SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kendrick* [2015] QCA 27
PARTIES:	**R** **v** **KENDRICK, Nathan John** (applicant)
FILE NO/S:	CA No 136 of 2014 DC No 17 of 2012 DC No 236 of 2012 DC No 61 of 2014 DC No 62 of 2014 DC No 63 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	6 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2014
JUDGES:	Fraser and Morrison JJA, and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. In respect of each of Counts 1-3 on Indictment 62/2014 and Count 1 on Indictment 63/2014, set aside the order that the applicant be imprisoned for a period of four years.** **4. In lieu thereof, sentence the applicant in respect of each of Count 1-3 on Indictment 62/2014 and Count 1 on Indictment 63/2014, for a period of three years.** **5. Direct that the terms of three years imprisonment are to be served concurrently with each other, but cumulatively to the term of four years imprisonment on the activation of the suspended sentence, but noting that the terms of imprisonment activated on the suspended sentence are to be served concurrently with each other.** **6. Set aside the orders made on 2 May 2014 that the date the applicant is eligible for parole be fixed at 1 March 2016.**

7. **Order that the date the applicant is eligible for parole be fixed at 15 October 2015.**
8. **Otherwise affirm the orders made on 2 May 2014.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – EFFECT OF SENTENCE OF IMPRISONMENT ON PRISONER – THE TOTALITY PRINCIPLE – where the applicant was convicted of three counts of armed robbery in company, one count of armed robbery and one count of unlawful use of a motor vehicle – where for the four counts involving robbery the applicant was sentenced to four years imprisonment, to be served concurrently, but cumulative on a previously suspended sentence imposed in 2012 – where the applicant was sentenced in 2012 with a head sentence of five years which was suspended after 12 months for an operational period of five years – where as a result the applicant was now serving eight years imprisonment, four years which was previously suspended, along with the additional period of four years – where the applicant was to serve one-third of the sentence before becoming eligible for parole – where the applicant does not contend that there was demonstrable error in principle by the learned sentencing judge – where the applicant contends that the new cumulative sentence has a crushing effect on him as he is of a young age – whether the cumulative sentence offended the totality principle

Penalties and Sentences Act 1992 (Qld), s 147

Azzopardi v The Queen; Baltatzis v The Queen; Gabriel v The Queen (2011) 35 VR 43; [2011] VSCA 372, considered
Director of Public Prosecutions v Grabovac [1998] 1 VR 664, considered
Fridey v The Queen [2014] VSCA 271
Johnson v The Queen (2004) 78 ALJR 616; [2004] HCA 15, considered
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, considered
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, considered
R v Baker [2011] QCA 104, considered
R v Beattie; Ex parte Attorney-General (Qld) [2014] QCA 206, considered
R v Gordon (1994) 71 A Crim R 459, considered
R v Hunter [2006] 14 VR 336; [2006] VSCA 129, considered
R v Lacey [2013] QCA 318, considered
R v LAE (2013) 232 A Crim R 96; [2013] QCA 189, considered
R v Leighton [2014] QCA 169, considered
R v Margaritis; Ex parte Attorney-General (Qld) [2014] QCA 219, considered

R v Morrow [2006] QCA 305, considered
R v Norden [2009] 2 Qd R 455; [2009] QCA 42, considered
R v Styles [2003] QCA 374, considered
R v Sullivan [2005] VSCA 286, considered

COUNSEL: S Bain for the applicant
D Balic for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading, in draft, the reasons of Morrison JA and Henry J. Like Henry J, I agree that Morrison JA's review of the relevant circumstances and comparable sentencing decisions demonstrates that the sentence imposed upon the applicant was manifestly excessive when its cumulative effect is properly taken into account. For that reason I agree that the application for leave to appeal against sentence must be granted and that the other orders proposed by Morrison JA should be made. I do not find it necessary in this application to express any view upon the questions: whether sentencing courts are obliged to avoid a "crushing" sentence, the principled basis for any such obligation, and (if it exists) whether or not it is separate from, or an aspect of, the "totality principle".

[2] I record my respectful agreement with the reasons of Henry J, and subject only to that and the matters I have mentioned, also with the reasons of Morrison JA.

[3] **MORRISON JA:** This is an application for leave to appeal against a sentence imposed on 2 May 2014, when the applicant was convicted of three counts of armed robbery in company, one count of armed robbery and one count of unlawful use of a motor vehicle. On the four counts involving robbery the applicant was sentenced to four years imprisonment, the sentences being concurrent with one another but cumulative on a previously suspended sentence imposed in 2012. On the count of unlawful use of a motor vehicle the applicant was sentenced to 12 months imprisonment, to be served concurrently with the sentences for the robbery offences, but also cumulative on the invoked suspended sentence.

The sequence of sentences

[4] On 4 April 2012 the applicant was convicted and sentenced in respect of a number of charges arising out of offences committed in 2010 and 2011 (**the 2011 offences**). There were three indictments presented on that occasion, containing a total of 21 offences. The offences and the principal period of imprisonment imposed can be summarised as follows:

(a) Indictment 17/2012: one count of armed robbery in company with personal violence; two counts of unlawful use of a motor vehicle; one count of breaking and entering premises and wilful damage; one count of break, enter and steal; and one count of dangerous operation of a vehicle; all offences committed over three days in July 2011; five years imprisonment in respect of the armed robbery count;

(b) Indictment 18/2012: five counts of armed robbery in company; two counts of unlawful use of a motor vehicle; one count of break and

enter premises with intent to commit an indictable offence; one count of breaking and entering and wilful damage; and one count of stealing; sentenced to an effective head sentence of five years imprisonment in respect of the armed robbery counts;

(c) Indictment 91/2012: one count of receiving tainted property; one count of fraud; two counts of unlawful use of a motor vehicle; one count of entering premises with intent; offences committed between December 2010 and 24 March 2011; 12 months imprisonment on all counts, except entering premises with intent, for which he was sentenced to three years imprisonment; and

(d) the head sentence of five years was to be suspended after 12 months, for an operational period of five years; all sentences were to be served concurrently.

[5] The applicant was released under those sentences on 3 April 2013. Between 2 June and 19 June 2013 the applicant committed further offences (**the 2013 offences**) which were the subject of five counts presented under three indictments, and in respect of which the sentences the subject of this application were recorded on 2 May 2014. They can be summarised as follows:

(a) Indictment 61/2014: unlawful use of a motor vehicle; 12 months imprisonment, to be served concurrently with the offences under the next two succeeding indictments, but cumulatively upon the balance of the suspended sentence imposed in 2012;

(b) Indictment 62/2014: three counts of armed robbery in company; four years imprisonment, to be served concurrently with other sentences imposed that day, but cumulatively on the invoked suspended sentence; and

(c) Indictment 63/2014: one count of armed robbery; sentenced to four years imprisonment, to be served concurrently with the other offences imposed that day, but cumulatively on the invoked suspended sentence.

Grounds of the application

[6] The applicant contends that whilst there is no demonstrable error in principle by the learned sentencing judge, nonetheless the sentence imposed in 2014 has a crushing effect on the applicant, who was 22 years old at the time of the offences and nearly 23 at the time of sentence. It was contended, therefore, that the sentence imposed was manifestly excessive. This was said to arise because the sentencing judge invoked the remaining four years of the suspended sentence given in 2012, because the 2013 offences had been committed at a time when the applicant had been released on suspension. Therefore, it was contended, the additional period of four years for the armed robbery counts meant that the applicant had an effective sentence of eight years, to serve one-third before becoming eligible for parole. Whilst it was accepted that the applicant's recidivism made general and personal deterrence, and denunciation and community protection important, the applicant's youth and the overall crushing effect of the sentence meant that this Court should intervene.

Circumstances of the 2011 offences

[7] This Court has the benefit of the Schedule of Facts tendered at the sentencing hearing in 2012, which outlines the circumstances of all the offences at that time. For present purposes I intend to ignore those relating to the offences other than those which involved robbery.

[8] Four involved the applicant, with another person or persons, robbing three service stations and a Pizza Hut and taking cash and cigarettes. The attendants were threatened with knives, sometimes by the applicant and sometimes by the applicant's co-offenders. On one occasion the applicant remained in a car while the robbery occurred, again with the attendant being threatened with a knife.

[9] One involved robbery with personal violence. The applicant and others left a night club, and walked to a nearby service station. The applicant was disguised and threatened the driver of a vehicle in order to make her leave her vehicle. The applicant smashed the rear passenger window and jumped into the car. When the driver started to drive away, the applicant pushed her out of the car. When she climbed back in to try and take back her vehicle, a fight ensued involving another of the applicant's companions. The applicant punched the driver a number of times, then dragged her out of the car and across the road. The applicant then drove the vehicle away. That offence was committed while the applicant was on bail for the other armed robbery offences. That fact was noted in submissions to the sentencing judge on that occasion.[1]

The 2012 sentencing hearing

[10] Submissions made on behalf of the applicant at the 2012 sentencing included that he "had a raging methylamphetamine addiction for many, many years, since 16 years of age".[2] It was conceded that the armed robbery offence involving the car jacking was a

> "very serious offence because it involved actual application of violence by [the applicant] against an innocent woman who, rather bravely, stood up to him and his co-offender and paid the price with violence visited upon her".[3]

[11] The applicant's counsel also gave some brief details of the applicant's upbringing in "a violent and dysfunctional household", where he and his brothers had to protect his mother from their abusive, alcoholic father. The violence was meted out to all members of the family, until eventually the father was forced to leave home. The applicant left home in his later teenage years, eventually falling into an addiction to methylamphetamine.[4]

[12] It is evident from the submissions made on behalf of the applicant in the 2012 sentencing hearing that a sentence was sought which did not include declaring the 10 and a half months, which had been served in custody, as pre-sentence custody.[5] Counsel for the applicant submitted that a sentence in the order of six years was warranted on the comparable authorities, but seems to have invited an approach reflected in the following passage from the learned sentencing judge on that occasion:

---

1 AB 127.
2 AB 132.
3 AB 132.
4 AB 133.
5 AB 135-136.

> "If he gets six, he only gets an eligibility date. If, on the other hand, a sentence is constructed which – in which he abandons time that he's otherwise entitled to have declared, then he gets – or the court has the opportunity of effectively giving him – practically, I should say, not effectively – effectively giving him six by giving him five on the top, suspended after 12, and couple that with a probation order with parole-like conditions so that if he's foolish enough to want to breach them, then he'll go back very quickly …".[6]

[13] In his sentencing remarks the sentencing judge referred to the submission on behalf of the applicant that the sentence could be constructed in such a way as to give a fixed date of release and supervision, whilst acknowledging that the range of sentence needed to be in the order of six to seven years.[7] His Honour proceeded in that way, saying:

> "When I weigh all of those things up I ultimately conclude that I can accept Mr MacKenzie's submissions about penalty. Might I say that firstly they're realistic. They accept that there has to be in practical terms a very substantial prison sentence on all of the serious offences. All of the other offences will receive less serious prison sentences but they'll be concurrent so they won't affect the top and I accept that there's a way of constructing that sentence which will give you a fixed date of release. Happily for you it's going to be 12 months from today."[8]

[14] For the purpose of constructing a sentence that gave a fixed release date the sentencing judge selected one of the counts in respect of which probation was offered. Count 6 on Indictment 17/2012 was selected, that being a count of dangerous operation of a vehicle. On that count the applicant was sentenced to 12 months imprisonment and three years probation. On the counts involving robbery the applicant was sentenced to five years imprisonment on each.

[15] In respect of the time served in custody the sentencing judge said this:

> "I make no declaration in respect of the time served in custody to date. You don't lose that time in a practical sense because that's the only way in which your actual time in custody approaches two years, which is practically what you would have got as an eligibility date if I'd sentenced you to six with parole eligibility after two, you get a bonus of about a month and a-half. That you get because of your age and your co-operation more than anything else."[9]

[16] The sentencing judge explained to the applicant that he was being given the certainty of a fixed date of release, and supervision for two years after that release, under the probation order. All of the prison sentences were to be suspended after having served 12 months, for an operational period of five years. His Honour then added:

> "You will then be unsupervised for another three years. Now, whether you stuff up on the first two or in the last three you are still

---

6 AB 136.
7 AB 153.
8 AB 154.
9 AB 159.

> owed five years less 12 months, so you will have four years hanging over your head and that four years will hang over your head until the 3rd of April 2017. So any offence at all punishable by imprisonment between now and the 3rd of April 2017 could see you do the whole of the four, even after you have done one. You can do one from today, you have got four left."[10]

Circumstances of the 2013 offences

[17] Once again I intend to focus only on the four offences involving robbery. The first concerned a service station where the applicant acted as a "look out" for the robbery. Two offenders forced open the service station doors and one of them threatened the attendant with a screwdriver. The two offenders were disguised. They stole some cash, biscuits and chocolates. The screwdriver was handed to the applicant, who hid it under the seat of a car.

[18] The second involved an attempted robbery, again on a service station. The applicant and another man attempted to break in by kicking the doors. The applicant was disguised at the time. When they could not open the doors they ran back to a car and drove away. The applicant admitted that they were going to "stand over" the attendant until he handed over money.

[19] The third occasion involved another service station. Two young women acted as a decoy, by entering the service station and asking to use the toilets. When they left the applicant and another man ran through the doors. They were disguised and carrying knives. The applicant's co-offender had his knife pointed towards the attendant at all times. The applicant admitted that they threatened the attendant, who handed over the cash till. The money from the robbery was used to purchase methylamphetamine.

[20] The fourth occasion also involved a service station. By arrangement two young women approached the store and the attendant opened the doors for them. As they did so the applicant, wearing a balaclava and gloves, went through. He was armed with a screwdriver which he pointed at the attendant. About $560 in cash was stolen. The applicant admitted that he had threatened the attendant.

The 2014 sentencing hearing

[21] As the prosecutor observed, the 2013 offences occurred only about three months after he was released from custody on 3 April 2013. The offences therefore breached the orders made in 2012, for the suspended sentence and probation.

[22] The learned sentencing judge was the same judge who had sentenced the applicant in 2012. He observed in relation to the 2012 sentence:

> "The sentence of five years to serve 12 months, if I remember correctly, was achieved by not declaring a period of about 10 and a half months custody that he had already served and it was in effect a sentence of six years to serve two years."[11]

[23] Counsel for the applicant put certain factual matters before the sentencing judge, without objection. They included that when the applicant came out of gaol under the first set of sentences, he thought he was coming out to resume a personal

---

10 AB 160.
11 AB 37.

relationship, but discovered that it had broken down whilst he was in custody. As a consequence he "started using drugs again and, as a result, he ended up with these offences."[12] That drug was identified as methylamphetamine. Further, counsel characterised the robberies as not involving pre-planning or sophistication, but having "the look of completely drug-induced pre-emptive sort of strikes" and "in a sense disarrayed conduct by people who obviously have drug problems".[13]

[24] Counsel for the applicant also made it clear that whilst he did not concede that the sentencing judge should order that the applicant serve the remaining four years under the 2012 sentences, such an order was "clearly within the bounds. I don't argue against it."[14] Ultimately counsel for the applicant submitted that an extra two to three years on top of the four to be served from the 2012 sentences would be appropriate. Thus the submission was made expressly that "an appropriate penalty would be anything from six to seven years and that's a totality thing".[15]

[25] In his sentencing remarks the sentencing judge made it clear that he had decided that the applicant should serve the whole of the outstanding portion of the 2012 sentences, namely four years. He then identified that the key issues in the case were what sentence should be imposed, whether it would be cumulative, and whether he should set a parole eligibility date.[16]

[26] The sentencing judge concluded that the sentence to be imposed "quite clearly should and must be cumulative", that is to say on top of the four years that would be invoked from the breach of the orders in 2012. His Honour explained that in these terms:

> "To return to criminal offending in the same way as you had previously, that is, armed robberies, within three months of release without taking any real advantage of the probation order and returning almost immediately to drug offending and high level criminal offending, that is, armed robberies, must bring a cumulative sentence on top of the four years …[17]
>
> …
>
> … you are ordered to serve the whole of that outstanding sentence, which is effectively four years. I do not consider it would be unjust for you to do so, particularly given the nature of your re-offending so soon after you were released."[18]

[27] The sentencing judge referred to matters which had been raised by the applicant's counsel, by way of mitigation. That included the applicant's expectation to continue a relationship and, when it failed, his quick return to the use of amphetamines, and the drug-induced and opportunistic nature of the offending. The sentencing judge also expressly took into account the early pleas of guilty, the applicant's youth, and the nature and circumstances of the role the applicant played

---

12 AB 50.
13 AB 50, 51.
14 AB 51.
15 AB 51. The reference to "a totality thing" was a reference to the principle of totality as expressed in *Mill v The Queen* (1988) 166 CLR 59.
16 AB 70.
17 AB 70.
18 AB 71.

in "each of these very serious offences".[19] His Honour took the view that whilst the offending,

> "may not be the most sophisticated of offending it's certainly serious. It involved co-offenders. It involved using those co-offenders as decoys on a couple of occasions …".[20]

[28] The sentencing judge was also cognisant of the two issues which he described as being "the two factors that ultimately weigh most heavily in the sentence that I impose", namely whether the sentence would be crushing, and the applicant's young age.[21] His Honour referred to the applicant's youth when framing the additional penalty:

> "In terms of the additional penalty, having received a sentence of six years effectively, although it was sentenced as five years, for the six armed robberies on 4 April 2012, with respect it seems to me that the starting point has to be that six years. And that would effectively result in a 12 year overall sentence. However, I accept that I then have to take into account your age – you're only 22 now, you were 21 at the time – and even though you were only a young person when I sentenced you for the six armed robberies, it was clear that they were so serious and so persistent that they had to receive a substantial head penalty. And you must of course receive a substantial head penalty for having returned to armed robberies so soon after your release on a suspended sentence and on probation …".[22]

[29] His Honour then dealt with those sentences which had to be adjusted because of the breaches of the suspended sentence and probation order. Having done so his Honour said: "So your effective sentence in respect of those matters is four years".[23] He then sentenced the applicant to four years imprisonment on each of the robbery charges, to be served concurrently with each other, but cumulatively on the invoked four years.

[30] Then his Honour turned to setting a parole eligibility date. His Honour first noted that the applicant had been in custody in respect of the 2013 offences for a total of 312 days. He then said he intended to set a parole eligibility date "essentially at a third of the effective period of – you effectively served".[24] That period was eight years, or 96 months. One-third of that would have meant 32 months. Counsel for the applicant calculated the one-third period as being 22 and a half months, "if you take the 10 off a third of eight years … 22 and a half months from there".[25] In the end his Honour set a parole eligibility date at 1 March 2016 "taking into [account] the 10 and a half months you've already served".[26]

Discussion

---

19 AB 77.
20 AB 70.
21 AB 70 and 71.
22 AB 70.
23 AB 72.
24 AB 72.
25 AB 72.
26 AB 73.

[31] The applicant contends that the sentence imposed in 2014 offended the totality principle. That principle was explained in *Mill v The Queen* when the High Court approved this statement from Thomas, *Principles of Sentencing*:[27]

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['']; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.'"[28]

[32] The High Court in *Postiglione v The Queen*[29] referred to the wider totality principle reflected in *Mill*. McHugh J expressed it thus:

> "The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved."[30]

[33] McHugh J identified the basis of that broad principle in this way:

> "In *Kelly v The Queen* O'Loughlin J, sitting in the Full Court of the Federal Court of Australia, applied the following unreported remarks of King CJ in *R v Rossi*:
>
> > 'There is a principle of sentencing known as the principle of totality, which enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect.'
>
> The application of the totality principle therefore requires an evaluation of the overall criminality involved in all the offences with which the prisoner is charged. Where necessary, the Court must adjust the prima facie length of the sentences downward in order to achieve the appropriate relativity between the totality of the criminality and totality of the sentences."[31]

---

27 2nd Ed (1979) at 56-57; footnotes omitted.

28 *Mill v The Queen* (1988) 166 CLR 59, at 63. (***Mill***)

29 (1997) 189 CLR 295. (***Postiglione***)

30 *Postiglione* at 307-308.

31 McHugh J at 308. Citations omitted. See *LAE*, at [33].

[34] The ambit of the totality principle was referred to recently by this Court in *R v Beattie*.[32] There Philip McMurdo J[33] said:

> "The ambit of the totality principle has been extended in at least two ways. The first, which is illustrated by *Mill v R*, is where an offender commits a number of offences within a short space of time but in more than one State. Upon being sentenced to a term of imprisonment in one State, the offender cannot be sentenced in the other State until he is released from custody under the first sentence. In such a case, it is necessary for the second sentencing judge to consider in aggregate the sentences and if necessary to moderate the sentence then to be imposed.[34] **The principle has also been extended in the sentencing of an offender who is then serving an existing sentence. In such a case, 'the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable**.'[35]"

[35] The particular aspect of the totality principle which the appellant seeks to invoke is that related to where sentences are imposed which will be cumulative upon or overlap with an existing custodial sentence. That is said to apply here because the sentencing judge invoked the remaining four years under the sentences imposed in 2012, because the offences for which the applicant was sentenced in 2014 occurred during the period of the suspension and probation orders under the 2012 sentences. Thus, it is said, when the sentences for the 2014 offences were imposed, the applicant was serving an existing sentence.

[36] This aspect of the totality principle was referred to in *Gordon*, where Hunt CJ at CL said:

> "When a custodial sentence is to be imposed which will be cumulative upon, or which will overlap with, an existing custodial sentence, the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable."[36]

[37] As was pointed out in *LAE*[37] that part of the principle was echoed by the Victorian Court of Appeal in *Hunter*:

> "There must be relativity between the totality of the criminality and the totality of sentences, not only for the offences for which the person is being sentenced, but for the sentence which the person is currently serving."[38]

---

32 *R v Beattie; Ex parte Attorney-General (Qld)* [2014] QCA 206, at [19]. (***Beattie***). Emphasis added.

33 With whom Holmes and Gotterson JJA concurred.

34 Citing *Mill v The Queen* (1988) 166 CLR 59 at 63-64; *R v Todd* [1982] 2 NSWLR 517 at 519-520.

35 Citing *R v Gordon* (1994) 71 A Crim R 459 at 466 per Hunt CJ at CL (***Gordon***); *Postiglione v The Queen* (1997) 189 CLR 295 at 308 (***Postiglione)***; *R v Hunter* [2006] 14 VR 336 at [30] (***Hunter***); see also *R v LAE* [2013] QCA 189 at [35]-[37] (***LAE***).

36 *Gordon* at 466.

37 *LAE* at [36].

38 *Hunter* at [30], citing *R v Bakhos* (1989) 39 A Crim R 174; *R v Harrison* (1990) 48 A Crim R 197; and *Gordon*.

[38] In *Hunter* the offences for which the sentence was imposed took place while the offender was on parole in relation to other offences. At the time of sentencing his parole had been cancelled by the Parole Board and he was serving the unexpired period of his original sentence. The court addressed the principle applicable where that is the case:

> "Where parole is cancelled, the principle of totality must "bulk large" in the determination of the aggregate term of imprisonment imposed for the later offences.[39] In *R v Sullivan*,[40] Eames JA (with whom Charles and Buchanan JJA agreed), said:
>
> > '[T]he principle of totality … requires that the sentencing court evaluate the overall criminality involved in all the offences and adjust the sentence downwards, where appropriate, to ensure there is an appropriate relativity between the totality of the criminality and the totality of the length of sentence imposed. It is a principle which requires the court to have regard both to the sentences about to be imposed and those which the prisoner is already undergoing: see *Postiglione v The Queen* (1997) 189 CLR 295. Notwithstanding section 16(3B), the principle of totality also has application in circumstances where, as here, the sentence currently being served derives from a breach of parole.[41]'"

[39] In *Azzopardi v The Queen*[42] Redlich JA[43] said in relation to this aspect of the totality principle:

> "There are two accepted methods of adjusting the total sentence to satisfy the principle. Thus, it was said in *Mill*:
>
> > 'Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.'
>
> A like approach was adopted by the majority of the High Court in *Johnson v R*. In explaining the proper method to be adopted in sentencing for multiple offences, Ormiston JA, in *Grabovac*, made it clear that the "preferable course" described in *Mill*, is only a guide. His Honour said:
>
> > 'In general a Court should avoid imposing artificially inadequate sentences in order to accommodate the rules relating to cumulation. In other words, as the High Court said, where practical when applying accepted rules of sentencing as to totality, proportionality and the like and in order to fashion an appropriate total effective head term in relation to a series

---

39 *R v Greenslade* [2004] VSCA 213 per Batt JA at [30].
40 *R v Sullivan* [2005] VSCA 286.
41 *R v Sullivan* [2005] VSCA 286, at [20].
42 *Azzopardi v The Queen* [2011] 35 VR 43. (***Azzopardi***)
43 With whom Coghlan and Macaulay AJJA agreed.

> of offences, it is preferable to achieve a satisfactory result by passing appropriate individual sentences and to make those sentences wholly or partially concurrent, rather than by an order or orders for the cumulation of unnecessarily reduced individual sentences. Nevertheless, a rule of this kind can only be a precept or guideline to be applied as and when practicable. In particular, though concurrency is to be preferred, a degree of cumulation ought to be ordered where sentences represent separate episodes or transactions which ought to be recognised, though at all times avoiding the imposition of a 'crushing' sentence.'"[44]

[40] *Azzopardi* identified that a sentence is said to be "crushing" when it is of such a length that it would provoke a feeling of helplessness in the applicant if and when he or she is released, or which would result in the destruction of any reasonable expectation of useful life after release.[45] Whilst the need to avoid a sentence of that character is separate and distinct from the need to have regard to the principle of totality, nonetheless as a matter of practicality, the two principles are often conflated, and considered together.[46]

[41] The precise relationship between what is called a crushing sentence and the totality principle has been the subject of some debate in Queensland, and elsewhere.[47] However, there is no need to embark on a resolution of the question. The applicant's submissions referred to both concepts, and therefore it is convenient to address both.

The parole eligibility date

[42] The applicant had been detained in custody for a total of 312 days, from 24 June 2013 to 1 May 2014. That was a period of about 10 and a half months. Having noted that fact the sentencing judge indicated an intention to set the parole eligibility date at one-third of the effective sentence of eight years.[48] That was calculated correctly as 32 months. The intention of the sentencing judge was, as he said, to take into account the 10 and a half months that had already been served,[49] by deducting that period from the 32 months which reflected one-third of eight years. If that had been done the correct parole eligibility date would have been 17 February 2016. As it was, parole eligibility was set at 1 March 2016, which was exactly 22 months from 2 May 2014. It seems in the exchange leading to the setting of the date, the extra 12 days fell by the wayside.

[43] Accepting that the sentencing judge's intention was to take into account the full 312 days by discounting that from the normal one-third of the sentence imposed, the sentencing process miscarried at least to that extent.

[44] However, this was not a point taken before this Court. For that reason, and for the reasons which follow, it is not necessary to deal with it further.

---

44 *Azzopardi* at [63]-[64] (citations omitted). See also *Rouge v R* [2013] VSCA 160.

45 *Azzopardi* at [69].

46 *Fridey v R* [2014] VSCA 271, at [38] per Weinberg, Whelan and Beech JJA.

47 See the review by Fryberg J in *R v Schmidt* [2011] QCA 133. M Wilson J agreed with Fryberg J, but Muir JA declined to enter upon the question.

48 AB 72.

49 Actually 312 days.

Application of the totality principle

[45] No challenge was made to the sentencing judge's exercise of his discretion by invoking the balance of the sentence imposed in 2012. The sole submission was that to give a four year sentence cumulatively on top of that resulted in a manifestly excessive sentence. That was because, it was submitted, the applicant was a very young man who would end up having to serve at least four and a half years in prison in respect of both sets of offences.[50]

[46] The sentencing judge identified that the "starting point" for the appropriate sentences for the 2013 robberies was six years. The comparable authorities to which the court was referred would seem to support that, at least as a start point. *R v Styles*[51] was one referred to the sentencing judge both in 2012 and again in 2014, and to this Court as well. That involved an offender 21 years old when the offences occurred, and 26 when sentenced. He had an inconsequential criminal history. On a plea of guilty to two counts of armed robbery and two counts of armed robbery in company he was sentenced to six years imprisonment with a recommendation for parole after serving 21 months.[52] The robberies involved convenience stores where the offender entered with some form of disguise, armed with a knife and a blood filled syringe. On two occasions a co-offender was armed with a gun. On each case relatively small amounts of money were taken, after intimidating the shop attendant. There was a degree of planning on each occasion, and on each occasion the applicant was disguised and armed. After a committal the offender absconded and was at large for about four and a half years.

[47] The co-offender pleaded guilty to four counts of armed robbery. He had a previous conviction for armed robbery and attempted armed robbery. He was sentenced to seven years imprisonment with a recommendation for parole after serving two years. It was clear that he had received a significant discount because of his co-operation by pleading guilty at an early stage.

[48] On appeal Williams JA[53] said that a review of the comparable cases "indicates that a sentence in the range of six to seven years is appropriate for this type of offence". On the basis that there was no entitlement to a discount for an early plea, the head sentence of six years was "well within range and cannot be said to be manifestly excessive".[54]

[49] In *R v Leighton*[55] the offender was a 41 year old woman who committed a number of armed robberies by accosting people in car park lifts or at ATM machines, threatening them with a syringe which appeared to contain blood, and announcing that she either had AIDS or was "Hep C positive". There were four such occasions, and on one of them she stabbed one of the victims in the shoulder with the syringe. She had a significant criminal history, principally for dishonesty and drug offences. She was on parole for previous offences at the time of the offences for which she was

---

50 The original 10 and a half months in custody prior to being sentenced in 2012, plus the original 12 months served, plus the additional 10 and a half months in custody pending sentence in 2014, and then the 22 months until the parole eligibility date. That is a total of 55 months, or four years and seven months.

51 *R v Styles* [2003] QCA 374. (***Styles***)

52 There was an additional count of attempted break and enter in respect of which he was sentenced to 12 months imprisonment, to be served concurrently.

53 With whom Muir J and Holmes J (as they then were) agreed.

54 *Styles* at [18].

55 *R v Leighton* [2014] QCA 169.

sentenced. McMurdo P[56] referred to the fact that the offender had had a dreadful early life, significant psychiatric issues and was not without hope of rehabilitation.[57] On appeal the original sentence of eight years with parole eligibility after two years was reduced to six years imprisonment and parole eligibility after 26 months. In coming to that conclusion *Styles* was distinguished on the basis that it involved a very young offender with only one minor conviction, and who was not on parole at the time.

[50] Both *Styles* and *Leighton* support a start point of six years in this case. The other authority referred to by the applicant, *R v Morrow*[58] involved circumstances sufficiently distinct from the applicant's case to make it of little use. It involved a slightly older woman who committed three counts of armed robbery and was sentenced on her plea of guilty to five years imprisonment, suspended after 10 months. Her robberies were carried out by use of a syringe filled with her own blood and threats that she carried Hepatitis C. One occurred while she was on a bail for the other two. She suffered from a very serious drug addiction and by the time of sentence she had made some progress in rehabilitation. It also appeared, subsequent to sentencing, that she had been diagnosed with a mood disorder identified in one report as a bipolar disorder. On that basis her sentence of five years, suspended after 10 months was reduced to four years suspended after nine months.

[51] It is evident that the sentencing judge in the present case reduced his start point of six years to four years to balance the seriousness of the offending[59] and the "issue of a crushing sentence".[60] Given the recognition in *Fridey* that the notion of a crushing sentence is often conflated with that of totality, and considered as part and parcel of the same point, it is possible that the sentencing judge was adverting to the principle of totality in reaching his conclusion. Equally it is possible that his Honour was merely referring to the separate consideration of whether the sentence would be crushing. The discussion between the sentencing judge and counsel for the applicant does not lend support to one possibility as against the other.[61] When counsel proposed six to seven years saying "that's a totality thing", the discussion proceeded as to whether the sentence being discussed would be a crushing sentence or not.

[52] It has to be borne in mind that by the time of the sentence in 2014, not only was the sentencing judge confronted (again) with the applicant's poor criminal history, but also these factors:

(a) the applicant received a discount from six years to five years on the sentence in 2012 to reflect, in part, the 10 and a half months during which the applicant had been in custody at that time; in that sense a discount had already been given for the first set of offending;

(b) the 2013 offences occurred within a few months of the applicant being released under the suspension order, and on probation;

(c) whilst the 2013 offences were numerically less than those in 2011, the pattern of robberies had been maintained, with attacks on "soft targets"

---

56 With whom Gotterson JA and Henry J agreed.

57 *Leighton* at [23].

58 *R v Morrow* [2006] QCA 305.

59 As his Honour said, more serious because of the return to armed robberies so soon after release on the suspended sentence and probation.

60 AB 71.

61 AB 51-52.

such as service stations, and threatened violence to the victims by use of a weapon; however the scale of violence had not escalated; in fact it could be said to have diminished, as there was no actual personal violence unlike the circumstances of the 2011 offences;

(d) there was no evidence of any real rehabilitation in the interim.

[53] That said, the authorities do not seem to support a total sentence of eight years for offences of this kind. That is the effect of the sentence in this case, where four years for the 2013 offences was made cumulative upon the balance of four years to be served on the 2012 sentences. As the applicant's counsel contended, the effect will be that the applicant has to serve close to four and a half years of actual custody, before he can attempt to achieve parole. Notwithstanding that the sentencing judge adverted to the totality principle in reducing his start point of six years to four years for the 2013 offences, it is not evident that, having reached his view that four years was the correct penalty, he then explicitly considered the overall criminality involved in all the offences and adjusted the sentence downwards, where appropriate, to ensure there is an appropriate relativity between the totality of the criminality and the totality of the length of sentence imposed. In my view, had he done so then he could not have imposed, in the circumstances, a sentence as high as eight years with four and a half years to be served before parole eligibility.

[54] A failure to explicitly consider the aggregate sentence in order to determine whether a total sentence is just and appropriate bespeaks an error in the exercise of the sentencing discretion.[62] For those reasons I respectfully consider that the sentencing judge has fallen into error by not properly applying the totality principle. It therefore falls to this Court to re-sentence the applicant.

[55] The sentence that should be imposed has to reflect the fact that it is for a second set of offending, for violent offences, and in circumstances which indicate quite a degree of recidivism. The offences are serious, and the applicant's recidivism means that general and personal deterrence, denunciation and community protection are very important sentencing considerations in this particular case. Further, whilst the applicant could not really point to any significant degree of successful rehabilitation during the time he was imprisoned, an attempt to address his drug addiction could be made in prison.

[56] The preferable approach, derived from *Mill* and *Johnson*, is that a sentence is fixed for each offence, then aggregated before taking the next step of determining concurrency or accumulation, and to consider what is an appropriate non-parole period.[63] However, *Johnson* recognised that it was not an immutable practice.

[57] The first step is to deal with the question of the balance of the 2012 sentences as the applicant is caught by s 147 of the *Penalties and Sentences Act* 1992 (Qld). Under s 147(2) the court must order the offender to serve the whole of the suspended imprisonment, unless it is of the opinion that it would be unjust to do so. As to that question, this Court in *Baker* adopted what was said by Holmes JA in *R v Norden*:[64]

---

62 *R v Baker* [2011] QCA 104 at [47], per Atkinson J, McMurdo P and Peter Lyons J concurring. (***Baker***)

63 *Johnson* v *The Queen* (2004) 78 ALJR 616 at [26].

64 [2009] QCA 42 at [13]-[15].

"[48] In exercising the discretion under s 147(2) of the PSA, the sentencing judge must have regard to the setting of a parole release date or parole eligibility date. Holmes JA explained the necessary procedure in *R v Norden* as follows:

"[13] The question is whether the decision to set the parole release date should be regarded as an aspect of the decision to be made under s 147(2); that is, something to be taken into account in deciding whether it would be unjust to order the offender to serve the whole of the suspended imprisonment. (Section 147(3) specifies the factors which must be taken into account, but that list is not an exhaustive list: see *R v Stevens*). Or, alternatively, should it be treated as a separate and independent exercise of discretion, arising once a decision is made that it is not unjust to require the offender to serve the suspended imprisonment?

[14] The first alternative provides, in my view, the better answer. What must be borne in mind is that a judge acting under s 147 is not re-sentencing an offender, but dealing with him for a breach of suspended sentence. The first step in that process is to consider whether it is unjust to make an order that the offender serve the whole of the suspended imprisonment. Necessarily, in deciding whether it is unjust to so order, relevant considerations will be that a parole release date or parole eligibility date is to be set, and when it is to be set. Decisions as to parole cannot sensibly be made as a separate exercise of discretion; one does not decide that it is not unjust to order the offender to serve the whole of the suspended imprisonment and only then turn to consideration of a parole date. Rather, the judgment required by s 147(2) must be made allowing for the prospective parole date, among other relevant factors. That process is appropriately regarded as entailing a single exercise of discretionary judgment; and the appeal from an order made under s 147(1)(b) should be regarded as correspondingly confined to an examination of that discretionary judgment.

[15] That situation does not alter simply because the order is made in combination with others.""

[58] The 2011 offences were committed at a point where the applicant already had a significant criminal history. The 2011 offences were not trivial, involving repeated acts where violence was threatened to innocent attendants at service stations. In the case of the car-jacking robbery actual violence was repeatedly inflicted on the owner of the vehicle. There were six such offences, committed over a relatively

short period. Whilst it is true that the applicant admitted the offences once apprehended, he exhibited no real sign of remorse. Further, notwithstanding the chance afforded to him by the sentencing judge in 2012, he demonstrated no real effort at rehabilitation. Once released the applicant reverted to criminal activity of a similar nature almost immediately. Further, the applicant offended whilst on probation and subject to a suspended sentence.

[59] Nothing in the circumstances required to be considered under s 147(3) of the *Penalties and Sentences Act* 1992 (Qld) convinces me that it would be unjust to order that the applicant serve the balance of the 2012 sentences.[65] Counsel for the applicant (both before the sentencing judge, and this Court) did not contend otherwise. The sentences imposed on 2 May 2014, insofar as they invoked the balance of the sentences imposed in 2012 and re-sentenced the applicant accordingly, were in my respectful view, correct.

[60] In coming to the view that it would not be unjust to order the balance of the 2012 sentences to be served, I have borne in mind that the applicant ought to have the benefit of a set parole eligibility date, so that any chance of rehabilitation is not stifled. The fact that the applicant will be sentenced to a term of imprisonment on the 2013 offences impacts on the selection of the date, which for reasons which follow, takes both sets of sentences into account. I consider that such a date ought to be set, and that, for the reasons which appear below, that date ought to be 17 and a half months from 2 May 2014.

[61] As for the 2013 robbery offences, the comparable cases referred to above suggest a start point at six years is appropriate. That was the start point for this applicant when sentenced in 2012 for offences very similar in nature to the 2013 offences. There is nothing in any of any facts since that would compel a different conclusion.

[62] Next, consideration needs be given to whether the 2014 sentences should be served cumulatively or concurrently with the 2012 sentences.

[63] The issue of whether to order a sentence to be served cumulatively or not has been the subject of recent attention by this Court. In *R v Lacey*[66] Fraser JA adopted these comments from Wilson J:[67]

> "[55] The task which always confronts a sentencing judge is to impose the penalty which is "just and appropriate" in all the circumstances. It always necessitates fashioning a sentence provisionally, and then reviewing all its component parts (which often comprise the imposition of a term of imprisonment, a decision on how pre-sentence custody is to be treated, and fixing a non-parole period by the imposition of a serious violent offence declaration or otherwise) to ensure the overall sentence is just and appropriate in all the circumstances.
>
> [56] Where the imposition of a cumulative term of imprisonment is a live issue, the sentencing judge has to be especially careful to ensure that the sentence ultimately imposed is not

---

65 See *Baker* at [57] where a similar view was taken.

66 *R v Lacey* [2013] QCA 318 (***Lacey***).

67 *Lacey* at [55]-[57] referring to Wilson J in *R v Lacey* [2013] QCA 292 at [55]-[57].

> disproportionate to the offender's overall criminality and that it does not stifle prospects of rehabilitation, which is one of the purposes of sentencing.

[57] In *R v Clements* Macrossan CJ and de Jersey J (with whom Pincus JA agreed) said –

> 'It is true that a broad discretion applies when a judge is giving consideration to a decision whether to impose consecutive or concurrent terms. Of course, if no special direction is given then the separate sentences which he pronounces will be concurrent: previously s 20 of the *Criminal Code* (Qld) and now ss 155 and 156 of the *Penalties and Sentences Act* 1992 (Qld). While the discretion as to the imposition of cumulative terms is broad, there are certain approaches which have gained acceptance. In *Campbell and Brennan* [1981] Qd R 516 at 524 it was said that it is important that the court should look for some clear reason why sentences should be served cumulatively in a particular case before so ordering and also should determine whether the resulting effective sentence is out of proportion to the combined seriousness of the offences (the 'totality' principle). It also appears to be accepted that concurrent terms will usually be called for in the case of a series of related offences committed over a short time span. In other situations the court may be conscious of a clear and compelling need to visit an offence with a separate additional penalty. However, in many instances the judicial discretion may be at large and less restricted by particular principle. Still, a need for caution will always attend the matter to which attention was drawn in *Campbell and Brennan*, viz that an unjust excessiveness may be produced if care is not taken to assess the overall effect of the imposition of cumulative penalties.'"

[64] I consider it appropriate to order the sentences for the 2013 offences be served cumulatively with the invoked sentences from 2012. As was said by Ormiston JA in *Grabovac*,[68] "a degree of cumulation ought to be ordered where sentences represent separate episodes or transactions which ought to be recognised, though at all times avoiding the imposition of a "crushing" sentence". Here although the 2013 offences were similar in nature to those in 2011, they occurred more than two years later, and thus cannot be said to be related offences committed over a short time frame. Further, the fact that the 2013 offences were committed so soon after the applicant's release under the orders made in 2012 means there is a clear and compelling need to visit those offences with a separate additional penalty. I am also mindful that the combined effect ought not be such as to make it a "crushing" burden for the applicant.[69] As for the applicant's prospects of rehabilitation, I do not consider that they will be stifled; in fact the contrary is the case given his addiction.

---

68 *Director of Public Prosecution v Grabovac* [1998] 1 VR 664 at 665. See also *R v Lomax* [1998] 1 VR 551.

69 *R v Cutajar; ex parte A-G (Qld)* [1995] QCA 570, at [8] per McPherson JA; *Baker* at [41].

[65] On the basis that the robbery offences in 2013 will attract a sentence to be served cumulatively with the invoked portion of the 2012 sentences, and that they attract, as a start point, six years imprisonment, the next step in my view is to apply the totality principle so as ensure there is an appropriate relativity between the totality of the criminality and the totality of the length of sentence imposed. In doing so the guidance given in *R v Margaritis; Ex parte Attorney-General (Qld)*[70] should be borne in mind:

> "[12] The application of the totality principle does not require that there must invariably be some reduction in the accumulation of otherwise appropriate sentences to avoid the so called "crushing" effect. The appropriate course is to arrive at an appropriate sentence and then assess the cumulative effect to gauge whether the overall sentence is disproportionate to the offender's criminality."

[66] An adjustment to the sentence should be made to reflect the overall criminality. Therefore I would reduce the start point of six years to three years, to be served cumulatively with the invoked sentence from 2012. That means an effective head sentence in respect of all the robbery offences, invoked and otherwise, of seven years, which gives due recognition to the totality of the criminality, given that the 2013 offences are the applicant's second set of such offences, and were committed only a short time after he was released on probation and under the suspended sentences.

[67] As to setting a parole eligibility date, I would follow the approach taken by the sentencing judge, namely of setting that date by taking the ten and a half months in custody off the one third point of the total sentence. One third would fall at 28 months from 2 May 2014. Reducing that by ten and a half months results in and parole eligibility date at 17 and a half months from 2 May 2014, namely 15 October 2015.

Conclusion

[68] For the reasons given I would order as follows:

1. The application for leave to appeal is granted.
2. The appeal is allowed.
3. In respect of each of Counts 1-3 on Indictment 62/2014 and Count 1 on Indictment 63/2014, set aside the order that the applicant be imprisoned for a period of four years.
4. In lieu thereof, sentence the applicant in respect of each of Counts 1-3 on Indictment 62/2014 and Count 1 on Indictment 63/2014, for a period of three years.
5. Direct that the terms of three years imprisonment are to be served concurrently with each other, but cumulatively to the term of four years imprisonment on the activation of the suspended sentence, but noting that the terms of imprisonment activated on the suspended sentences are to be served concurrently with each other.

---

70 [2014] QCA 219, per Muir JA, PD McMurdo J and P Lyons J concurring.

6. Set aside the orders made on 2 May 2014 that the date the applicant is eligible for parole be fixed at 1 March 2016.

7. Order that the date the applicant is eligible for parole be fixed at 15 October 2015.

8. Otherwise affirm the orders made on 2 May 2014.

[69] **HENRY J:** I agree with the reasons of Morrison JA, subject to the following divergence of view as to the nature of the error which warrants this Court's intervention.

[70] In *R v Baker*,[71] Atkinson J, with whom the President and Lyons J agreed, found:

> "The sentencing judge in this case did not consider, after he had imposed both sentences, whether the combined sentence offended the totality principle. He did not, in accordance with the requirements in *Mill*, review the aggregate sentence and consider whether the total was just and appropriate. … The failure to explicitly consider the aggregate sentence in order to determine whether the total sentence was just and appropriate bespeaks an error in the exercise of the sentencing discretion."

[71] Those remarks emphasise the need in a case like the present, for the sentencing judge to review the aggregate sentence and consider whether the total is just and appropriate. However, I do not understand her Honour to have by those remarks meant that the absence of an express statement in a sentencing judge's reasons that the judge has undertaken such a review will of itself always bespeak error. Much depends on the individual case. In some cases, it may be apparent as a matter of inference that such a review has purportedly occurred, in which case an absence of express reference to the review would not of itself bespeak error. This is such a case.

[72] Here, the learned sentencing judge's reasons included a remark that in arriving at an appropriate sentence, he was "taking into account that issue of a crushing sentence".[72] This appears to be a reference to what had been said about the issue of a crushing sentence during submissions, which included this observation by his Honour:

> "[I]f I'm persuaded by the Crown's cumulative argument or submission, the only real issue after that becomes that issue of a crushing sentence and how the overall effect, if it is cumulative, should be ameliorated to deal with the fact, even if he gets another – if he were to get another six, for example, on top of the four that he owes, then it's effectively a 10 year sentence."[73]

[73] That observation shows his Honour was well aware of the need to undertake the exercise of reviewing the aggregate sentence and consider whether the total was just and appropriate. I infer the reference in his Honour's reasons to taking into account "that issue of a crushing sentence" in arriving at an appropriate sentence was a reference back to what he had said during submissions, serving as a short hand

---

71 [2011] QCA 104 [47].
72 AB 71.
73 AB 46.

reference to undertaking the requisite exercise. Against that background, the absence of a clearer, more explicit reference to the exercise in his Honour's reasons does not of itself bespeak error.

[74] Nonetheless, the review by Morrison JA of the circumstances of this case and of the sentences in other cases demonstrates the sentence imposed was, considered in the light of its cumulative effect, manifestly excessive. The total of the aggregate sentence was itself so high as to compel the inference that his Honour must in some way have erred in the consideration he was required to give to whether that total was just and appropriate.[74]

[75] It follows that I agree with the conclusion of Morrison JA that it is necessary to re-sentence the applicant.

[76] I agree with the orders proposed by Morrison JA.

---

74 *House v The King* (1936) 55 CLR 499,505.