishing features of the respondent's offending were identified by the sentencing judge including the multiplicity of offences, the period of time over which the offending was committed, the sexual offences and the aggravation of the CEM offending by the distribution of the folder of CEM to the Russian website. The seriousness of the sexual offences arises from their commission in conjunction with the burglary offences and the recordings in breach of privacy. The sentencing judge was cognisant that, though a guilty plea, the respondent's cooperation with the police had not been full.

[48] Apart from the appellant's submission that the sentences for the sexual offences could have been approached differently by the sentencing judge, the appellant did not submit that the sentence of imprisonment applied to each offence otherwise demonstrated error.

[49] The relevant maximum penalty for each offence of sexual assault under s 352(1)(a) of the *Code* is imprisonment of 10 years. The relevant maximum penalty for each offence of indecent treatment under s 210(2) of the *Code* is imprisonment of 14 years. The concurrent sentence of four years' imprisonment for each count of sexual assault and indecent treatment appears recognises that each offence was committed by the respondent as an intruder in the complainant's private home while taking advantage of a sleeping complainant. The objective seriousness of each actual assault otherwise does not make it an example of the more serious offences for that type of offending. Support for the sentence of four years' imprisonment for each of the sexual offences is found in *Sagiba*.

[50] In *Sagiba* the offender had no previous convictions and pleaded guilty to offences committed over a period of six months during which he turned 19 years old. There were 15 indictable offences to which he pleaded guilty on an *ex officio* indictment involving the breaking and entering or attempted breaking and entering of nine separate premises. During three of the burglaries the offender indecently assaulted the female occupant of the premises. In the first assault, the offender lay on top of the complainant, simulating intercourse with a sheet between them, and when the complainant fully awoke and reacted with shock, the offender left. The next complainant awoke to find the offender in her house and fondling her pubic area on the outside of her clothing. The offender then kissed her on the cheek and neck and, when she realised the offender was not her husband, he ran off. The offender then returned to the premises of the first complainant. She was walking inside her home, when the offender took hold of her, she struggled, he momentarily touched her pubic region and tried to push her legs apart, but she screamed, and he ran off. The offender was sentenced to concurrent terms, the longest of which was four years' imprisonment. The Attorney-General's appeal against sentence was unsuccessful. In the course of his reasons, Thomas JA stated:

> "My view upon reading the papers was that perhaps a sentence of five years' imprisonment might have been a satisfactory response and might have been more appropriate than the four year sentence which was imposed, but that it was difficult to say the four years was manifestly inadequate. Such a view is not one which satisfies the tests necessary for interference with a primary sentence upon an appeal by the Attorney-General. Such an exercise is not one of substituting one discretion for another when the variation of opinion is not substantial."

[51] Although the appellant submitted, in reliance on *Sagiba*, that one of the sexual offences (such as count 100) could have attracted a sentence of imprisonment of five years and engaged Part 9A of the Act, that submission served more to illustrate the fundamental submission that the ultimate sentencing outcome was manifestly inadequate, rather than showing that was the approach that should have been followed by the sentencing judge. The nature of the sexual offending was such that it is difficult to see how, consistent with the approach required by *R v McDougall and Collas* [2007] 2 Qd R 87 at [19], there was any room for the exercise of the discretion under s 161B(3) of the Act to declare the respondent to be convicted of a serious violent offence, even if the sentences for the sexual offences had been structured, so as to engage Part 9A of the Act.

[52] The approach of the respondent's counsel, in effect, to consider whether each of the components of the ultimate sentence reflects a decision within the proper exercise of the sentencing discretion does not address the appellant's complaint that the ultimate sentence does not reflect the overall criminality of the offending.

[53] Having regard to the totality, period and variety of the respondent's offending, the effective head sentence of eight years (before any further mitigation) gives recognition to the plea of guilty to the 154 offences.

[54] It is common for a parole eligibility date on a guilty plea to be fixed after one-third of the head sentence, but that is not an invariable rule, as the circumstances may not justify that approach: *R v Ungvari* [2010] QCA 134 at [30]-[31]. The facts and circumstances of the respondent's multiple offences make this an exceptional case that does not justify the common approach. In fact, it is the further mitigation of that effective sentence of eight years with an eligibility for parole date fixed after one-third of the sentence that results in the sentence that is unreasonable and fails to reflect the overall criminality of the respondent's offending.

[55] As the appellant has shown that the sentences are manifestly inadequate, this Court has an unfettered jurisdiction to re-sentence the respondent: *Lacey* at [62].

[56] In re-exercising the sentencing discretion, I consider that the concurrent sentences of imprisonment imposed by the sentencing judge appropriately balanced all the relevant factors and would not disturb any of the individual sentences. I would therefore impose the same sentences, but without the parole eligibility date. I have considered the appellant's submission to postpone the parole eligibility date, as was done in *Assurson,* applying the approach in *McDougall and Collas* at [21]. The purposes of sentencing the respondent and giving due weight to all the factors relevant to this sentencing will be achieved by leaving the date for eligibility for parole as that determined by s 184 of the *Corrective Services Act* 2006 (Qld) which will be after the respondent has served one-half of the effective sentence.

Orders

[57] The orders should be:

1. Appeal allowed.
2. Sentences varied by removing the parole eligibility date.
3. The orders imposed by the sentencing judge are otherwise confirmed.

[58] **PHILIPPIDES J:** I agree with the reasons for judgment of Mullins J and the orders proposed.