SUPREME COURT OF QUEENSLAND

CITATION:	*R v Coleman* [2015] QCA 176
PARTIES:	**R** **v** **COLEMAN, William Alfred** (applicant)
FILE NO/S:	CA No 79 of 2015 DC No 121 of 2015 DC No 559 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	25 September 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2015
JUDGE:	Fraser and Gotterson JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave is granted.** **2. Appeal is allowed.** **3. Sentence imposed on 22 April 2015 in respect of Count 1 on Indictment 121 of 2015 is set aside.** **4. In respect of Count 1 on Indictment 121 of 2015, order that the applicant be imprisoned for a period of three and a half years.** **5. Direct that the term of three and a half years imprisonment is to be served cumulatively upon the sentence imposed on 18 October 2011.** **6. Order that the date the applicant is eligible for parole be fixed at 16 September 2016.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of armed robbery – where the applicant committed the offence whilst on parole – where the applicant was still serving the head sentence of six years imprisonment for his previous conviction of armed robbery – where the applicant was sentenced to three years and

six months imprisonment to be served cumulatively upon the sentence of six years imprisonment already being served – whether the learned sentencing judge failed to take into account the mitigating factors at the sentencing hearing – whether the cumulative sentence should have been further moderated – whether the parole eligibility date fixed at the two-thirds mark of the aggregate sentence was manifestly excessive – whether the learned sentencing judge erred in calculating the full time release date and in fixing the parole eligibility date – whether the cumulative sentence imposed by the learned sentencing judge was manifestly excessive

Corrective Services Act 2006 (Qld), s 184
Penalties and Sentences Act 1992 (Qld), s 9, s 156A, s 160C, Sch 1

Director of Public Prosecutions v Grabovac [1998] 1 VR 664; (1997) 92 A Crim R 258, considered
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, considered
R v Apps [2008] QCA 326, distinguished
R v Beattie; Ex parte Attorney-General (Qld) [2014] QCA 206, considered
R v Brown [2000] QCA 402, considered
R v Kendrick [2015] QCA 27, followed
R v Kengike [2013] QCA 40, considered
R v Maxfield [2002] 1 Qd R 417; [2000] QCA 320, distinguished
R v Shillingsworth [2002] 1 Qd R 527; [2001] QCA 172, followed

COUNSEL:	C R Smith for the applicant M T Whitbread 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 the reasons for judgment of Ann Lyons J. I agree with those reasons, save that I have found it unnecessary to decide whether or not there is a sentencing principle which requires courts to avoid a "crushing" sentence, or such a principle which is separate and distinct from the "totality principle": cf [38] of those reasons. I agree with the orders proposed by her Honour.

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

[3] **ANN LYONS J:** On 17 April 2015, the applicant was arraigned and pleaded guilty in the District Court at Brisbane to one count of armed robbery on 22 July 2014. The sentencing hearing was then adjourned to 22 April 2015.

[4] At the time of the 2014 robbery, he was on parole for a previous armed robbery in 2010 for which he had been sentenced, on 18 October 2011, to a period of six years imprisonment. That armed robbery occurred in November 2010 in circumstances

where the applicant had threatened a 79 year old lady by gaining entry into her car and forcing her to drive him around whilst armed with a syringe. That sentence was ordered to be served with lesser concurrent sentences for deprivation of liberty, stealing and fraud. At the time of that 2011 sentence, he had served 298 days in pre-sentence custody. His full time release date for those offences at the time of sentence was 23 December 2016 and the sentencing judge had fixed a parole eligibility date of 1 December 2012.

[5] At the adjourned sentencing hearing on 22 April 2015, the applicant was sentenced to three years and six months imprisonment for the 2014 armed robbery. That sentence was ordered to be served cumulatively upon the remainder of the sentence of six years that he was currently serving. The sentencing judge stated that the end date for the aggregate sentence was 17 April 2021 and fixed a parole eligibility date of 16 July 2017.

[6] The applicant argues that the cumulative sentence imposed on 22 April 2015 was manifestly excessive for a number of reasons, namely:

(a) A sentence of three and a half years failed to sufficiently take into account the mitigating factors;
(b) The sentence of three and a half years was to be served cumulatively upon the sentence of six years already being served and the head sentence of three and a half years should have been further moderated to reflect that fact; and
(c) The parole eligibility date of 16 July 2017 was fixed at the two-thirds mark of the aggregate sentence.

[7] Counsel for the applicant also argues that the sentencing judge made an error of fact in the sentencing process when he proceeded on the basis that the full time release date for both sets of offences was 17 April 2021. That error is conceded by the Crown prosecutor. It would seem clear that the sentencing judge did not take into account the fact that the applicant had served a period of 298 days in pre-sentence custody between 24 December 2010 and 18 October 2011 in relation to the sentence imposed on 18 October 2011. The correct full time release date for the aggregate sentence is in fact 25 June 2020 and not 17 April 2021.

[8] The applicant argues that on the basis of the incorrect dates used by the sentencing judge, he thought he was fixing a parole eligibility date at approximately five years and nine months (69 months) into an aggregate head sentence of nine years and six months imprisonment (114 months). The applicant argues that when the correct dates are factored into the equation, the parole eligibility date is in fact six years, six months and 22 days (almost 79 months) into an aggregate sentence of nine years and six months (114 months). This essentially places parole eligibility at a point which is some ten months later into the sentence and at the two-thirds mark of the aggregate sentence.

The circumstances of the offence

[9] On 22 July 2014 at around 7.48 pm, the applicant went to the Dan Murphy's liquor store at Woolloongabba. Despite the fact that there were people in the store waiting to be served, the applicant approached the salesman behind the counter and called out that he was to "open the till." The applicant yelled "I have a gun. Open the till. Get the money out." The complainant was fearful that there was a gun and an amount of $460 was taken from the cash register.

The sentencing hearing

[10] At the sentencing hearing, the prosecutor submitted that the sentence imposed had to be served cumulatively upon the sentence that the applicant was currently serving, as he committed the latest robbery whilst on parole for an earlier robbery he had committed for which he had been sentenced to six years imprisonment. The Crown prosecutor noted that, given that circumstance, the offending was serious and aggravated.

[11] The Crown prosecutor relied on a number of decisions including *R v Maxfield*,[1] *R v Kengike*,[2] *R v Brown*,[3] and *R v Apps*.[4] The sentences in *R v Maxfield* and *R v Apps* involved pleas of guilty from offenders who had criminal histories but had not previously been sentenced for robbery. In both of those decisions, a term of five years imprisonment was imposed with a parole eligibility date after two years. *R v Maxfield* involved a 35 year old man who had robbed a pharmacy in circumstances where he waved around an unloaded pistol and stole $160. *R v Apps* involved a robbery where there was no express threat made, although it was thought by the complainant that he had a weapon. In *R v Brown*, a sentence of six years imprisonment was imposed in relation to a 39 year old man with a long criminal history. He had more than 11 previous offences for armed robbery. That offence involved the armed robbery of a post office where he had covered his face and used a toy gun to threaten the victim. The Court of Appeal did not interfere with the sentence of six years imprisonment.

[12] In *R v Kengike*, the applicant pleaded guilty to the offence of armed robbery in company with personal violence which involved the robbery of a 7-Eleven store where he, whilst armed with a pair of scissors, grabbed a staff member by the shirt and stole an amount of $200. That offence breached a suspended sentence for unlawfully using a motor vehicle. The Court of Appeal noted that the offender had a bad criminal history which included previous convictions for armed robbery. A sentence of six and a half years imprisonment was imposed, with a parole eligibility date which had to be calculated by reference to the period of imprisonment that the offender was currently serving. In essence, the offender was required to serve an additional two years imprisonment on the sentence of six and a half years before he was eligible for parole.

[13] The prosecutor also submitted that the recent decision of *R v Kendrick*[5] was of assistance in terms of the principles of totality which the learned sentencing judge was required to consider in relation to the sentence imposed.

[14] The prosecutor acknowledged the diagnosis of bipolar disorder but submitted that the applicant was able to be managed within the prison setting and his illness was not directly connected to the commission of the offence. The prosecutor also submitted that this was not a matter where the principles of general and personal deterrence were any less applicable.

[15] The prosecutor also submitted that the applicant had in fact served about three years of the earlier six year sentence and had been on parole for about 19 months at the time of the latest offending.

[16] The seven page criminal history[6] tendered at the hearing was concerning and indicated a criminal history which had commenced when the applicant was 19 years old and

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1 [2002] 1 Qd R 417; [2000] QCA 320.
2 [2013] QCA 40.
3 [2000] QCA 402.
4 [2008] QCA 326.
5 [2015] QCA 27.
6 ARB 24-31.

included a probation order when he was 25 years old which required that he undergo psychiatric treatment. The criminal history also included about 18 stealing offences and 19 offences of fraud for which he had received some periods of imprisonment in 2009.

[17] Counsel for the applicant relied upon a report from psychiatrist Dr Anthony Tie.[7] That report made it clear that the applicant had been incarcerated since 24 July 2014 shortly after the armed robbery. By way of background, the report outlined that the applicant had joined the navy after leaving school in grade 11 but left after a short period and worked in hospitality, administration, sales and traffic control. The report noted that the applicant was under the care of the Prison Mental Health Service and was being treated with Epilim for his bipolar disorder, having been diagnosed in 2005. He also noted that he had been raped at the Arthur Gorrie Correctional Centre in 2010, as a result of which he became hypervigilant.

[18] The report also outlined a history of amphetamine use from 1988 with a short period of rehabilitation in 2008. He had a previous history of heroin use from the age of 16, but had ceased in 2010. The applicant has had three major relationships and has three sons from the relationships. His oldest son is 22 years old and he has two younger sons. The report noted that the applicant was using speed for 10 days straight prior to the robbery.

[19] Dr Tie concluded that the applicant had symptoms consistent with post traumatic stress disorder, bipolar II disorder, amphetamine dependence and borderline personality disorder. He considered that the bipolar II disorder was currently being managed through psychotropic medications and regular psychiatric reviews in custody. Dr Tie made it clear that his offending on 22 July 2014 was not affected by his mental illness and that he understood what he was doing, could control his actions and knew that he ought not to do the act. He did not consider that his clinical presentation at the time of his interview with police, which was two days after the offence, was consistent with a relapse of bipolar II disorder.

[20] Dr Tie opined, however, that a custodial sentence would be more burdensome upon the applicant due to the rape whilst incarcerated in 2010 and the persistent intrusive recollections and flashbacks which were consistent with post traumatic stress disorder. Dr Tie considered he had a vulnerability to a deterioration of his mental state from bipolar II disorder. He also considered that the applicant was vulnerable to a major depressive episode. He considered, however, that the risk could be managed through the Prison Mental Health Service. The applicant also had a number of very good references from officers of the Salvation Army who noted his willingness to help others.

The sentence imposed

[21] In imposing the sentence of three years and six months imprisonment, the learned sentencing judge recognised that the applicant was 50 years old at the time of the offending and 51 years old at the time of sentence. He considered the lengthy criminal history and noted the earlier convictions for dishonesty and the drug offences. He referred, in particular, to the robbery conviction in October 2011 but took into account the good references and the report of Dr Tie. His Honour was not satisfied that the circumstances were such that the prison sentence to be imposed would be more burdensome on the applicant. His Honour did make reference to the earlier sentence imposed in 2011, noting that he was about two and a half years into a six year sentence.

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7 ARB 49-60.

His Honour placed particular emphasis on the decision of *R v Kendrick*, and stated that a sentence of six years imprisonment was appropriate in the circumstances on the basis of the decisions to which he had been referred. He also considered that the sentence was appropriate after taking into account all of the mitigating factors he was required to consider in accordance with s 9(2) of the *Penalties and Sentences Act* 1992 (Qld).

[22] His Honour then indicated that if the sentence of six years imprisonment was added to the balance of the original sentence, which had been imposed on 18 October 2011, it would be excessive. He stated that he relied on the decision of the Court of Appeal in *R v Kendrick*, which had adopted the observations of Ormiston JA in *Director of Public Prosecutions v Grabovac* that "a degree of cumulation ought to be ordered where sentences represent separate episodes or transactions."[8] The learned sentencing judge considered that, after taking into account the totality principles, there needed to be an appropriate relativity between the totality of the criminality and the totality of the length of the sentence imposed. His Honour continued:

> "The 2014 robbery offences have a start point of six years, effectively to commence approximately two and a-half years from now. Now, although totality does not require that there must initially be some reduction in the accumulated sentence, to avoid a crushing effect, the cumulative effect must be assessed to determine whether the overall sentence is disproportionate to your criminality. In my view, an adjustment must be made to reflect overall criminality, and, in my view, it is appropriate to reduce the start point of the six year sentence that would otherwise commence from the 17th of October 2017, from six years to three and a-half years, with that period then being served cumulatively upon the 2011 sentence. That will give an effective end date of all sentences of 17 April 2021. That is about six years away."[9]

[23] As I have already indicated, there are some factual errors in that paragraph. Firstly, the end date of the 2011 sentence was 25 December 2016[10] and not 17 October 2017. Secondly, the end date of the aggregate sentence is 25 June 2020 and not 17 April 2021. The next step in the sentencing process required that a parole eligibility date be fixed and there is no doubt that, in fixing that date, his Honour was working on an incorrect factual basis.

[24] Given that incorrect factual basis, I am satisfied that the sentencing discretion has miscarried and this Court should therefore exercise the discretion afresh.

What sentence should be imposed?

[25] In coming to an appropriate sentence, I have taken into account the submissions of both Counsel and the decisions relied upon at the sentencing hearing. Counsel for the applicant had argued that a head sentence of six years is too high where there was no personal violence and where no weapon was used.

[26] The applicant also argued that the fact that he was suffering from a mental illness means that imprisonment for him would be especially onerous and that this should be recognised in a greater reduction in the head sentence. I accept that Dr Tie's report

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8 [1998] 1 VR 664, 680.

9 ARB 22 ll 7-18.

10 See Exhibit 1 to the Affidavit of Thomas Grice Zwoerner affirmed 23 July 2015. The applicant was at large for two days prior to his arrest on 24 July 2014.

does refer to these factors and they clearly should be taken into account in determining the final sentence which should be imposed. Dr Tie made it clear, however, that the applicant was receiving appropriate mental health treatment in custody including daily medication and that he was under the care of the Prison Mental Health Service. Whilst he noted a vulnerability to depression, there was none in evidence at the time the report was compiled even though he had been in custody for some time.

[27] At the sentencing hearing, Counsel for the applicant submitted that he had been "very productive whilst in custody"[11] and was once again engaged with the Salvation Army in prison. I also note that the number of references in support of the applicant were considerable and that they spoke well of him and the efforts he had made with the Salvos Streetlevel Community prior to his most recent offending. I also accept that it was an early plea, as he entered a plea of guilty at committal, and that he had shown genuine remorse when first interviewed by police.

[28] In coming to an appropriate penalty in relation to the current offending, there is no doubt that personal deterrence is a significant factor, particularly given that the sentencing judge at the 2011 sentence had indicated that the psychologist's report on that occasion had stated that if the applicant remained drug and alcohol free, it would be likely that he would not re-offend. It is clear that the current offending occurred in the context of a drug binge. Whilst general deterrence does not loom large where an offender has a mental illness, it is clear that in this case the applicant was being treated for his mental illness and was fully compliant with his medication. Dr Tie also indicated that his mental illness had no impact on the offending. Accordingly, both personal and general deterrence must be taken into account in fashioning an appropriate sentence.

[29] I accept that some of the comparable sentences relied upon were worse examples of armed robberies. However, some of the comparable sentences indicate that sentences in the order of six and a half years imprisonment have in fact been imposed for armed robberies. The sentence imposed in *R v Kengike* was in fact a sentence of six and a half years imprisonment. In the decision of *R v Brown*, this Court indicated that, given the applicant's age and criminal history, a sentence of six years was "at the lower, if not the lowest, level of the range referred to."[12] Whilst more youthful offenders who do not have the applicant's criminal history might be sentenced to periods of imprisonment of five years (as was the case in *R v Apps*) or where it was a first offence of armed robbery (as was the case in both *R v Apps* and *R v Maxfield*), it would seem to me that where those factors do not operate, it is hard to argue that a head sentence of six years is not the appropriate sentence.

[30] Furthermore, whilst the sentences imposed in both *R v Apps* and *R v Maxfield* were five years imprisonment, the parole eligibility dates were fixed after two years which is beyond the one-third mark and at the 40 per cent mark.

[31] In the present case, it simply cannot be ignored that the applicant was 51 years old at the time of sentence, had a seven page criminal history and an appalling traffic history. Significantly, he committed the current armed robbery offence whilst on parole for a similar offence of armed robbery in 2010. At the 2011 sentencing hearing for the 2010 armed robbery offence, the sentencing judge noted that it was the fourteenth time that the applicant had appeared in Court to plead guilty to criminal offences.[13]

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11 ARB 15 ll 8.
12 [2000] QCA 402, 5.
13 ARB 33 ll 22-25.

[32] It is clear that pursuant to s 156A of the *Penalties and Sentences Act* 1992 (Qld), any sentence imposed on the applicant must be served cumulatively with any other term of imprisonment he is liable to serve, as armed robbery is an offence which is mentioned in Schedule 1 and the applicant was on parole when he committed the current offence.

[33] Section 156A of the *Penalties and Sentences Act* 1992 (Qld) is in the following terms:

> "**156A Cumulative order of imprisonment must be made in particular circumstances**
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> (1) This section applies if an offender—
> (a) is convicted of an offence—
> (i) against a provision mentioned in schedule 1; or
> (ii) of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1; and
> (b) committed the offence while—
> (i) a prisoner serving a term of imprisonment; or
> (ii) released on post-prison community based release under the *Corrective Services Act 2000* or released on parole under the *Corrective Services Act 2006*; or
> (iii) on leave of absence, from a term of imprisonment, granted under the *Corrective Services Act 2000* or the *Corrective Services Act 2006*; or
> (iv) at large after escaping from lawful custody under a sentence of imprisonment.
>
> (2) A sentence of imprisonment imposed for the offence must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve."

[34] Section 9(1)(a) of the *Penalties and Sentences Act* 1992 (Qld), however, requires that any sentence imposed must be imposed "to punish the offender to an extent or in a way that is just in all the circumstances." Section 9(2) then provides the sentencing guidelines that a court must have regard to and, in this case, the following provisions are particularly relevant:

> "**9 Sentencing guidelines**
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> (2) In sentencing an offender, a court must have regard to—
> …
> (k) sentences already imposed on the offender that have not been served; and
> (l) sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender;…"

[35] Accordingly, s 9 requires that a court consider the effect of the cumulative imposition of the sentences. The relevant principles in relation to the mandatory cumulative sentences in s 156A were discussed by this Court in *R v Shillingsworth*:[14]

> "[3] The sentence imposed in this particular case had to be cumulative, as demanded by s 156A of the *Penalties and Sentences Act*. But

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14 [2002] 1 Qd R 527; [2001] QCA 172, [3].

> that did not require the sentencing court to be oblivious to the overall effect the sentence would produce on the applicant, or to fail to look at the wider picture. The passing of a sentence is a basic function belonging to courts in the exercise of their criminal jurisdiction whether the jurisdiction is inherent or statutory, or a combination of both. Section 9 of the *Penalties and Sentences Act* is, as its caption suggests, a legislative statement of "sentencing guidelines". It contains both a recognition of longstanding principles observed by the courts in exercising criminal jurisdiction, and, since the 1997 amendments, a requirement of greater emphasis upon deterrence and protection of the community in the case of violent offenders. The section does not purport to be a complete code of sentencing principles and inter alia recognises the right of the court to take into account "any other relevant circumstance". But overall it is an affirmation of the need of a sentencing court to look at all possible sentencing options and their potential effect. As noted in *Bojovic*, sentencing is a practical exercise." (citations omitted)

[36] The extension of the totality principle, as originally expressed by the High Court in *Mill v The Queen*,[15] to sentences where an offender is serving an existing sentence was recently referred to and recognised by this Court in *R v Beattie; Ex parte Attorney-General (Qld)*[16] and *R v Kendrick*.[17] In *R v Kendrick*, the applicant was a youthful offender so there was an additional issue of the need to avoid a 'crushing' sentence. In that decision, the Court noted the following:

> "[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 and the "issue of a crushing sentence". 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. 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.
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> [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:
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> (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;

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15 (1988) 166 CLR 59; [1988] HCA 70.
16 [2014] QCA 206.
17 [2015] QCA 27.

(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" 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. 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. However, *Johnson* recognised that it was not an immutable practice." (citations omitted)

[37] It is clear therefore that the Court must recognise the reality of the impact of a cumulative sentence in circumstances where a significant period of time will in fact be served in relation to the first set of offences. As counsel for the applicant submitted at the sentencing hearing, a strict cumulative sentence of six years on top of a sentence of six years would have been manifestly excessive. What is an appropriate reduction in the circumstances of this case? Counsel for the applicant argues that a sentence of three years would be appropriate to reflect the issues of totality whereas counsel for the respondent argues that the reduction to three and a half years imposed by the sentencing judge "cannot be said to be unjust and inappropriate."

[38] In the present case, the applicant will have served all but one year, seven months and 21 days of the head sentence of six years imposed in 2011. The requirement to serve all the remaining portion of his sentence was a consequence of him committing another offence whilst on parole. The fact that he will have to serve most of his original sentence is a factor which clearly needs to be taken into account when imposing the term of the cumulative sentence so that the sentence imposed punishes the applicant in a way which is just in all of the circumstances, but also recognises the reality of the 2011 sentence he still has to serve. In my view, a reduction of the sentence of six years to a sentence of three and a half years is appropriate to reflect the seriousness of his criminality, the consequences to the applicant for committing an offence whilst on parole and the recognised principles as outlined in *R v Kendrick*.

What parole eligibility date should be fixed?

[39] As the applicant breached his parole for the sentence imposed on 18 October 2011, his parole was cancelled[18] and he does not have a current parole eligibility date pursuant to the *Penalties and Sentences Act* 1992 (Qld). Section 160C(5) of that Act, however, provides that this Court may fix the date the applicant is eligible for parole.

[40] If this Court does not fix a parole eligibility date pursuant to the *Penalties and Sentences Act* 1992 (Qld), then the applicant's parole eligibility date would be statutorily set by s 184(2) of the *Corrective Services Act* 2006 (Qld), which is in the following terms:

> "**184 Parole eligibility date for other prisoners**
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> …
>
> (2) The prisoner's parole eligibility date is the day after the day on which the prisoner has served half the period of imprisonment to which the prisoner has been sentenced, despite any grant of remission. …"

[41] In my view, this Court should fix a parole eligibility date because parole eligibility at the fifty percent mark would be too onerous in terms of an appropriate sentence to be imposed, given his guilty plea and the strength of the support shown for him at the sentencing hearing on 22 April 2015.

[42] At what point, however, should the parole eligibility date be fixed given the applicant is serving an aggregate sentence of nine and a half years imprisonment? At the sentencing hearing, counsel for the applicant made the following submission:

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18 *Corrective Services Act* 2006 (Qld), s 184(1)(d); ARB 21 l 27.

> "MS GIAROLA: Well, it seems settled in – or seemed unambiguous in Kendrick that that Court intended to set the parole eligibility date at one-third of the total period. Mr Coleman finds himself about four years and four months through the initial six year period. The pre-sentence custody certificate indicates he has one year and eight months left to serve and, as my learned friend and your Honour correctly identified, the three years will go on top of that. If your Honour was minded to impose three years, we would have a total period of nine years.
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> Obviously a third of that would be at the three year mark, but we're four years and – around four and a-half years into it now. My submission is that it would be open for your Honour to set a parole eligibility date of today. If your Honour was to impose three years, he's effectively halfway through that at the present time and the matter – it would be certainly within your Honour's discretion and, in my submission, it would be appropriate to set it today given in other cases, where cumulative imprisonment seems to have been imposed, the parole eligibility date is somewhere around the third mark of the total period."[19]

[43] In fixing an appropriate parole eligibility date, there is no doubt that it is not a strict arithmetical exercise and that a number of factors must be taken into account. However, it is important to bear in mind the actual periods which are involved. The applicant is serving an aggregate sentence of nine and a half years which amounts to 114 months or 3,470 days in custody. His current full time release date on the aggregate sentence of nine and a half years is 25 June 2020.

[44] There is no doubt that fixing a parole eligibility date at the one-third mark (which would be 13 October 2015) would see the applicant serving 38 months or 1,156 days in custody. A parole eligibility date at the half way mark (which would be 14 May 2017) would see him serving 57 months or 1,735 days in custody.

[45] Based on my calculations, the applicant served 23 months in custody from 24 December 2010 to 3 December 2012 before he was released on parole. He was out on parole for 598 days or one year, seven months and 21 days. He then served a further nine months after his arrest on 24 July 2014 until the date of sentence on 22 April 2015. He has now served a further five months in custody from that date. That gives a total of approximately 37 months in custody.

[46] Counsel for the applicant contends that the Court could set an immediate parole release date. However, as I have outlined, he has not yet reached a point where he has actually served even one-third of the aggregate sentence, which would not occur until 13 October 2015. In my view, setting a parole eligibility date at the one-third mark would not sufficiently acknowledge his level of offending given the offence was committed whilst he was on parole and the head sentence of three and a half years has already been significantly reduced.

[47] Counsel for the respondent submits that in the ordinary course on a total sentence of nine and a half years, the earliest point at which the applicant could apply for parole would be at the 50 per cent mark which, in this case, would be 14 May 2017.

[48] In the circumstances of this case, I consider that a parole eligibility date should be fixed at a point which is earlier than the 50 per cent mark but not at the one-third mark. In

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19 ARB 14 ll 33-50 to 15 ll 1-3.

my view, a parole eligibility date should be fixed at a point after the applicant has served 49 months of his 114 month sentence (about 43 per cent) in custody. Accordingly, I would make an order that the parole eligibility date be fixed at 16 September 2016.

Orders

[49] For the reasons given, I would make the following orders:

1. Application for leave is granted.

2. Appeal is allowed.

3. Sentence imposed on 22 April 2015 in respect of Count 1 on Indictment 121 of 2015 is set aside.

4. In respect of Count 1 on Indictment 121 of 2015, order that the applicant be imprisoned for a period of three and a half years.

5. Direct that the term of three and a half years imprisonment is to be served cumulatively upon the sentence imposed on 18 October 2011.

6. Order that the date the applicant is eligible for parole be fixed at 16 September 2016.