SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bowley* [2016] QCA 254
PARTIES:	**R** **v** **BOWLEY, Jason Ben** (applicant)
FILE NO/S:	CA No 240 of 2015 DC No 23 of 2015 DC No 24 of 2015 DC No 25 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Hervey Bay – Date of Sentence: 10 September 2015
DELIVERED ON:	11 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2016
JUDGES:	Fraser and Philip McMurdo JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant is granted leave to appeal against the sentences.** **2. The appeal is allowed.** **3. The sentences are varied, by imposing a term of seven years imprisonment in lieu of each term of eight years imprisonment; a term of six years imprisonment in lieu of the imposed term of seven years imprisonment; and a term of two years and nine months imprisonment in lieu of each term of three years and three months imprisonment.** **4. The date on which the applicant is eligible to apply for parole is 10 March 2018.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the sentencing Judge made a finding that the offences were committed whilst the applicant was under the influence of illicit drugs – where s 9(9A) of the *Penalties and Sentences Act* 1992 (Qld) provides that voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing the offender

– whether the sentencing Judge erred in concluding that the offences were committed whilst the applicant was under the influence of illicit drugs and accordingly did not properly give recognition to his mental condition as a mitigating factor

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the sentencing Judge made a finding that the offences were committed whilst the applicant was under the influence of illicit drugs – where the applicant alleges that the sentencing Judge should have given the applicant's counsel the opportunity to make submissions before making such a finding – whether the sentencing Judge made the finding that the applicant was under the influence of drugs at the time of the offending in breach of the requirements of procedural fairness

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the sentencing Judge had determined to take into account the period of pre-sentence custody and had done so in relation to the parole eligibility date – whether the sentencing Judge erred by failing to give effect to non-declarable pre-sentence custody in relation to the head sentences

Criminal Code (Qld), s 27, s 668E
Evidence Act 1977 (Qld), s 132C
Penalties and Sentences Act 1992 (Qld), s 9(9A), s 159A

Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37, cited
R v Clark [2009] QCA 361, considered
R v Miller (2011) 211 A Crim R 214; [2011] QCA 160, cited
R v Tsiaras [1996] 1 VR 398; [1996] VicRp 26, considered
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, considered
R v Yarwood (2011) 220 A Crim R 497; [2011] QCA 367, cited

COUNSEL: B J Power for the applicant
S J Farnden for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading in draft the reasons for judgment of Peter Lyons J. For the reasons given in [3] – [47] of that judgment, the sentencing judge erred in a way which vitiated the exercise of the sentencing discretion. It follows that this Court is obliged to exercise the sentencing discretion afresh and decide for itself the sentence "warranted in law": *Criminal Code*, s 668E; *Kentwell v The Queen* (2014) 252 CLR 601 at [42]. For the reasons given in [51] – [54] of the draft reasons of Peter Lyons J, I agree that the sentences proposed by his Honour are the appropriate sentences in this case. I also agree with the orders proposed by his Honour.

[2] **PHILIP McMURDO JA:** I agree with Peter Lyons J.

[3] **PETER LYONS J:** The applicant pleaded guilty to a total of seven offences committed on three occasions in November and December 2014. He was sentenced on 10 September 2015 to terms of imprisonment, the longest of which were for eight years, to be served concurrently; with a parole release date three years and three months after sentence.

[4] The applicant has applied for leave to appeal against his sentences. His primary grounds are that the sentencing Judge wrongly concluded that the offences were committed whilst the applicant was under the influence of illicit drugs and accordingly did not properly give recognition to his mental condition as a mitigating factor; that the finding that the applicant was under the influence of drugs at the time of the offending was made in breach of the requirements of procedural fairness; and that the sentencing Judge erred by failing to give effect to non-declarable pre-sentence custody in relation to the head sentences.

Background

[5] The applicant was 23 years of age, both at the time of the offending and of sentence. He had a criminal history both in New South Wales and Queensland which, in the context of the present offences, might be regarded as neither particularly significant nor extensive. It did include some drug-related offending, and some offences involving violence. However, a custodial sentence had not previously been imposed.

[6] In August 2014 he had been sentenced for offences committed between May and July of that year, a number of which related to drug use, and including a charge of unlawful use of motor vehicles, aircraft or vessels. He was then sentenced to 18 months' probation. In October 2014 he was sentenced for an offence committed earlier that month of possessing explosives without authority, and a fine was imposed.

[7] Given the matters raised in this application, it is unnecessary to describe in detail the applicant's offences. Their serious nature was rightly recognised by the sentencing Judge, and is acknowledged in the applicant's submissions. However, I shall make some brief observations about them. On the first two occasions, the applicant went to the premises of a sex worker. On both occasions, he grabbed the complainant by the neck or throat. On each of these occasions he was accompanied by another person. On the first occasion he used a knife. On each of these occasions, the complainant was robbed. On the first occasion the applicant claimed to be "the pimp" and said, "I get girls to work for me". He also pretended that he was working for a "boss".

[8] Shortly after the second occasion on which the applicant committed these offences, he was apprehended but then released on bail. The third occasion for the applicant's offending was a little less than three weeks later. He went to the house of a person he knew, but which he had been asked not to visit. He was with another person. The complainant was alone. He asked if he could enter, and then did so. The applicant then asked whether the complainant had cannabis or money and the complainant said that he did not have anything. The applicant and his associate then began to hit the complainant. The applicant produced something that looked like a gun and which was capable of firing a projectile, but was not a conventional weapon. It was discharged, and the complainant later found several little bits of lead in his shoulder. The complainant managed to escape.

Material before sentencing Judge

[9] A psychiatric report dated 24 August 2015 was tendered on behalf of the applicant. Its author had access to medical records. They showed that in July 2014, the applicant

had presented to the Fraser Coast Mental Health Service with his step-father. At that time he reported a long history of difficulty controlling anger, and ongoing steroid abuse. He also reported past admissions to acute psychiatric wards. No delusional thoughts were elicited on this occasion.

[10] On 21 August 2014, the applicant presented to the mental health clinic at Hervey Bay. He was concerned that his head was not clear, and stated he would like to resume taking antidepressants. He stated that police were harassing him because he was hanging around with a man from a bikie gang. He denied any perceptual disturbances.

[11] The medical records revealed that the applicant had been assessed by a psychologist from the Prison Mental Health Service at the Maryborough Correctional Centre on 5 March 2015. The psychologist noted that the applicant had undertaken three previous assessments by the Hervey Bay Mental Health Service; and that a collateral history had been obtained from Illawarra Community Mental Service Staff, contact with them ending in 2009. On this occasion, the applicant's mother was contacted. She said she had been taking the applicant to mental health services since he was aged four and he had been diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. He first attempted to hang himself at the age of eight. He was expelled from school and became aggressive. Over time he also became grandiose and irrational. From his mother's description, the applicant's letters whilst in prison after his offending could be said to be delusional.

[12] The psychologist found the applicant's speech to be disordered and difficult to understand. He exhibited flight of ideas and tangential thinking. At times his speech was incomprehensible. His mood was depressed and his affect labile. He reported "command auditory hallucinations of a violent nature" and "disturbing visual hallucinations". A number of his statements, one of which was that he was "running prostitutes", were considered delusional. The psychologist had earlier recorded that the applicant "reported hearing a voice coming from a dark shadow in the corner of his ceiling"; and had stated that "he had pulled a rabbit in through a weep hole in his detention unit exercise yard and was 'taking care of it'". The applicant stated that he needed food for his rabbit and was asking the officers for some lettuce.

[13] The psychiatrist's report included the following:

> "During early 2014 Mr Bowley's amphetamines and steroid abuse escalated. He became addicted to those substances and as a consequence lost his employment and friends and began noticing changes in his thinking. He was periodically suicidal and his functioning markedly deteriorated. When using drugs he felt powerful, as if he was living in a fantasy world. He saw himself as a big criminal and felt as if he was an actor in a movie about his own life. He gradually became psychotic and completely consumed by drug addiction. This is the context in which he committed his criminal offences during the month of November 2014. He said his thinking was chaotic and he could not sleep for weeks at a time. He perceived everything around him happening extremely rapidly. He reported experiencing delusions and visual hallucinations.
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> Mr Bowley had a fragmented memory of the alleged incidents, which he did not dispute. Eventually he was arrested in New South Wales and incarcerated at the beginning of January. It took him more than

> two months to improve in mental state. During this period he exhibited grossly disturbed behaviours and had to be placed in a detention unit. He confirmed that he thought he had a rabbit in his cell. He gradually recovered from his psychosis with the help of religion and kind people that he was able to talk to. It was only then that he realized the depth of his disturbance. At the time of the interview he felt he was back to his normal self."

[14] One of the questions which the psychiatrist was asked to address was the psychological state of the applicant in the lead up to the offending. His response was:

> "In the lead up to his alleged offending Mr Bowley was suffering from what is commonly described as a substance-induced psychosis. He was experiencing symptoms consistent with a psychotic state induced by intoxicating substances, including grandiose thinking, elevated mood, an altered perception of reality, severe insomnia, disorganized thinking and perceptual abnormalities. His main drugs of abuse were steroids and amphetamines. His absence of memory for the alleged incidents can be explained by the state of intoxication. He remained grossly disturbed for an extended period following his incarceration and even two months later he was still unwell to the extent that the Prison Mental Health Service psychologist requested an assessment under the Mental Health Act. Such a prolonged psychotic state is likely to be a result of the profound pathological changes in brain biochemistry that occurred as a product of mind-altering substances."

[15] Finally it is convenient to record the following response to a question as to the applicant's future prospects:

> "A substantial proportion of individuals who abuse amphetamines, steroids and other stimulants end up developing a chronic psychiatric condition that is often indistinguishable from schizophrenia or schizoaffective disorder. This does not necessarily have to be the case with Mr Bowley. His overall prognosis is favourable, as long as he is capable of maintaining abstinence from steroids, amphetamines and related substances. Despite his prejudicial upbringing, he does not appear to have a history of extensive antisocial behaviour and his past violence and aggression seems to be related almost exclusively to the circumstances when he was under the influence of illicit substances. Without drugs he can probably lead a reasonably healthy and productive life."

[16] A Court report dated 26 February 2015 was produced, dealing with the sentence of probation imposed on 15 August 2014. The report records a failure to report on 11 December 2014. The applicant was considered to have high risk needs in relation to employment, substance abuse and mental health. The applicant had reported cannabis use on a daily basis; and on some occasions when reporting, to be under the influence of that drug.

[17] The applicant also wrote a letter to the sentencing Judge, tendered at the sentence. He stated that he had been addicted to drugs since the age of 14, which later extended to abusing steroids and peptides, and eventually becoming addicted to ice. He became drug free in jail "for the first time in many years". He said that it was "… purely an addiction to drugs which led me to commit the offences presented here today". He also said, "One so badly affected my (sic) drugs I have hardly much memory of what happened." He also recorded that "… my mental health was deteriorating."

Submissions at sentence

[18] It is unnecessary, for the purposes of this application, to record the prosecutor's submissions at sentence in any detail. However they included a reference to the applicant's time in custody from 28 November 2014, which could not be the subject of a declaration under s 159A of the *Penalties and Sentences Act* 1992 (Qld) (*PSA*). The prosecutor agreed with the sentencing Judge that this period could be taken into account. She also described the plea as early.

[19] The submissions by the applicant's counsel referred both to his history of drug taking, and his drug addiction "which had escalated in the period from early 2014 to November 2014" and he was said to be "psychotic and … completely consumed by his addiction"[1]. Reference was made to his condition on 27 November 2014 as revealed by the Court report from the Probation and Parole Service, it being submitted that he "was clearly unwell" and "actually in a psychotic state … in quite a worrying psychotic state"[2]. Reference was also made to his condition on 18 November (read by the applicant's counsel, without objection, from a statement of a Senior Constable Griffiths) where it was accepted that he was under the influence of a drug or other intoxicating matter[3]. It was submitted that "the offences were committed in the context of the drug addiction which had escalated from early 2014 to a stage in November 2014 around when these offences were being committed that he was psychotic and completely consumed by his addiction. His mental state was so unbalanced that after his arrest in New South Wales on the 28th of December and his transfer back to Queensland, it took more than two months - more than two months for the state to improve"[4].

[20] In her submissions in reply, the prosecutor drew the sentencing Judge's attention to s 9(9A) of the PSA, saying[5],

> "Just in relation to the defendant's use of drugs, it's certainly accepted that the officer, Paul Griffiths, made those observations on the 18th of November 2014 when at the watch-house. However, certainly during that time, there is some pre-planning. It's not disputed he wasn't (sic) using drugs … at the time, but it has to weighed against that feature, I'd submit."

Sentencing remarks

[21] The learned sentencing Judge dealt at some length with the circumstances of the offending and its consequences for the complainants. His Honour then said:

> "Now, it would appear by reference not only to the Court report, but also the report of the psychiatrist tendered on your behalf that it is very likely that you committed these offences whilst under the influence of drugs of some sort, and I will come to the details of that in a bit more in a moment. You may well have been at least on one or some or all of those occasions in a psychotic or near psychotic state. Pursuant to section 9, subsection (9A), of the Penalties and Sentences Act 1992,

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1 AR p 32.
2 AR p 33.
3 AR p 33-34.
4 AR p 34.
5 AR p 45.

> voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor to take into account. That said, in a moment I will come to some aspects of the psychiatrist's report which I consider to be of some relevance."

[22] His Honour then discussed the applicant's criminal history, and the Court report previously mentioned. He later returned to the psychiatrist's report. He related some of the psychiatrist's observations to the applicant's conduct on the first occasion. He also noted the psychiatrist's opinion relating to the period leading up to the offending.

[23] After a discussion of some cases, the sentencing Judge returned to the submission made by the applicant's counsel as to the appropriate sentence. His Honour recorded the submission as being that an appropriate head sentence would otherwise be eight years, which should be reduced to seven years because of time spent in custody (which could not be declared under s 159A of the PSA), with parole eligibility after one-third of the sentence had been served. His Honour then stated that a sentence of eight years would see the applicant released after 32 months (one-third of the period of the head sentence). His Honour then continued:

> "On balance, I consider - and while I can understand the submission, I do not consider a sentence of that type would properly reflect the level of criminality involved in these three instances. In my view, having regard to the seriousness of the offending involved, a head sentence in the range of 10 to 12 years would be open. However, having regard to your youth, your limited criminal history, the expression of remorse that I accept, and also the antecedents to which I have referred, I intend to begin at the lower end of that range, namely, 10 years. Having regard to the early plea of guilty, I propose to reduce that to eight years for the most serious offending.
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> I must say, when I first received this file, my first inclination was to make a violent offender order. However, in this case - and I am fully aware of the Crown's situation about making submissions on sentences but, nonetheless, it would appear that there was no urging of that course of action on the part of the Crown and, more importantly, though, I accept the submissions made by Mr Rutledge that, having regard to your age and the prospects of rehabilitation, to require you to serve 80 per cent of that period might indeed be more inclined to do more harm than good; that is, to crush any prospects of genuine rehabilitation. Normally, that would see you with a parole eligibility date at four years. However, whilst the time spent in time is not declarable, I intend to take it into account and the sentence - the head sentence that I intend to impose for the most serious offending is eight years' imprisonment and I set a parole eligibility date after three years and three months, which, on my calculation, which would make it 10 December 2018."

[24] Ultimately, his Honour imposed terms of eight years' imprisonment for four of the offences, covering each of the three occasions previously mentioned, with lesser sentences for the remaining offences.

Submissions on application

[25] For the applicant it was submitted that the sentencing Judge erred in determining that the applicant had committed the offences "whilst under the influence of drugs of some

sort" when that had not been established to the standard prescribed in s 132C of the *Evidence Act* 1977 (Qld); and accordingly not adequately giving effect to the applicant's mental condition at the time of the offending, the sentencing Judge purporting to rely on s 9(9A) of the PSA. It was submitted that the evidence was not sufficient for the conclusion which his Honour had reached. The applicant's psychotic state would warrant a lower sentence than in fact was imposed.

[26] In the alternative, it was submitted that, if the sentencing Judge was contemplating a finding that the applicant was under the influence of drugs at the time of the offending, then the applicant's counsel should have been given the opportunity to deal with that in submissions. Since that had not occurred, the applicant had been denied procedural fairness.

[27] Finally it was submitted that the sentencing Judge had correctly determined to take into account the period of pre-sentence custody (approximately nine months), and had done so in relation to the parole eligibility date. While, in an appropriate case, the discretion might be exercised in that way, in the present case the sentencing Judge had done so without explanation, and without any reason to do so. Accordingly, in determining the head sentences there had been an error in the exercise of the sentencing discretion.

[28] The respondent submitted that the applicant's experienced counsel had not sought a finding that the applicant committed the offences whilst under the influence of a psychosis. Rather he relied on the applicant's intoxicated state as an explanation for the offending, and as demonstrating the significant steps taken by the applicant towards his rehabilitation. It was not possible to separate the applicant's drug use from the effect that his drug addiction was having on his mental health, and these aspects were properly taken into account by the sentencing Judge. There was overwhelming evidence that the applicant was under the influence of drugs at the time of the offences, and the learned sentencing Judge was correct to reach that conclusion. There was no error in the approach of the sentencing Judge. The sentencing Judge raised with defence counsel the question whether the applicant was under the influence of drugs at the time of the offending. The prosecutor also raised that matter in his submissions in reply, and defence counsel could have sought leave to make further submissions. It was within the discretion of the sentencing Judge to take account of time already spent in custody only when determining an early parole eligibility date. Even if the learned primary Judge erred in exercising the sentencing discretion, this Court should impose the same sentence.

Intoxication and psychosis

[29] The sentencing Judge stated that it was "very likely" that the applicant was under the influence of drugs when committing these offences[6]. It is difficult to understand this as anything other than a finding that the applicant was in fact under the influence of drugs on each of the three occasions. Some support for this conclusion appears from the fact that immediately after that statement, his Honour noted that the applicant may well have been in a psychotic state; again followed by a reference to s 9(9A) of the PSA, and a statement that voluntary intoxication by drugs is not a mitigating factor.

[30] There was an appropriate basis for a finding that the applicant was intoxicated by drugs at the time of his offending. His letter records that at the time he was addicted

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6 AR p 52/25.

to drugs, and so badly affected by them that he had "hardly much memory of what happened"[7]. The psychiatrist expressed the view that the applicant's absence of memory for the offending conduct "can be explained by the state of intoxication"[8]. The applicant told the psychiatrist that the use of drugs placed him in a mental state quite similar to that demonstrated by his conduct on the first occasion[9]. Some support for the finding might also be found in the fact that the applicant is recorded in the Court report as stating that he was using cannabis on a daily basis[10]. While the acceptance by the applicant's counsel of the fact that, on 18 November 2014 the applicant was under the influence of a drug or other intoxicating matter, is consistent with the finding, it does not seem to me of itself to provide support for it.

[31] The sentencing Judge appears to have accepted the diagnosis of the psychiatrist. There was no reason to reject it; and it was at least generally consistent with the applicant's previous admissions to psychiatric wards, his other attempts to obtain assistance with his mental health, his observed condition on 27 November 2014, his prolonged drug abuse, and his behaviour and condition for an extended period after his incarceration.

[32] The sentencing Judge referred to the applicant's psychotic condition as, it would seem, explicative of the apparent enjoyment of power on the first occasion[11]. While his Honour referred to matters from the psychiatrist's report relating to the applicant being delusional, his substance-induced psychosis, and the likelihood of profound pathological changes in the brain biochemistry[12], these matters do not appear to have been taken into account in mitigation of the sentence. When his Honour later identified the factors which reduced the sentence from a notional range of 10 to 12 years, no mention was made of the applicant's psychiatric condition.

[33] The sentencing Judge placed considerable emphasis on both general and personal deterrence[13]. No consideration as to whether the applicant's moral culpability was reduced by the psychiatric condition is apparent in the sentencing remarks. It was not described as a mitigating factor. These considerations tend to confirm that, save in the limited respects already noted, the applicant's psychiatric state was not taken into account in the sentencing process, and in particular, was not seen as a mitigating factor. It seems to have been treated as a matter not to be so relied upon because of s 9(9A) of the PSA.

[34] The presence of a mental abnormality which does not amount to the defence of insanity under s 27 of the Criminal Code is often a significant matter in the sentencing process. In *R v Tsiaras*[14] the Victorian Court of Appeal identified a number of respects in which a defendant's serious psychiatric illness not amounting to insanity is relevant to that process. In *R v Verdins*[15] the same Court revisited the principles stated in *Tsiaras*. It pointed out that the relevance of the considerations identified in *Tsiaras* was not limited to cases of serious psychiatric illness[16]. That Court also restated the relevant principles. The authority of both of these decisions has been recognised in this State[17]. It

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7 AR p 98.
8 AR p 96.
9 AR p 93; compare AR p 81.
10 AR p 75.
11 AR p 59/35.
12 AR p 54-55.
13 AR p 56/16.
14 [1996] 1 VR 398.
15 (2007) 16 VR 269.
16 *Verdins* at [3]-[13].
17 See for example *R v Clark* [2009] QCA 361; *R v Miller* [2011] QCA 160; *R v Yarwood* [2011] QCA 367.

is, however, appropriate to focus on the reformulation of principles found in *Verdins*. It is in the following terms (a reference has been omitted):

> "Impaired mental functioning, whether temporary or permanent ('the condition'), is relevant to sentencing in at least the following six ways:
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> 1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offenders' legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
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> 2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
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> 3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
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> 4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
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> 5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
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> 6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment."

[35] Whether the sentencing Judge was correct to treat s 9(9A) of the PSA as excluding the applicant's psychiatric condition from consideration for the purpose of mitigating his sentence is a question of some difficulty. That provision is as follows:

> "(9A) Voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing the offender."

[36] The definition of "intoxication" in the Oxford English Dictionary[18] includes the following:

> "2. The action of rendering stupid, insensible, or disordered in intellect, with a drug or alcoholic liquor; the making drunk or inebriated; the condition of being so stupefied or disordered."

[37] Similarly, the definition of that term from the Macquarie Dictionary[19] includes the following:

> "1. Inebriation; drunkenness".

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18 2nd Ed, Clarendon Press, Oxford, 1989.

19 3rd Ed, The Macquarie Library, Sydney, 1999.

[38] Some assistance may also be found in that dictionary's definition of the term "intoxicate", which includes

> "1. To affect temporarily with loss of control over the physical and mental powers, by means of alcoholic liquor, a drug, or other substance."

[39] As a matter of impression, the statutory expression seems directed to the state produced by the active presence of alcohol or a drug in the human body.

[40] The applicant's psychiatric condition was described by the psychiatrist as a "substance-induced psychosis"; with his prolonged psychotic state "likely to be a result of the profound pathological changes in brain biochemistry that occurred as a product of mind-altering substances".

[41] The Oxford English Dictionary includes the following definition of "psychosis"

> "1. *Path*. Any kind of mental affection or derangement; esp. one which cannot be ascribed to organic lesion or neurosis (cf. NEUROSIS I). In mod. use, any mental illness or disorder that is accompanied by hallucinations, delusions, or mental confusion and a loss of contact with external reality, whether attributable to an organic lesion or not."

[42] In the Macquarie Dictionary, the term is defined to include:

> "1. *Pathology* any major, severe form of mental affection or disease.

[43] Similarly, Black's Medical Dictionary[20] defines "psychosis" as follows:

> "One of a group of mental disorders in which the affected person loses contact with reality. Thought processes are so disturbed that the person does not always realise that he or she is ill. Symptoms includes DELUSIONS, HALLUCINATIONS, loss of emotion, MANIA, DEPRESSION, poverty of thought and seriously abnormal behaviour. Psychoses include SCHIZOPHRENIA, MANIC DEPRESSION and organically based mental disorders."

[44] In the present case, on the psychiatrist's evidence, the applicant was suffering from a psychosis in the period leading up to his offending. It was manifest on the first occasion on which he offended. It persisted for some months, the psychiatrist recording that the applicant remained "grossly disturbed" well after his incarceration. His psychotic state was considered to be a result of "pathological changes in brain biochemistry". It seems to me that such a state is something quite distinct from "voluntary intoxication … by … drugs". It was therefore erroneous to exclude it from consideration in the sentencing process, by reference to s 9(9A) of the PSA.

[45] For the respondent it was submitted that counsel for the applicant at the sentence hearing had not sought a finding that he was affected by psychosis at the time of his offending, but had relied on his psychiatric condition to show that he had good prospects of rehabilitation. Although it is clear that the applicant's counsel acknowledged that the applicant was under the influence of drugs on 18 November 2014, he also went on to rely on the psychiatrist's opinion that the offences were committed, saying,

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20 41st Ed, A & C Black, London, 2005.

"…He was clearly unwell…he was … in a psychotic state…the psychiatrist concludes….around when these offences were being committed that he was … he was psychotic …His mental state was so unbalanced that after his arrest in New South Wales on the 28th of December … it took more than two months – more than two months for the state to improve"[21].

[46] The fact that the applicant was both intoxicated by drugs at the time of commission of these offences, and suffering from a psychosis, does not mean that his mental state is to be excluded from consideration as a mitigating factor. In *R v Clark*[22] the applicant had consumed alcohol, and excessive quantities of prescription drugs to which she was addicted. A doctor had expressed the view that her intoxication was "the major component in the offences", though he did not exclude her mental state from consideration[23]. It was held that, nevertheless, her mental state should be taken into account as a mitigating factor. Although this case was decided before the introduction of s 9(9A) of the PSA, it proceeded on the basis that, "Voluntary intoxication is not a mitigating factor in sentencing an offender"[24].

[47] I am therefore of the opinion that the learned sentencing Judge erred in failing to take into account the applicant's mental abnormality when determining the sentences. By reference to the matters raised in *Verdins*, the applicant's condition was relevant to his moral culpability and accordingly to the determination of a just punishment. It made denunciation a less significant sentencing objective. It moderated the significance of both general deterrence and personal deterrence.

[48] It is therefore necessary to determine the sentences that should have been imposed on the applicant.

The Sentence

[49] The applicant's counsel submitted that each of the terms of imprisonment of eight years should be reduced to seven years; and that the applicant should be eligible for parole after serving two years and six months of the sentence. The respondent submitted that, if the sentencing discretion were to be exercised afresh, the same sentences should be imposed.

[50] The respondent's submissions did not criticise the manner in which the sentencing Judge determined the sentences to be imposed. In those circumstances, if, as I have concluded, his Honour erred by not taking into account the applicant's mental condition, it is difficult to see that it would be appropriate to impose the same sentences.

[51] There is an additional reason why I would be reluctant to maintain the sentences imposed by the sentencing Judge. As already mentioned, the sentencing Judge indicated that the result of the mitigating factors, save for the plea of guilty, would have resulted in a sentence of 10 years, which was reduced to eight years by reason of the plea of guilty. The period of almost nine months in custody was said to be reflected in the setting of the parole eligibility date, three years and three months after sentence. It is not uncommon to reflect the mitigating feature of a plea of guilty by setting the parole eligibility date at about one-third of the sentence, as his Honour at one point recognised. For a sentence of 10 years, that would have been three years

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21 AR p 33-34.
22 [2009] QCA 361.
23 See *Clark* at [22].
24 *Clark* at [23].

and four months after sentence (without taking into account the period in custody). Moreover, given the uncertainty about a grant of parole, I would be reluctant to reflect the effect of time already spent in custody only by setting a parole eligibility date. There is considerable force in the applicant's submission that, absent good reason to do so, this was incorrect in principle.

[52] For the applicant it was contended that the terms of imprisonment of eight years should be reduced to terms of seven years, because of the applicant's mental condition. I am prepared to accept that submission in substance. However, since the mental condition affects each of the sentences, I would reduce the term of imprisonment of seven years for burglary to one of six years; and the sentences for the assaults on 2 November and 7 December 2014 in each case to a term of two years and nine months.

[53] I also consider that in those circumstances, it is appropriate to alter the date on which the applicant is eligible for parole. The applicant contended for 10 March 2018. The respondent did not contend that, if the applicant's submissions were otherwise accepted, this date was inappropriate. In the context of the sentences which I would otherwise impose, I am prepared to accept the applicant's submission.

Conclusion

[54] Strictly speaking, the conclusions which I have reached make it unnecessary to determine whether the finding of intoxication was made in breach of the requirements of procedural fairness. However, it is apparent from the submissions made on behalf of the applicant in the sentencing hearing that his intoxication was not in issue. I do not consider that there was a breach of those requirements.

[55] I would make the following orders:-

(a) The applicant is granted leave to appeal against the sentences.

(b) The appeal is allowed.

(c) The sentences are varied, by imposing a term of seven years imprisonment in lieu of each term of eight years imprisonment; a term of six years imprisonment in lieu of the imposed term of seven years imprisonment; and a term of two years and nine months imprisonment in lieu of each term of three years and three months imprisonment.

(d) The date on which the applicant is eligible to apply for parole is 10 March 2018.