SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brown; Ex parte Attorney-General (Qld)* [2016] QCA 156
PARTIES:	**R** **v** **BROWN, Jake George** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NOS:	CA No 116 of 2015 DC No 130 of 2015 DC No 131 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Maroochydore – Date of Sentence: 14 May 2015
DELIVERED ON:	14 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2015
JUDGES:	Fraser JA and Jackson and Bond JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The sentences on counts 10, 11, 14, 22, 24, 25, 26 and 27 be varied to the extent that the parole eligibility date should be fixed at five years and four months.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent was sentenced to nine years of imprisonment on each of six counts of rape and two counts of sodomy which were the major offences – where the respondent was sentenced to lesser periods of imprisonment, to be served concurrently, for 23 other offences of assault with intent to rape, further counts of rape, procuring a sexual act by coercion, using electronic communications to procure a child under 16, indecent treatment of a child under 16, possessing child exploitation material and distributing child exploitation material – where no serious violent offence declaration was made – where the parole eligibility date was fixed at four years – where the respondent made contact with each of five complainants through social media and requested nude

photographs or sex in exchange for money – where the major offences were committed in three episodes against three separate complainants – where all three episodes involved multiple or prolonged rapes as well as some actual violence by choking, two episodes involved threats and the last episode was committed while the respondent was on bail – whether the sentence was manifestly inadequate – whether a discretionary declaration of a serious violent offence should have been made or, if not, the respondent's parole eligibility date should have been delayed to a date later than the halfway mark

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – PRINCIPLES APPLIED BY APPELLATE COURT TO CROWN APPEALS – where the Attorney-General, by supplementary written submissions, sought to argue that the respondent's autism spectrum disorder was a factor in aggravation of the sentence that might otherwise be imposed – where that contention was not advanced before the sentencing judge – whether the Attorney-General should be permitted to raise that argument on the appeal

Corrective Services Act 2006 (Qld), s 184
Criminal Code (Qld), s 348, s 349, s 669A
Penalties and Sentences Act 1992 (Qld), s 9, s 160D(3), s 161A, s 161B, s 161C

House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
Muldrock v The Queen (2011) 244 CLR 120; [2011] HCA 39, cited
R v Assurson (2007) 174 A Crim R 78; [2007] QCA 273, applied
R v Basic (2000) 115 A Crim R 456; [2000] QCA 155, considered
R v Benjamin (2012) 224 A Crim R 40; [2012] QCA 188, applied
R v Bojovic [2000] 2 Qd R 183; [1999] QCA 206, cited
R v CAJ [2009] QCA 37, considered
R v Corr; ex parte Attorney-General (Qld) [2010] QCA 40, cited
R v Dowden [2010] QCA 125, considered
R v Goodger [2009] QCA 377, cited
R v Goodwin; ex parte Attorney-General (Qld) [2014] QCA 345, cited
R v Hester [2008] QCA 277, cited
R v Kahu [2006] QCA 413, considered
R v Major; ex parte Attorney-General (Qld) [2012] 1 Qd R 465; [2011] QCA 210, cited
R v MAK (2006) 167 A Crim R 159; [2006] NSWCCA 381, cited
R v Margaritis; Ex parte Attorney-General (Qld) (2014) 244 A Crim R 317; [2014] QCA 219, applied
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, applied

R v Miller (2011) 211 A Crim R 214; [2011] QCA 160, cited
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited
R v Perini: ex parte Attorney-General (Qld) (No 2) (2011) 222 A Crim R 333; [2011] QCA 384, cited
R v PS [2004] QCA 347, considered
R v Tahiraj [2014] QCA 353, considered
R v Williams; Ex parte Attorney-General (Qld) [2014] QCA 346, considered
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL:	M Byrne QC for the appellant S Courtney for the respondent
SOLICITORS:	Director of Public Prosecutions (Queensland) for the appellant Butler McDermott for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Jackson J. I agree with those reasons and with the orders proposed by his Honour.

[2] **JACKSON J:** On 14 May 2015, the respondent to this appeal by the Attorney-General was convicted and sentenced for 29 offences in the District Court of Queensland at Maroochydore. He was sentenced to periods of imprisonment of:

(a) nine years on each of six counts of rape and two counts of sodomy ("major offences");
(b) three years on each of five further counts of rape and two counts of assault with intent to rape;
(c) two and a half years on each of six counts of procuring a sexual act by coercion;
(d) two years on each of five counts of using electronic communications to procure a child under 16;
(e) 18 months on each of one count of indecent treatment of a child under 16, one count of possessing child exploitation material and one count of distributing child exploitation material.

[3] All the periods of imprisonment were ordered to be served concurrently. The learned sentencing judge declined to "declare [the respondent] to be convicted of a serious violent offence" ("SVO") as part of the sentence in respect of any of the offences under s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld) ("PSA").

[4] The learned sentencing judge set a parole eligibility date of four years.

Circumstances of the offending

[5] The offending involved five separate female complainants:

(a) EHJ aged 15 years at the time of the offences;
(b) CLD aged 14 years at the time of the offences (who was a friend of EHJ);
(c) AJW aged 16 years at the time of the offences;
(d) EFT aged 16 years at the time of the offence; and
(e) ARB aged 15 years at the time of the offences.

[6] None of the complainants was previously known to the respondent. He made initial contact with four of them through social media sites. He also communicated with them by telephone text messages.

[7] As succinctly submitted by the appellant, the respondent's modus operandi was to offer money for sex or for nude or otherwise intimate images. Some of the complainants provided images of themselves more willingly than others. The respondent used the threat of exposure of the images to persuade two of the complainants to have sex with him.

[8] All but three of the offences occurred between 29 April 2013 and 20 May 2013.

[9] There was a group of five initial offences of using electronic communications to procure a person under 16 years to engage in a sexual act and offences of procuring a sexual act by threats involving complainants EHJ and CLD. As one illustration of those offences, the respondent used electronic communications with intent to procure EHJ to engage in a sexual act on two occasions, by a text message that he would pay her $1,300 to her if she had sex with him and a request to her to send nude pictures of herself.

[10] These offences were followed by three separate episodes of much more serious offending involving multiple offences of rape and, in two of those episodes, an offence of sodomy.

[11] On 14 May 2013, the respondent vaginally raped and sodomised CLD, in a degrading and threatening incident in his car, involving some actual violence by choking and a threat outlined in more detail below.

[12] The second major episode of offending occurred on 19 May 2013, when the respondent assaulted with intent to rape, vaginally raped and sodomised AJW, again in a degrading and threatening incident in his car, involving some actual violence by choking and a threat to slit her throat or stab her.

[13] On 20 May 2013, the respondent sent to CLD a copy of an image she had previously sent to him accompanied by a text asking for a yes or no answer to an implied request for sex.

[14] The third major episode occurred on 11 January 2014, when the respondent vaginally raped EFT at her residence in an incident involving some actual violence by choking.

[15] The absence of consent, as defined in s 348 of the *Criminal Code*, is an element of the offence of rape under s 349 of the *Criminal Code* that underlines the characterisation of rape as an offence of violence. But the circumstances that amount to an absence of consent differ from one case to another.

[16] None of the complainants who were raped was grabbed or abducted and raped by a stranger, because each had previously electronically communicated with the respondent and met him or got into his car without any force – but in some sense the respondent's offending was not far removed from that. The respondent was not known previously to any of the complainants except by their internet chats, text messages and exchanges of images. However, those internet exchanges participated in by the complainants were generally sexual in content. The complainants were incautious in participating in those exchanges. To that initial extent, the respondent did not trick, threaten or force any of them to engage in contact with him over the internet.

[17] The appellant submitted that the respondent's conduct was predatory. In my view, as outlined above, it was. It is appropriate, however, to say something more about the facts giving rise to the major offences.

[18] CLD met the respondent for the purpose of having sex. Her consent was not freely and voluntarily given within the meaning of s 348 because it was obtained by the threat of exposing compromising images of her to her friends and school teachers.

[19] At a number of points while in the respondent's car, CLD asked whether they were finished yet. The last time she did so, the respondent grabbed her by the throat with one hand and choked her saying "We'll be done when we're done. Are you clear with that?" He continued to sexually penetrate her, both vaginally and orally.

[20] The respondent and AJW had exchanged salacious text messages, after which the respondent turned up at her place of employment when she was finishing her shift and he offered her a lift home. When they stopped near her house, the respondent tried to persuade her to engage in sexual acts for money, but she resisted initially. Although then she agreed to masturbate him for money, because she felt that he would not let her out of the car "unless she did something", her consent to have sex was not freely and voluntarily given.

[21] She attempted to refuse his further advances. On telling him that "I am not having sex with you" he responded by grabbing her throat with one hand, choking her and threatening to slit her throat or stab her unless they had sex. He then let go of her throat. There is no suggestion that the respondent in fact had a knife. AJW attempted to persuade him to let her out of the car if she did not take his money. He refused. While attempting vaginal penetration, he grabbed her by the throat again and demanded that she put his penis in her vagina, which she did.

[22] On a date or dates in May or June 2013, the respondent was charged with the offences relating to CLD and the offences relating to electronic communications with EHJ. He was granted bail.

[23] On 23 December 2013 and in January 2014, whilst on bail, the respondent offered to pay EFT for sex via a social networking site. She sent to him a number of nude images and arranged to meet him to have sex for money. They had discussed their sexual preferences by messages. She had said she liked to be "choked" during sex.

[24] As previously agreed and as arranged, on 11 January 2014, EFT met the respondent to have sex for money. As part of the arrangements, when she got into the respondent's car she removed her underwear while they drove to her residence. However, after they arrived there and EFT requested the money before having sex, the respondent refused and threatened to send compromising images she had sent to him to members of her family. Her consent was not freely and voluntarily given because of the threat.

[25] While having sex, the respondent choked EFT with one hand until she was gasping for air. She put her hands under his hand to move it away. The respondent said to her that he "thought she liked that". She said she did but not that hard.

[26] Lastly, on 13 January 2015 the respondent offended by using electronic communication to procure the complainant ARB to engage in a sexual act. The respondent asked her to send naked images to him for money, which she refused to do. The respondent then

threatened that if she did not send images he would spread rumours about her, so she sent an image of herself naked in front of a mirror. The respondent distributed child exploitation material in relation to her by sending a copy of the image to another person on a social networking site. The recipient alerted ARB's friend.

[27] The complainants EHJ and ARB did not have physical contact with the respondent.

Antecedents

[28] The respondent had no previous conviction. With one qualification to be mentioned later, the respondent's personal antecedents and circumstances were unexceptional.

[29] He was born 18 August 1993, was aged 19 when most of the offences were committed, was aged 20 at the time of the rape of EFT and was aged 21 at the time of the offences against ARB.

Appellant's submissions

[30] The grounds of appeal in the notice of appeal are that the sentences were manifestly inadequate, that the learned sentencing judge erred in failing to make any serious violent declaration and that the learned sentencing judge erred in ordering that the respondent be eligible for parole after four years.

[31] First, the appellant submitted that the learned sentencing judge should have imposed a head sentence of more than 10 years, having regard to the decisions of *R v CAJ*,[1] *R v Basic*,[2] *R v Williams; Ex parte Attorney-General (Qld)*[3] and *R v Tahiraj*.[4] The appellant submitted that the present offending was objectively more serious than in each of those cases.

[32] A head sentence of 10 years or more will result in a declaration of the conviction for the relevant offence or offences as a conviction of an SVO.[5] The appellant submitted that would be justified by reference to comparable sentences as well as principle.[6]

[33] Second, the appellant submitted that if the head sentence imposed by the learned sentencing judge of nine years for each of the major offences (counts 10, 11, 14, 22, 24, 25, 26 and 27) is not increased, none the less this court should vary the sentences to impose a declaration of an SVO, presumably in respect of each of those offences.

[34] Relying on *R v McDougall and Collas*,[7] the appellant submitted that a declaration of an SVO is required to give recognition to the "concerning and serious features" of the respondent's offending including, but not limited to, issues of the protection of the public.

[35] Third, the appellant submitted that if neither of the first two submissions were accepted, this court should vary the sentence to delay the parole eligibility date to a date later than the "halfway mark" of four and a half years. The appellant submitted that, in the absence of reasons, it should be inferred that the learned sentencing judge

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1 [2009] QCA 37.
2 (2000) 115 A Crim R 456.
3 [2014] QCA 346.
4 [2014] QCA 353.
5 *Penalties and Sentences Act* 1992 (Qld), ss 161A(a), 161B(a) and 161C.
6 *R v McDougall and Collas* [2007] 2 Qd R 87, 95 [18].
7 [2007] 2 Qd R 87, 96 [19] and 97 [21].

considered that it would have been appropriate to order a parole eligibility date after three years, absent the facts of the respondent twice offending whilst on bail. On that assumption, the appellant submitted that a starting point of three years was plainly unjust or unreasonable and that this court can delay parole eligibility after the halfway mark for good reason.[8] The appellant submitted this was an appropriate case in which to do so.

Mental abnormality

[36] One of the factors considered by the learned sentencing judge was the significance and impact of the respondent's autism spectrum disorder. It will be necessary to say more about it later.

[37] Initially, the appellant submitted that although the existence of a mental abnormality may reduce an offender's moral culpability (and reduce the weight to be given to both personal and general deterrence),[9] it may also be of such a nature that the protection of the public operates as a countervailing factor.[10] Particularly, the appellant submitted that an offender cannot be sentenced to a more severe sentence than if he or she had not been suffering from the mental abnormality, but neither will the sentence be reduced.

[38] However, by supplementary submissions filed after the oral hearing of the appeal, the appellant departed from that position. It was submitted that in an appropriate case mental abnormality can probably be regarded as an aggravating factor on sentence and as extending the boundaries of what otherwise would be a proportionate sentence in all of the circumstances.[11]

Aspects of an Attorney-General's appeal

[39] Since *Lacey v Attorney-General (Qld)*[12] it has been accepted that an Attorney-General's appeal under s 669A of the *Criminal Code* is to be conducted on the principles governing an appeal against an exercise of discretion set out in *House v The King*.[13]

[40] As well, other principles have been articulated by this court as to matters that are to be taken into account or not taken into account in the exercise of the court's powers. One principle is that it does not assist the administration of justice when cases are relied upon as comparable cases by the appellant in an Attorney-General's appeal against sentence that were not placed before the sentencing judge by the prosecutor.[14]

[41] In this case, for example, *Tahiraj* was relied upon in support of the appellant's submissions but was not relied upon before the learned sentencing judge. In my view, *Tahiraj* is not significant in deciding this appeal. It is not comparable. It is unnecessary to consider, therefore whether this court should maintain its approach to comparable cases not placed before the sentencing judge.

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8 *R v Assurson* (2007) 174 A Crim R 78, 82 [22] and 83 [27]; *Penalties and Sentences Act* 1992 (Qld), ss 160A and 160D(3).

9 *Muldrock v The Queen* (2011) 244 CLR 120, 138-139 [53]–[54].

10 *R v Goodger* [2009] QCA 377, [25]; *R v Perini; ex parte Attorney-General (Qld) (No 2)* (2011) 222 A Crim R 333, 349-350 [33]–[35]; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 475.

11 *Muldrock v The Queen* (2011) 244 CLR 120, 138-139 [60]–[61]; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 473; *R v Perini; ex parte Attorney-General (Qld) (No 2)* (2011) 222 A Crim R 333, 350 [35], 358-359 [71]–[73] and 362 [86]; *R v Miller* (2011) 211 A Crim R 214, 225 [60]; *R v Hester* [2008] QCA 277, [23] and [30]–[31].

12 (2011) 242 CLR 573.

13 (1936) 55 CLR 499; see *R v Melano; ex parte Attorney-General (Qld)* [1995] 2 Qd R 186.

14 *R v Corr; ex parte Attorney-General (Qld)* [2010] QCA 40, [36].

[42] Similarly, the contention (developed only in supplementary written submissions) by the appellant that the respondent's autism spectrum disorder is a factor in aggravation of the sentence that might otherwise be imposed, not either a neutral factor or one that might reduce the sentence, was not made before the learned sentencing judge.

[43] In my view, the appellant should not be permitted to raise that argument in this appeal. The appellant did not submit that this court should not follow its earlier statements as to contentions not advanced before the sentencing judge. This conclusion says nothing about whether it would be a proper submission or contention to make in some other case on sentence.

Autism Spectrum Disorder

[44] There was evidence before the learned sentencing judge that the respondent's offending was likely to have been affected by his particular personality traits, diagnosed as autism spectrum disorder. Reports by three consultant psychiatrists (Drs Unwin, Grant and Beech) were tendered in evidence, as well as a short report by a paediatrician (Dr Hurley) who treated the respondent as a child.

[45] The learned sentencing judge referred to this evidence in some detail in his sentencing remarks and first described it as of "considerable relevance to the exercise of the sentencing discretion".

[46] For present purposes, it is enough to extract from the sentencing remarks part of what was said by Dr Grant as follows:

> "It is clear that Mr Brown's autistic disorder means that he has a markedly limited ability to feel normal emotions, to express his own emotions, or to feel empathy with other people. He finds it very difficult to understand the effects his behaviour might have on others. He has a very concrete view of what he must and must not do, at times sticking rigidly to rules and at other times blandly disregarding them. Whilst this is a very significant impairment which would affect his ability to know that he ought not carry out the acts for which he is charged, in my opinion he was not totally deprived of that capacity."

[47] The learned sentencing judge referred to s 9(2)(e) of the PSA and the principles expressed in the authorities to the effect that a condition, such as the respondent's disorder, "may not be an appropriate vehicle for reflection of principles of personal and general deterrence". This is because there is a lessening of his moral culpability as a result of the condition. However, his Honour continued:

> "In your case, that is a very difficult question to answer, for the reasons that I have stated by reference to parts of the psychiatric assessments. The principles are well-enunciated in the case of *R v Goodger* [2009] QCA 377 and have been repeated on many occasions by the Court of Appeal; for example, *R v Yarwood* [2011] QCA – by reference to a longstanding Victorian authority, *R v Tsiaras* [1996] 1 VR 398 and *R v Verdins* [2007] 16 VR 269."

[48] The learned sentencing judge then set out a passage from the reasons of Keane JA in *Goodger*, including where his Honour cited the following comment with approval:

> "An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark

> him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe."[15]

[49] The appellant submitted that in the circumstances of this case "it was necessary for [the learned sentencing judge] to expressly state whether he found the mental illness to have a mitigatory effect or not, especially given that he identified the issue as 'a very difficult question to answer'".

[50] I do not agree. In my view, the learned sentencing judge's statement that he found the issue a very difficult question to answer, read in the context of his subsequent case references and the passage extracted from Keane JA's reasons in *Goodger*, shows that his Honour did not consider that the respondent's autism spectrum disorder particularly mitigated the sentence that he would have imposed otherwise. I do not consider that his Honour treated the disorder as increasing the sentence to be imposed. Nothing that his Honour said suggested that he did. Nor did the prosecution at the sentence hearing submit that he should do so.

Structure of the sentences

[51] It is necessary to say something more about the structure of the sentences for the particular offences where the sentence was a period of nine years' imprisonment, in the context of the other offences on the same days.

[52] Counts 10, 11 and 14 were the offences committed against complainant CLD that resulted in sentences of nine years. Counts 10 and 14 were offences of penile rape by vaginal penetration and count 11 was an offence of sodomy. There were 10 other offences in relation to CLD. One of them (count 13) was an offence of assault with intent to commit rape. Two other offences of rape which attracted lesser sentences of three years consisted of the respondent making CLD "suck his penis" (counts 9 and 16). There was another count of rape attracting a sentence of three years relating to when the respondent continued after CLD asked whether they were finished yet (count 12). With one other lesser offence that occurred on the same occasion, these offences constituted one episode of offending against CLD on 14 May 2013.

[53] Counts 24, 25 and 26 were all offences committed against complainant AJW that resulted in sentences of nine years. Counts 24 and 26 were offences of penile rape by vaginal penetration and count 25 was an offence of sodomy. Three other offences of rape during the same episode that attracted lesser sentences of three years occurred when the respondent instructed AJW to perform oral sex on him (count 20), inserted his finger in her vagina (count 21) and started to put his penis into her vagina (count 22).

[54] The third serious episode of offending involved EFT on 11 January 2014 and occurred at her house. There was an event of penile rape by vaginal penetration for approximately 30 minutes (count 27) and the respondent pressured EFT to perform oral sex on him as well (although that was not separately charged).

[55] The court enquired about the structuring of the sentences as a head sentence or sentences for the most serious offences and the principles discussed in *R v Nagy*.[16] In

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15 *R v Goodger* [2009] QCA 377, [25].

16 [2004] 1 Qd R 63, 72 [39].

response, the appellant submitted that there was no error on the part of the learned sentencing judge in treating the head sentence as attaching to some of the counts alleging rape and sodomy, and submitted that the learned sentencing judge's indication of an overall sentence was an assessment of the criminality comprising all the offences that could and could not be the subject of a declaration of an SVO. In other words, the appellant submitted that the "overall sentence" did not involve any component for any offence that could not be the subject of a declaration of an SVO.

[56] Further, the appellant submitted that if error were detected in the learned sentencing judge's conclusion of nine years for the head sentence, a cumulative sentencing approach would result in individual periods of imprisonment of less than nine years but the overall resulting period of imprisonment for the relevant offences would none the less exceed 10 years. This would result in a declaration of an SVO.[17]

[57] The appellant did not challenge the learned sentencing judge's exercise of discretion in imposing heavier sentences for counts 10, 11, 14, 22, 24, 25, 26 and 27. There was no challenge either to the exercise of discretion to impose the same period of imprisonment for each of those sentences as part of an effective head sentence of nine years.

[58] The description of the three most serious episodes of offending set out above is incomplete as to the detail of each episode and as to the overall extent of the offending, but serves sufficiently to analyse the appellant's submissions.

[59] There were other less serious episodes involving CLD and her communications with the respondent via social media sites or text messages in April 2013. Similarly, there were further less serious offences involving the same sort of activity with EHJ between 30 April 2013 and 18 May 2013. Third, there were further offences of a similar kind involving ARB on 13 January 2015.

[60] This summary illustrates that the major offences fell into three separate episodes of conduct, involving three different complainants, each of whom was raped on multiple occasions during a single episode (although only one offence was charged in respect of EFT). As well, each of CLD and AJW was sodomised. I note that the anal penetrations were not charged as rapes, although there is no suggestion that any facts as to consent differed for any of those offences.

[61] Taken as three separate episodes of offending, it was appropriate for the learned sentencing judge to impose sentences to be served concurrently in relation to each episode. But among the different episodes, it was necessary that the overall offending be reflected either in sentences to be accumulated or by adopting a head sentence to reflect the overall criminality of the conduct for which the sentences were being imposed. The different courses open to the learned sentencing judge were explained in *Nagy*.

[62] Neither of the parties complained about the learned sentencing judge's approach to that question in the present case. In the absence of manifest error, it would not be appropriate, therefore, to consider it in any detail. However, in an appropriate case the assessment of a head sentence or sentences must take into account the operation of the SVO provisions under Pt 9A of the PSA. For example, it would be erroneous in assessing a head sentence for multiple offences to include consideration of an offence which was not against a provision mentioned in sch 1 of the PSA if that inclusion would have the effect of increasing the head sentence to an extent that could impact upon the application of s 161A of the PSA.

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17 *Penalties and Sentences Act* 1992 (Qld), ss 161A, 161B and 161C.

[63] In this case, no practical problem of that kind is raised even though some of the offences dealt with by the sentences were not included in sch 1 of the PSA. The exceptions were the five offences of using electronic communication with intent to procure a person under 16 years to engage in a sexual act, a single offence of knowingly possessing child exploitation material (being photos of EHJ that remained on the respondent's phone when arrested) and a single offence of distributing child exploitation material by sending a copy of an image of ARB to another person.

[64] It is appropriate to say something further about the appellant's reliance on *Tahiraj*. That case concerned convictions for use of a carriage service to procure a person under 16 years of age contrary to s 474.26 of the *Criminal Code Act* 1995 (Cth). Those offences are similar to some of the lesser offences in the present case.

[65] The offender in *Tahiraj* took advantage of a vulnerable teenager, not quite 14 years old, and caused her to participate in humiliating sexual behaviour on webcam for his gratification. He caused her to penetrate her vagina with her finger whilst watching and recording it. On two relevant counts, the offender was ordered to be imprisoned for three years.

[66] Of course, there are significant differences in sentencing regimes that apply for Commonwealth offences and the offences of like nature in this case.

[67] Nevertheless, the appellant sought to rely on *Tahiraj* as support for the view that the overall criminality of the respondent's offending was greater than that recognised by the sentences imposed as the head sentence in this case. In other words, the appellant pressed for an increase of the head sentences, for the purposes of s 161A, by reliance on the seriousness of the offending conduct for the offences of using electronic communications to procure a child under 16, indecent treatment of a child under 16, possessing child exploitation material and distributing child exploitation material.

[68] Under the structure of sentencing adopted by the learned sentencing judge, the question should be approached by reference to the sch 1 offences for which a period of nine years' imprisonment was imposed and having regard to the other sch 1 offences that might affect the overall criminality of the offending conduct, in setting those head sentences.

Manifest inadequacy

[69] Discussion of the cases relied upon by the appellant should begin with the recognition that "past sentences do not mark the outer bounds of a sentencing judge's permissible discretion."[18]

[70] *Basic* was an application for leave to appeal against sentence by an offender. He was a mature man, with prior convictions for different offences, who was convicted of one count of assault with intent to commit rape, one count of indecent assault with a circumstance of aggravation and one count of rape. He was sentenced to periods of imprisonment of two years, three years and eight years respectively for each offence and a declaration of conviction of an SVO was made. He had grabbed the complainant from behind, made threats such as "be quiet or I'll hurt you" and dragged her into bushland. He put his hand down the front of her pants, digitally penetrated

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[18] *R v Goodwin; ex parte Attorney-General (Qld)* [2014] QCA 345, [5], referring to *Barbaro v The Queen* (2014) 253 CLR 58, 74 [41].

her vagina and then anally penetrated her with his penis (curiously on those facts, there was only one conviction of rape). Margaret McMurdo P said that the comparable sentences demonstrated that the sentence imposed was within the appropriate range of seven to 10 years and that the sentencing judge had imposed a sentence at the lower end of the range and decided to declare a conviction of an SVO. The application for leave to appeal was dismissed.

[71] It is difficult to compare *Basic* to this case. At the level of a single episode of offending, there was more violence in *Basic* than in any of the episodes in the present case. At the level of the head sentences for multiple rapes upon different complainants over a series of episodes, it has nothing to say.

[72] *CAJ* is a better comparator. It involved an application for leave to appeal against sentence by the offender. He was convicted of six counts of rape and some other lesser offences. He was sentenced to four years for each of the first three offences of rape against a 14 year old girl during a single episode when he was 15 or 16 years old (and therefore a child at the time of those offences). He dragged her into a shed, ripped off her clothes and engaged in a penile-vaginal rape, followed by penetrating her vagina with a bottle and a further penile-vaginal rape.

[73] He was further sentenced to imprisonment of 10 years for offences of rape committed during two further episodes a few years later. Two offences of rape were committed against a 15 year old girl during an episode when he was 19 years old. He tricked the complainant into letting him into her house, slapped and threatened her, forced her to take her clothes off and engaged in penile-vaginal and anal rape, leaving her with external and internal physical injuries.

[74] His last offence of rape was against a 13 year old girl who he grabbed in a park and marched up against a fence, where he forcibly digitally penetrated her vagina and threatened to "bash" her.

[75] Fraser JA described *CAJ* as a case at the top of the range of seven to 10 years described in *Basic*. The offender was younger and with better prospects of rehabilitation than some other cases but the offending was more serious and persistent than in *Basic*. The application for leave to appeal was refused.

[76] *Williams* is a case that has relevance on three levels for the present case: first, as to the head sentence; second, on the question of the discretionary declaration of an SVO; and, third, on the appropriate period for a parole eligibility date. The present part of the discussion is confined to the first point.

[77] It was an Attorney-General's appeal. The offender had been sentenced on convictions for assault with intent to commit rape, deprivation of liberty and rape. On the rape count he was sentenced to eight years' imprisonment with three years fixed for parole eligibility. He had tackled the complainant who was out for an evening training run, used force to restrain her, threatened to punch her if she was not quiet and then engaged in penile-vaginal rape. She sustained abrasions, including to her vagina, and other minor injuries.

[78] This court unanimously dismissed the Attorney-General's appeal from the sentence of eight years and the learned sentencing judge's refusal to declare the rape a conviction for an SVO as manifestly inadequate, but (by majority) increased the

period of the parole eligibility date to four years. McMeekin J referred to *Basic* and five other cases[19] as supporting the observations that the range of sentences for the rape of a young woman alone in a public place where there has not been a brutal bashing of the victim, where the offender has no prior like convictions and pleads guilty is between seven and 10 years.[20] His Honour also observed that sentences for rape do not tend to exceed 10 or 11 years unless accompanied by substantial violence and that where the violence is not substantial and there is a timely plea, a sentence of less than 10 years is the norm.[21] His Honour held that there could be no complaint with the sentence of eight years in the case before the court.

[79] *Basic*, *CAJ* and *Williams* were the cases relied on by the appellant on the question of the level of the effective head sentence. The appellant sought to characterise the offending in the present case as more serious (or if not worse, as bad) as that in each of the other cases. This was on the basis of the respondent's predatory conduct towards his three rape victims by his use of social media sites and texting to threaten or persuade them to arrive at the meeting where the offending occurred. A similar argument was advanced to the learned sentencing judge, but like him I am not persuaded that is how the comparison should be made.

[80] A point of greater substance is that even allowing for some of the differences in the cases, the sentences for the single episodes of offending in *Basic* and *Williams* (and similarly the analysis of the other cases involving such offending in *Williams*) may not sit comfortably with the conclusion that nine years was within discretion for the head sentence to be applied to the three major episodes of offending and other offences here. And, so far as *CAJ* is concerned, the sentence imposed was of 10 years in relation to the offending for two of the three episodes, where the first three offences of rape in the first episode carried a lower sentence because the offender was a child at that time.

[81] On the other hand, as was pointed out in oral argument, the conclusion in *CAJ* was that 10 years was not manifestly excessive, not that nine years would have been manifestly inadequate.

[82] The appellant's principal point in support of the conclusion that nine years is manifestly inadequate was that the most serious offending conduct occurred over three significant separate episodes. Each of the first two episodes was constituted by multiple rape offences and a sodomy offence and the last episode was constituted by a single but prolonged rape offence. As well, the appellant relied on the premeditated nature of the offending, as disclosed by the respondent's method of overcoming each complainant's lack of consent.

[83] As previously mentioned, the only case of multiple episodes of offending relied upon by the appellant was *CAJ*, however the offender was a child at the time of the first episode, the sentence for those offences of rape was four years' imprisonment. For the two later episodes of offences of rape, the sentence imposed for each offence was 10 years of imprisonment, described by Fraser JA as a "heavy" sentence,[22] but it was not disturbed on appeal. The appellant's submissions about *CAJ* should be accepted in part. In the present case, the offences were all committed by the respondent as an

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19 *R v Kahu* [2006] QCA 413; *R v Dowden* [2010] QCA 125; *R v Purcell* [2010] QCA 285; *R v Benjamin* (2012) 224 A Crim R 40; *R v GAR* [2014] QCA 30.

20 *R v Williams; Ex parte Attorney-General (Qld)* [2014] QCA 346, [47]-[49].

21 *R v Williams; Ex parte Attorney-General (Qld)* [2014] QCA 346, [50]-[51].

22 [2009] QCA 37, [25].

adult of between 19 and 21 years. The complainants in both cases were of similar ages. There were other offences in the present case. *CAJ* may have had better prospects of rehabilitation but he deployed greater violence.

[84] There are few other comparable cases. One is *R v PS*.[23] Although the decision was overturned in the High Court on an appeal against conviction,[24] the sentence was not challenged. That case concerned three convictions of rape at trial relating to three separate episodes and complainants. A fourth conviction for assault with intent to commit rape related to a fourth episode and complainant. The offender was aged between 16 and 18 years at the time of the offences. Two of the complainants were aged 15 years at the time of the offences relating to them, one was 16 years and the last was 18 years. Each of the offences involved an unsuccessful attempt at seduction followed by the offender imposing his will upon the complainant with some actual physical force, albeit not so as to cause physical injury. The sentences for the first two offences of rape were four years, because of the offender was then a child, as in *CAJ*. The sentence for the third offence of rape was nine years with a declaration of an SVO. Those sentences were ordered to be served concurrently. The sentence for the offence of assault with intent to commit rape was three years, to be served cumulatively, because it was committed whilst on bail for the earlier offences, and with a declaration of an SVO.

[85] On appeal, this court reduced the sentences. It set aside the sentence of nine years for the third offence of rape as manifestly excessive, substituted seven years and set aside the declaration of an SVO for that offence as not justified. The declaration of an SVO for the offence of assault with intent to commit rape was also set aside as manifestly excessive. The effect was to reduce the overall sentence to 10 years with eligibility to apply for post-prison community based release after serving five years.[25]

[86] Other cases of multiple episodes and offences of rape are more serious and not comparable enough to be of significant use.[26]

[87] It will be recalled that in *Basic* there was reference to an "appropriate [range] of seven to 10 years".[27] That was a conclusion as to the appropriate range for the offence in *Basic*, arrived at by reference to a discussion of six other cases. The notion of cases attracting a range of seven to 10 years has been explored in subsequent cases. In *R v Kahu*, Keane JA referred to the review of the authorities in *Basic* as demonstrating a range: "for the rape of a young woman alone in a public place where there has not been a brutal bashing of the victim, and where the offender had no prior like convictions … between seven and 10 years where the offender has pleaded guilty."[28]

[88] However, Holmes JA has since warned against that statement as an oversimplification of the cases discussed in *Basic*.[29] Apart from *Kahu*, *R v Dowden*[30] is an example of a case of a single episode of rape where a sentence of nine years was originally imposed but reduced to eight years on appeal. After discussing a number of other potentially comparable cases, as well as *Basic* and *Kahu*, Holmes JA reached the

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23 [2004] QCA 347.
24 *Phillips v The Queen* (2006) 225 CLR 303.
25 This appears to antedate the operation of s 161C(2)(b) of the *Penalties and Sentences Act* 1992 (Qld).
26 See, for example, *R v Hill* [2012] QCA 59, [24]–[29].
27 (2000) 115 A Crim R 456, 460.
28 [2006] QCA 413, [41].
29 *R v Williams; Ex parte Attorney-General (Qld)* [2014] QCA 346, [3].
30 [2010] QCA 125.

conclusion that it was erroneous to accept a submission "that *Basic* established a range of seven to ten years for rape of a stranger without violence".[31] Although her Honour did not expressly mention that the offender has pleaded guilty in this formulation, as did Keane JA in *Kahu*, I do not take that to be the focal point of her disagreement with the proposition that *Basic* established a seven to 10 year range.

[89] In my view, the cases do not strongly support the conclusion that the learned sentencing judge in the present case fell into error in his Honour's conclusion that a sentence of nine years was appropriate as the head sentence for the major offences, reflecting the criminality of the offending for all the offences. But the cases do not support the learned sentencing judge's conclusion either.

[90] A court of appeal considering a head sentence imposed for multiple offences committed over a number of discrete episodes of offending conduct must confront considerable analytical difficulties in assessing the head sentence that is required to reflect the overall criminality of the offending conduct against the conclusionary standard of manifest inadequacy. A sentencing judge in this State is not required to construct the sentence in a way that reflects the individual sentences and the degree of cumulation applied, as is required, for example, under the applicable legislation in Victoria.[32]

[91] It is a useful first step to analyse, by reference to the three major multiple episodes of offending, the sentence that would have been sufficient punishment for all or any of those offences, putting to one side the other offences previously mentioned for that analysis. To do so does not take the erroneous step of substituting what this court considers the appropriate sentence would have been in place of the learned sentencing judge's decision. It is no more than a tool for analysis of the question of manifest inadequacy. I am fortified in this approach by the analytical method of Margaret McMurdo P in *R v Major; ex parte Attorney-General (Qld)*.[33]

[92] The offences in each of the three major episodes were serious enough to have warranted significant terms of imprisonment, taking each episode alone. In particular, the offences relating to AJW were the most serious. She had not arranged to meet the respondent for sex. He turned up at her place of work. When he had her alone in his car, she refused to have sex with him, except to masturbate him when she felt pressured to do so. He made a threat of violence by slitting her throat or stabbing her to overcome her refusal to have sex. Not long after that, he grabbed her by the throat to demand that she put his penis in her vagina. The episode included multiple offences of rape and an offence of sodomy. Taken alone, an effective term of imprisonment of not less than five years and six months to six years for the major offences in that episode would have been appropriate, in my view. This is so in the light of the respondent's very early guilty plea, lack of prior criminal history and youth. Against that analytical step, and leaving aside any possible other special mitigating factor or factors, it is possible to see that the head sentence for all the offences in the three major episodes of offending might be manifestly inadequate. In particular, the circumstances of the offences against CLD were only a little less serious than those relating to AJW, while the offence relating to EFT was on any view less serious.

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31 *R v Dowden* [2010] QCA 125, [36].

32 For example, see *Director of Public Prosecutions v Felton* (2007) 16 VR 214.

33 [2012] 1 Qd R 465, 479–480 [48]–[49].

[93] Of course, the learned sentencing judge was required to review the aggregate sentences and consider whether they were just and appropriate having regard to the totality principle.[34] And, as is often recognised, "the severity of a sentence increases at a greater rate than any increase in the [linear] length of the sentence".[35] Against that, the learned sentencing judge was also required to have regard to the overall criminality[36] and whether the sentences reflected the totality of the respondent's criminality.[37]

[94] In this case, the major offences against CLD and AJW were only six days apart, whereas the major offence relating to EFT was eight months later. Each episode was separate from the other.

[95] Second, the large number of offences constituting the three major episodes of offending were not the full extent of the respondent's offending for the purposes of assessing the appropriate head sentence. There were 14 other offences in the collection of six counts of procuring a sexual act by coercion, five counts of using electronic communications to procure a child under 16, one count of indecent treatment of a child under 16, one count of possessing child exploitation material and one count of distributing child exploitation material. Those offences involved two other complainants. However, I put to one side the offences that were not offences under sch 1 of the PSA for this purpose, as previously discussed.

[96] Third, the offence of rape against EFT and the lesser offences against ARB were committed when the respondent was on bail for some of the earlier offences.

[97] This analysis shows that the head sentence of nine years in the present case was a lenient sentence, even allowing for a considerable reduction in what would otherwise have been the accumulation of separate periods of imprisonment for the major offences and the other offences, because that would have produced a crushing overall sentence. Nevertheless, with some diffidence, I have reached the conclusion that his Honour's exercise of discretion has not been shown to have miscarried to the requisite degree of satisfaction. Manifest inadequacy is not justified because the result arrived at below is markedly different from other sentences. Interference is only justified where the difference is such that there "must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons."[38]

Discretionary declaration of serious violent offence

[98] In *R v Bojovic*,[39] this court acknowledged that the courts are not "to subvert the intentions of Part 9A [of the PSA] by reducing what would otherwise be regarded as an appropriate sentence" and continued:

> "What has to be determined is whether in all the circumstances it is desirable that such a declaration be made. In deciding whether or not to make it, the court should not be blind to the fact that the making of it will have a serious aggravating effect upon the sentence."[40]

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34 *Mill v The Queen* (1988) 166 CLR 59, 63; *R v Baker* [2011] QCA 104, [35]–[47].
35 *R v MAK* (2006) 167 A Crim R 159, 164 [16].
36 *R v Margaritis; Ex parte Attorney-General (Qld)* (2014) 244 A Crim R 317, 323–325 [31]–[39].
37 *R v Major; ex parte Attorney-General (Qld)* [2012] 1 Qd R 465, 490 [95].
38 *R v Margaritis; Ex parte Attorney-General (Qld)* (2014) 244 A Crim R 317, 321 [38], referring to *Hili v The Queen* (2010) 242 CLR 520, 538–541.
39 [2000] 2 Qd R 183.
40 [2000] 2 Qd R 183, 190 [27]–[28].

[99] The court continued, speaking of an example case where the question of a declaration is discretionary:

> "… [I]f according to ordinary principles a violent offence seems to call for a sentence of between six and eight years, and it is one where the discretion to make a violent offender declaration arises, such that it might but not must be made, the sentencing judge has the discretion in the event that a declaration is to be made, to impose a sentence towards the lower end of the applicable range. Conversely if the Judge is to give the offender the benefit of declining to make such a declaration, it might be appropriate to consider imposing a sentence towards the higher end of the range. If this were not done, it is difficult to see how the sentencing judge could properly discharge his or her duty under s 9 of the Act. A just sentence is the result of a balancing exercise that produces an acceptable combination of the purposes mentioned in s 9(1)(a) to 9(1)(e) of the Act."[41]

[100] I have previously mentioned *Williams* in which a discretionary declaration of an SVO was involved. As well, in *R v Benjamin*[42] this court considered a discretionary declaration of an SVO in relation to the offence of rape. In that case Margaret McMurdo P said:

> "As in almost all rape offences, the present offence involved a degree of actual violence and the infliction on the complainant of physical bodily harm with psychological after-effects. But there was no threat to kill or maim, no use of a weapon and no permanent physical injury, features which are all too commonly associated with offences of rape. Nor was there any aggravating feature of revenge or sadistic cruelty. The applicant's criminal history was limited and his good work record does not presently suggest that his parole release date need be delayed beyond 50% in order to protect the community. He is 27 years old. He seems to have the support of his partner and his family. He cooperated with the administration of justice by supplying DNA for testing which led to his arrest and by his early plea of guilty. These matters in combination suggest he may be a suitable candidate for parole and rehabilitation. Whilst the applicant has committed a most grave offence, there is nothing about it that takes it into the more serious examples of rape offences warranting a declaration."[43] (footnotes omitted)

[101] Henry J in *Benjamin* reviewed 13 cases of sentences for rape before discussing the circumstances in *Benjamin*. Relevantly, his Honour characterised *Basic*, which was relied on by the appellant in the present case, as less serious than *Benjamin*. In drawing a distinction between cases where a sentence range of about seven to 10 years was appropriate and cases where a sentence range of about 10 to 14 years was appropriate his Honour referred to the statements by Keane JA in *Kahu* and another case as illustrating that a "material difference" in the two ranges is the presence and extent of any physical violence additional to the act of physical violation constituting rape.[44]

[102] But as Holmes JA in effect observed in *Williams*,[45] some of the cases where the sentence falls in the lower range exhibit circumstances of additional violence, apart

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41 [2000] 2 Qd R 183, 191–192 [34].
42 (2012) 224 A Crim R 40.
43 (2012) 224 A Crim R 40, 43–44 [4].
44 (2012) 224 A Crim R 40, 56 [76].
45 [2014] QCA 346, [4].

from the penetrative act without consent. This conclusion is supported by McMeekin J's observation in the same case that several of the decisions reviewed in *Basic* which resulted in the observation by Keane JA in *Kahu* involved terms of imprisonment under 10 years where there was "considerable violence involved".[46]

[103] Returning to her Honour's observations in *Benjamin*, referring to *R v McDougall and Collas*[47] Margaret McMurdo P said:

> "Declarations are usually reserved for more serious examples of offences of that type or where there is some other feature justifying the requirement that the offender serve 80% of the sentence before parole eligibility. A declaration may be made where there is good reason to postpone the date of eligibility for parole because of the circumstances which aggravate the offence. A declaration may also be made where circumstances suggest that the protection of the public or adequate punishment requires a longer period of actual custody before eligibility for parole. The Court noted that:
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> > 'the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question, and, so outside "the norm" for that type of offence.'"[48]

[104] Against that measure, in the light of the facts as to consent and violence summarised above, it is not readily apparent in this case that the more serious offences of rape and sodomy were outside the "norm" or more serious examples of offence of rape. The aggravating factor of violence by choking holds during some of the offences is disturbing. But even taking into account the threats to slit the throat of or stab AJW, the offences were not more than usually serious examples and did not contain features justifying that the respondent serve 80 per cent of the sentence before parole eligibility.

[105] The appellant submitted that the need to protect any members of the community under s 9(3)(b) of the PSA called for a declaration of an SVO in relation to each of the more serious offences.[49] The argument seemed to be based upon the extent of the risk of re-offending by the respondent if he were released on parole, because of his mental abnormality. In my view, the appellant's argument should not be accepted. Any such risk was not a particular factor engaged in any of the cases as to the making of a discretionary declaration of an SVO on which the appellant relied. It is not a factor, in relation to any of the particular offences in this case, that takes the offence outside the norm for that type of offence.

Parole eligibility date

[106] The appellant's third submission is that the learned sentencing judge erred in fixing a parole eligibility date of four years.

[107] The appellant submitted that if the other contentions made were not accepted, this is an appropriate case to delay parole past the half way mark, because a sentence of nine years with parole eligibility after four years was plainly unjust or unreasonable. The

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46 [2014] QCA 346, [50].
47 [2007] 2 Qd R 87, 97 [21].
48 (2012) 224 A Crim R 40, 43 [3].
49 *R v McDougall and Collas* [2007] 2 Qd R 87, 97 [21].

appellant accepts that in selecting the period of four years, the learned sentencing judge may have increased the period by one year because there were some offences committed on bail. But it is supposition to conclude that his Honour reasoned in that way. The appellant did so in order to support a submission that it was unreasonable to have started from the point that parole eligibility otherwise would have properly arisen after three years on a head sentence of nine years.

[108] In oral submissions, the appellant submitted that the approach of instinctive synthesis that is required, using cases just as a yardstick, would have led the learned sentencing judge to the imposition of either a discretionary declaration of an SVO or a parole eligibility date higher than four years.

[109] In *Williams*, as previously mentioned, this court reduced the sentence of nine years to eight years, but at the same time, by majority, removed the parole eligibility date which had been fixed at three years in the court below. McMeekin J said that the lenient head sentence in the circumstances of that case – categorised by his Honour as a case of a rape of a stranger in a public place – "can be justified only by accepting that it takes into account, to a degree, and whether recognised by the sentencing judge or not, the mitigating features personal to the respondent."[50]

[110] As well, his Honour observed that for such a case, no sentencing decision cited to the court had a period of actual imprisonment before eligibility for parole as short as three years.[51]

[111] Next, his Honour concluded that *Williams* was a worse case than *Dowden*,[52] where the sentence was eight years and no parole eligibility date was fixed.[53] Finally, his Honour reasoned that there was insufficient difference between the circumstances in *Williams* and those in *Benjamin* to justify that, because a discretionary declaration of an SVO was made, parole eligibility in *Benjamin* was not reached until 80 per cent of the sentence of nine years.[54]

[112] Of the many points of comparison made by McMeekin J in *Williams*, few are of obvious significance in the present case. None was specifically relied upon by the appellant. Perhaps the strongest point is that the head sentence in the present case is also one that can be justified only by taking into account the mitigating factors personal to the respondent, so that any further reduction in sentence in fixing the date for parole "raises the prospect that there [is] significant double counting."[55]

[113] In my view, when considering the present case two points should be kept steadily in mind. First, the statutory context is that the learned sentencing judge was empowered under s 160D(3) of the PSA to fix the date when the respondent is eligible for parole by order. Absent such an order, s 184(2) of the *Corrective Services Act* 2006 (Qld) ("CSA") provides that the respondent's parole eligibility date is the day after the day on which the respondent has served half of the period of imprisonment of nine years. Second, the period for eligibility for parole in the present case was fixed at four years. That is six months short of the statutory period of half the period of imprisonment ordered by a sentence.

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50 [2014] QCA 346, [52].
51 [2014] QCA 346, [48].
52 [2014] QCA 346, [61]–[62].
53 [2014] QCA 346, [61]–[71].
54 [2014] QCA 346, [73]–[79].
55 [2014] QCA 346, [71].

[114] Section 160D(3) of the PSA empowered the learned sentencing judge to fix a parole eligibility date either before or after the half way mark. That is recognised expressly by s 184(3) of the CSA.

[115] It is sometimes said to be a "general and flexible practice" or "common practice" in this State to fix a parole eligibility date for an offender who makes an early plea of guilty and with other mitigating factors.[56] However, the statutory framework in a case like the present is one in which any period less than half is a reduction of the normative period provided for eligibility for parole under s 184(2). In a similar way, any period greater than half is an increase of the normative period.

[116] *R v McDougall and Collas*[57] and *R v Assurson*[58] are authority that the statutory discretion to postpone the date of parole eligibility will be exercised where there is good reason to do so and the relevant considerations will usually be concerned with circumstances which aggravate the offence in a way that suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole. The judgment of the court in *McDougall and Collas* continued:

> "In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence."[59]

[117] In the present case, the aggravating features of note were that the respondent committed the 2014 and 2015 offences while on bail and that, viewed overall, his offending conduct showed an established continuing pattern of offending using the methodology described above. The need for protection of the public from such conduct by him is reinforced, in addition to those aggravating features, by the medical evidence which bears upon his capacity to change his behaviours and thereby be rehabilitated.

[118] Overall, I have come to the view that the learned sentencing judge erred either in failing to consider, in circumstances where he did not make a declaration of an SVO, whether to postpone the parole eligibility date that would otherwise apply to the head sentence having regard to those factors or that having regard to them, the sentences for the major offences were manifestly inadequate. In fairness to the learned sentencing judge, I note that he was not expressly asked to consider the question of postponing the parole eligibility date under s 160D(3) and was not referred to *McDougall and Collas* on that point.

[119] The conclusion I have reached is that the sentences on counts 10, 11, 14, 22, 24, 25, 26 and 27 be varied to the extent that the parole eligibility date should be fixed at five years and four months.

[120] **BOND J:** I agree with Jackson J.

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56 *R v Cameron* [2014] QCA 55, [18]; *R v Amato* [2013] QCA 158, [19].
57 [2007] 2 Qd R 87, 97 [21].
58 (2007) 174 A Crim R 78, 82 [22].
59 [2007] 2 Qd R 87, 97 [21].