SUPREME COURT OF QUEENSLAND

CITATION:	*R v Woods* [2016] QCA 310
PARTIES:	**R** **v** **WOODS, Aaron Lee** (appellant/applicant)
FILE NO/S:	CA No 133 of 2015 DC No 1764 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 22 May 2015; Date of Sentence: 3 June 2015
DELIVERED ON:	25 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	12 July 2016
JUDGES:	Fraser and Philippides JJA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Dismiss the appeal.** **2. Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was found guilty by a jury and convicted of entering a dwelling with intent to commit an indictable offence (count 1) and wounding (count 2) – where the appellant submits that the trial judge failed to properly direct the jury in relation to circumstantial evidence – where the appellant further submits that the trial judge merely repeated conventional directions about reasonable doubt without directing the jury that if there was any reasonable possibility consistent with innocence it was the jury's duty to acquit the defendant – whether the trial judge erred in directing the jury CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was found guilty by a jury and convicted of entering a dwelling with intent to commit an indictable offence (count 1) and wounding (count 2) – where the appellant was sentenced to concurrent terms of imprisonment of 10 years on

count 1 and six years on count 2 – where the appellant applies for leave to appeal against the sentences imposed for counts 1 and 2 – where the appellant submits that the sentences imposed are manifestly excessive – where the respondent submits that 10 years imprisonment was an appropriate sentence for the criminality of both counts – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the appellant was found guilty by a jury and convicted of entering a dwelling with intent to commit an indictable offence (count 1) and wounding (count 2) – where the appellant was sentenced to concurrent terms of imprisonment of 10 years on count 1 and six years on count 2 – where those terms of imprisonment were made cumulative upon a sentence of three years imprisonment which had been imposed for 49 other offences – where the appellant contends that the sentencing judge erred by improperly considering the issue of totality – where the appellant submits that the sentencing judge misapplied the totality principle by inflating the sentence for count 1 to take into account the circumstance that the sentence of three years imprisonment the appellant was currently serving was 'significantly less than it would be were it standing alone' – where the respondent contends that the sentencing judge did not adopt the approach alleged by the appellant – whether the sentence was manifestly excessive

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, cited
R v Curley [2002] QCA 140, cited
R v De Salvo (2002) 127 A Crim R 229; [2002] QCA 63, cited
R v Devon [2004] QCA 216, cited
R v Holder [1983] 3 NSWLR 245, cited
R v Keating [2002] QCA 19, cited
R v Maguire [2001] QCA 55, cited
R v Parker [2015] QCA 181, cited
R v Slade [2003] QCA 191, cited
R v Woods [2014] QCA 341, related

COUNSEL: S G Bain for the appellant/applicant
D L Meredith for the respondent

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

[1] **FRASER JA:** On 22 May 2015 the appellant was found guilty by a jury and convicted of entering a dwelling with intent to commit an indictable offence (count 1), and wounding (count 2). The appellant was sentenced to concurrent terms of imprisonment of 10 years on count 1 and six years on count 2. Those terms of imprisonment were made cumulative upon a sentence of three years imprisonment, with a parole release date of 24 November 2015, which had been imposed on 31 July 2014 for 49 other offences.

[2] The appellant has appealed against his convictions upon the ground that the trial judge failed to properly direct the jury in relation to circumstantial evidence. He has applied for leave to appeal against the sentences imposed for counts 1 and 2 on the grounds that they are manifestly excessive and the sentencing judge erred by improperly considering the issue of totality.

Appeal against conviction

[3] The 72 year old complainant lived with her husband in a residence at Manly. She gave evidence that on the night of 27 October 2012, when a festival was being held in Manly, she was disturbed by a noise. She went to investigate and was confronted by an intruder coming from the bathroom. The intruder was a man and much taller than she was, but there was no light and she was later not able to identify anyone from photoboards. Her impression was that he was 19 to 20 years old. He told her "…get out of the way you stupid old woman…" or words to that effect. The intruder slashed the complainant's face with a knife and left the house. The complainant's husband rang emergency services. Police arrived at about 8.31 pm. They found a bench underneath an open window into a bedroom of the house. The window was too high to be reached without the use of a stool or some other assistance.

[4] The festival in Manly was held about one to two kilometres from the complainant's house. The complainant's house was a short walk from a hotel. A male telephoned a taxi service at 8.39 pm from a mobile telephone which the appellant claimed was his. A taxi driver picked up a woman and a man from near the hotel. The taxi took the passengers to a place which was 0.5 of a kilometre from a residence in Morningside. The taxi driver could not identify the passengers. Other witnesses gave evidence that earlier the same day the appellant and the woman had left the residence in Morningside together to travel to the Manly festival but they did not return with them after the festival. One of the witnesses heard the appellant and the woman returning later that night but they were refused entry to the house.

[5] That woman, Ms Cook, gave evidence that she went with the appellant and others to the festival, spent a short time there, and then agreed to go with the appellant for a 10 minute walk into back streets. She saw the appellant go down an alleyway which she identified on a photograph (in effect identifying the complainant's residence). The appellant returned 10 minutes later in a distressed state and said "…something went wrong…". They walked together a short distance to the Manly hotel. She called a taxi and directed the driver to a street behind the Morningside residence. She and the appellant left the taxi without paying for the trip. Ms Cook had pleaded guilty to entering a dwelling with intent in relation to the present matter. She said that she acted as a lookout for the appellant.

[6] Defence counsel submitted to the jury that they could not be satisfied of the appellant's guilt beyond reasonable doubt. It was suggested that scenarios consistent with innocence were that Ms Cook assisted a different man to commit the offences and that, although the appellant's mobile phone was used to call a taxi, a different man got into the taxi.

[7] This was a circumstantial Crown case. The appellant argued that the trial judge should have directed the jury that, "if there is any reasonable possibility consistent with innocence, it is your duty to find the defendant not guilty" and that "follows from the requirement that guilt must be established beyond reasonable doubt." The appellant argued that the jury sought clarification from the trial judge about

reasonable doubt and circumstantial evidence but the trial judge merely repeated conventional directions about reasonable doubt without directing the jury that if there was any reasonable possibility consistent with innocence it was the jury's duty to find the defendant not guilty.

[8] In fact the trial judge did give the directions which the appellant argued were required. In summing up to the jury, the trial judge explained the nature of circumstantial evidence and directed the jury that, "[t]o bring in the verdict of guilty based substantially upon circumstantial evidence, it'd be necessary that guilt should not only be a rational inference but also the only rational inference that could be drawn from the circumstance."[1] The trial judge earlier and subsequently directed the jury on several occasions that before they could convict they had to be satisfied of the appellant's guilt beyond reasonable doubt. Furthermore, in the course of summarising the defence case, the trial judge referred to the hypotheses postulated by defence counsel that one of the group the appellant was with earlier on the night of the offence may have been the offender and Ms Cook may have been at the complainant's house with someone else. The trial judge referred to the submission by defence counsel that the jury should conclude that Ms Cook was there with someone else and directed the jury that they did not have to draw that conclusion; if they were left with a reasonable doubt, their duty would be to acquit.[2] The combination of these directions conveyed that if there was a reasonable hypothesis consistent with innocence it was the jury's duty to acquit.

[9] More directly, when the trial judge gave re-directions in response to a request by the jury for clarification about reasonable doubt and circumstantial evidence, the trial judge directed the jury in the very terms which the appellant contends were necessary:

> "To bring in a verdict based substantially upon circumstantial evidence, it's necessary that guilt should not only be a rational inference, but that it should be the only rational inference that can be drawn from the circumstances. If there was any reasonable possibility consistent with innocence, it's your duty to find the defendant not guilty. That follows from the requirement that guilt must be established beyond reasonable doubt."[3]

[10] Furthermore, in response to another request by the jury for re-directions concerning whether the defence was prevented by law from presenting an alternative scenario and whether they were obliged to decide that the defendant was not guilty if there was a reasonable explanation about what had happened, the trial judge directed the jury as follows:

> "… The second basic principle I wanted to remind you of is that the onus is on the prosecution to prove the charges beyond reasonable doubt.
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> … I should also say in this case, that whilst the defendant didn't give or call evidence, his counsel did suggest both to witnesses and in his address to you, other scenarios. So whilst the short answer is that there's no impediment on him presenting other scenarios, he did in fact do so. In particular to Ms Cook he suggested another scenario. That is that she had committed the offence in concert with another

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1 AB 239.
2 AB 243.
3 AB 264.

> male and it was that other male who went into the house and not the defendant and attacked [the complainant]…[4]
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> … It may also be that through discussion you yourselves may think of other scenarios that neither [defence counsel] nor [the prosecutor] thought of in their questioning or in their addresses.
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> You're entitled to take any such scenarios into account in your deliberations….
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> …[i]f you can find no reasonable inference from evidence that you do accept, consistent with innocence, then it is very likely that you would find the offences proven. … But if there is a reasonable possibility consistent with innocence, then it would of course be your duty to find the defendant not guilty."[5]

[11] Later the same day, in response to a further request by the jury, the trial judge reiterated that for the jury to convict the jury had to be satisfied beyond reasonable doubt of all of the elements of the offences. The trial judge continued:

> "The question you've asked me is how to proceed when considering your scenario which is unlikely but not impossible. … You are to exercise your own judgment as to whether the scenario that you're considering causes you to have a reasonable doubt about the defendant's committing the offences or not. And if you do have such a reasonable doubt you must acquit."[6]

[12] That was the last direction to the jury upon the topic. The appellant argued that at that time the trial judge should have emphasised that guilt should not only be a rational inference but it should be the only rational inference that could be drawn from the circumstances, and that if there was any reasonable hypothesis consistent with innocence then it was the jury's duty to acquit. So much was implicit in the direction. In any event, less than three hours earlier the trial judge had directed the jury that if there was a reasonable possibility consistent with innocence it was the jury's duty to find the defendant not guilty, and that direction was given in the context of earlier directions that, "To bring in a verdict based substantially upon circumstantial evidence, it's necessary that guilt should not only be a rational inference, but that it should be the only rational inference. … If there was any reasonable possibility consistent with innocence, it's your duty to find the defendant not guilty. …"[7]

[13] The only ground of the appeal against conviction is not made out.

Application for leave to appeal against sentence

[14] I will summarise the circumstances of the offences as they were described by the sentencing judge. On 27 October 2012 the appellant entered the house of an elderly couple in a suburb of Brisbane shortly before 8.20 pm. He entered through an open window. Each of the residents heard something and called out to each other. The elderly man was awake in his bedroom. His 72 year old wife, the complainant, went to check that he was alright. As she reached to open his door, the appellant came out of

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4 AB 276.
5 AB 278-279.
6 AB 282.
7 AB 264.

a bathroom armed with a knife. (At an earlier trial the appellant had been acquitted of the circumstance of aggravation of count 1 that he had been armed with a knife when he entered the house.) He said to the complainant words to the effect, "Get out of my way, you stupid old bitch" and struck her across the face with the knife. The complainant's face was cut from one cheek to the other across her mouth. The wound required about 20 or more stitches and was clearly disfiguring, but by the time of the re-trial the complainant had made a good physical recovery. The sentencing judge recorded that the scar was not visible to him. The complainant's victim impact statement conveyed that she suffered significant emotional distress.

[15] The sentencing judge found that, although the jury did not accept the alternative charge of unlawful wounding with intent to disfigure, the appellant's actions were "reckless and uncaring and without regard for any consequences" and, if it was "not inevitable", it was "certainly highly likely that, by acting as you did, you would cut her in the way that she was cut and would disfigure her."[8] Despite what the appellant said to the complainant before striking her with the knife, the complainant was not barring the appellant's exit from the house at all and there was no impediment to him leaving the house through the open window in the second bedroom through which he had entered and through which he ultimately did leave. The sentencing judge found that striking the complainant with a knife in the way he did, in those circumstances, was "wanton and gratuitous".

[16] The sentencing judge accepted that there was no evidence that the appellant specifically targeted an elderly couple and that striking the complainant across the face was an impulsive act, but the sentencing judge found that, at best for the appellant, his actions of taking possession of the knife inside the premises indicated a willingness to threaten violence to anyone who confronted him. The sentencing judge noted that this aggressive feature of the appellant's criminal conduct had been a feature of his prior offending in 1998 and 2006.

[17] The appellant was 33 years of age at the time of the offences in counts 1 and 2 and he was 36 years when sentenced. He has a very extensive criminal history. It occupies about 10 pages in the record book. His criminal history commenced with a Children's Court conviction for stealing in 1996. It includes a great many offences of burglary and entering houses. He was first sentenced to imprisonment in 1997 when (amongst other sentences) he was sentenced to 12 months imprisonment suspended for two years after having served 164 days, coupled with a declaration that 117 days served in pre-sentence custody were deemed time already served under the sentence. In 1998 he was ordered to serve the suspended period of that imprisonment upon a breach of the terms of the suspension being proved. On the same occasion he was sentenced to imprisonment for 18 months for further burglary and other offences. In the following years he was convicted and given many sentences, including sentences of imprisonment, for numerous similar offences. The most severe sentence, nine years imprisonment, was imposed in September 2006 when he was convicted of 27 indictable offences. The sentencing judge remarked that he also took into account 252 indictable offences, committed between 2004 and 2005, in the sentencing process. There was a declaration that 600 days of pre-sentence was deemed time already served under that sentence and a parole eligibility date was fixed in June 2008. The appellant thereafter committed many additional offences of the same kind as the one subject of this appeal.

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8 AB 340.

[18] In some of the appellant's prior offending he used violence. The offences for which the appellant was sentenced in May 1997 included one count of unlawful use of a motor vehicle with aggravation and one count of robbery with violence. Those offences were committed whilst the appellant was 17 years old. The offences were drug-related.[9] The complainant was an 80 year old lady who walked from her home to a bus stop. The appellant's co-offender snatched the complainant's handbag, pulling her from the seat. He threw her across the footpath and onto a bitumen road, where she fell and hit her face and temple. She also hurt her hip. The co-offender, holding the handbag, ran back to the car driven by the appellant, got into the car and they sped off.[10]

[19] The offences for which the appellant was sentenced in May 1998 included an offence in which the appellant pleaded guilty to 22 property offences. On one occasion, the appellant broke into the home of a 63 year old woman, demanded money and punched her twice with clenched fists, knocking her to the ground. The appellant punched her in the neck and when she tried to get up he threatened her. He knocked the phone from her hand when she reached for it. On another occasion, the appellant broke into the home of a woman and was confronted by a neighbour as he was leaving. He punched the neighbour an invalid pensioner, in the head and head-butted him, breaking his nose. The requirement to have surgery on his nose had a great impact on his life. At that time the appellant was on probation for similar offences. He had a very bad drug problem.

[20] In September 2006, the appellant, then 27 years of age, pleaded guilty to a large number of property offences. In one offence, an attempted robbery, the appellant confronted a 53 year old woman in her garage, took hold of her around the neck with his arm, and pressed a knife into her rib area. That complainant felt that she was being choked. She screamed and was told to shut up. When a neighbour appeared in the window of the next door house, the complainant screamed again and the appellant ran away. These offences were also associated with the appellant's drug addiction. For that attempted armed robbery offence, the appellant was sentenced to imprisonment for seven years.[11]

[21] To assist in understanding the appellant's arguments about his sentences it is useful to set out extracts from the sentencing remarks (in which I have added paragraph numbers for ease of reference):

> "1. At the time of the initial trial, the trial judge had to deal with a conviction for entering the dwelling with intent, of which you were convicted before me also, and a more serious conviction of unlawful wounding with intent to disfigure. His Honour also had to consider 49 other offences including 28 offences of burglary, three offences of attempted burglary, 14 other offences of stealing and other property offences to which you pleaded guilty.
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> 2. As the Court of Appeal makes clear, in *Woods v R* [2014] QCA 341, the original trial judge approached the sentence before him by imposing a sentence of 14 years for the offence of malicious wounding with intent and then adding "something which will reflect the other criminal behaviour which will be significantly less than it would be were it standing alone."

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9 AB 383.
10 AB 376-377.
11 AB 421.

3. Before me, consequently, issues of totality are also of some relevance. The offences before me were committed on the 27th of October 2012. The 49 offences before the original trial judge occurred over a period between the 10th of September 2011 and the 11th of December 2012. The Court of Appeal noted that the original sentencing judge, in imposing three years for many of the burglary and related offences, was conscious of the 14 years imposed for malicious wounding and that the three years

> *...was significantly less than it would be were it standing alone.*

4. In the Court of Appeal, Fraser JA, after setting aside the conviction and sentences on the matters that were tried before me, turned his mind to the appropriate sentence for the bulk of the burglary and the property offences before the original trial judge to which you pleaded guilty. His Honour said at paragraph 23 of the Court of Appeal judgment:

> *Giving the fullest weight to all of the matters in mitigation upon which the appellant relies and also bearing in mind that the sentencing judge intended to defer parole eligibility until after 80 per cent of the three year term, the appropriate sentence should certainly be no less severe than the effective head sentence imposed by the sentencing judge of three years' imprisonment, with parole release after half of that term. A more severe sentence could be imposed.*

5. I accept that the sentencing judge significantly moderated what otherwise would have been an appropriate sentence for these offences to take into account that his sentence was imposed cumulatively upon the 14 -year term.

6. In my view it is in such circumstances open to me and appropriate to impose a sentence for the burglary of 10 years imprisonment and to impose one of six years for the wounding offence. Whilst those sentences should be concurrent with one another, they are to be served cumulatively upon the sentences of three years and other sentences imposed for the 49 offences for which you pleaded guilty before Botting DCJ on the 31st of July 2014. In imposing that sentence for the burglary offence, I've had regard to your overall offending and to the provisions of the *Penalties and Sentences Act* and also to the matters urged upon me by counsel, in particular by your counsel in mitigation, and also to those factors referred to in the judgment of the Court of Appeal, some of which I have set out above."

[22] The sentencing judge referred to the appellant's "appalling criminal history" and to previous sentencing remarks in relation to the appellant's prior convictions, to remarks in this Court's 2014 judgment concerning sentencing factors, and to the appellant's lack of remorse. The sentencing judge returned to the question of cumulative sentences in the following passage (in which I have also added paragraph numbers):

"7. In my view, your offending, in particular the fact that the offences included the gratuitous unlawful wounding of an elderly woman, make this offending sufficiently distinct from those early offences to justify a cumulative sentence. In my view, whilst it might correctly be said that the wounding is objectively more serious than the burglary itself, it is necessary for me to look at the whole circumstances and to impose a sentence which adequately punishes you for your overall offending on the night of the 27th of October. In this regard, I'm conscious of the remarks of Street CJ in *R v Holder* [1983] 3 NSWLR 245 at 260 where his Honour said:

> *The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straight forward arithmetical addition of sentences is appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences. The effect of this practical consideration is always to produce an ultimate aggregate which is less than that which would be arrived at by a straight forward adding up of the terms appropriate for the offences if each were viewed alone. In carrying out this process of adjustment, it is both inevitable as well as proper that the ultimate decision be arrived at in the light of the totality of the criminality involved in all of the offences. As has been said more than once in this Court, where the principle of totality comes into effect, it is more often than not of little importance how the ultimate aggregate is made up (that is to say, whether by a series of aggregate terms or by a series of concurrent terms, or by partly one and partly the other). The important factor is the practical significance of the sentencing order.*

8. Such a practical approach to sentencing is, in my view, also consistent with the observations of the Court of Appeal in *R v Lovell* [2012] QCA 43, especially at paragraph 64.

9. I also indicate that in arriving at the sentence, and structuring the sentence as I have, I have not made a serious violent offence declaration. Were I sentencing you for the wounding offence alone or imposing a head sentence for the wounding offence, taking into account your overall criminality, and a lesser sentence in respect of the burglary, I would have made such a declaration

> as part of the overall sentencing process. In my view, your offence was serious and violent. An approach of imposing a sentence of, say, six years for the wounding with a serious violent offence declaration, and a further cumulative sentence for the burglary, which would not have been the subject of a serious violent offence order, might also have been possible, and might be considered as suitable and consistent with the approach of the Court of Appeal in *R v Derks* [2011] QCA 295 at paragraph 26.
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> 10. Ultimately, it is my view that the approach I have adopted of imposing the heavier sentence on the objectively less serious offence of burglary obviates the possibility of inadvertent error of the kind identified in that passage in *Derks*, and imposes a sentence for the totality of your offending, including that dealt with by Botting DCJ for the pleas, which is just and appropriate."

Ground 1: "the sentences imposed on count 1 and count 2 were manifestly excessive"

[23] The sentencing judge concluded (in paragraph 9) that, were a sentence of six years imprisonment to be imposed for count 2 alone, it would have been appropriate to make a serious violent offence declaration. Such a declaration would have had the effect that parole eligibility would not arise until after the appellant had served 80 per cent of the term. The sentencing judge ultimately did not make the declaration, but instead reflected the criminality in both offences in the sentence of 10 years imprisonment imposed on count 1. (That is reflected in the sentencing judge's reference in paragraph 7 to "your overall offending on the night of 27th October", in paragraph 9, and in the first part of paragraph 10.) The sentence structure chosen by the sentencing judge was designed to allow for the parole eligibility date being fixed at five years after the commencement of the cumulative term of 10 years,[12] whereas under the notional sentence the parole eligibility date would have occurred after the appellant served 6.8 years (the sum of 4.8 years of the six year term for count 2 and 50 per cent or two years of the cumulative four year term for count 1).

[24] The appellant emphasised the circumstances that the prosecution case was that the appellant was not armed when he entered the complainant's house, the jury verdict established that there was no specific intent associated with the swing at the complainant's face, and the injury had fortunately resolved leaving no visible scar and without serious physical consequences for the complainant. The appellant argued that *R v Devon*[13] and *R v Curley*[14] indicate that a wounding offence of this nature should attract a sentence which is no more severe than four years imprisonment.

[25] In *Devon*, a sentence of four years imprisonment for unlawful wounding, with lesser concurrent sentences for burglary and other offences, was found to be not manifestly excessive. The offender stabbed a woman in the chest with a knife, causing a two centimetre laceration and a non-tension pneumothorax when the complainant removed some CDs from a CD player to which the offender was listening. The reasons do not suggest that the complainant suffered any lasting physical injury. That offender had "quite a significant record of committing criminal offences"[15] over about eight years

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12 AB 344.
13 [2004] QCA 216.
14 [2002] QCA 140.
15 [2004] QCA 216 at [4].

(as against the appellant's very significant record extending for about eighteen years) and the most severe sentence imposed upon that offender was two years imprisonment (as against a sentence of nine years imprisonment previously imposed upon the appellant). In those circumstances, and because the sentence in *Devon* was imposed upon a plea of guilty, that case is not inconsistent with a markedly more severe penalty being imposed in this case. In *Curley*, a sentence of four years imprisonment suspended after 18 months was found to be not manifestly excessive. The offender struck her daughter on the head with a beer bottle and then used the broken bottle to cut her daughter's face and neck. The assault arose out of an argument between them about who was to care for the daughter's young child and both were significantly affected by alcohol. That offender pleaded guilty, she was remorseful, she and her daughter had since reconciled, and the daughter did not want the offender to be imprisoned. Those circumstances distinguish that decision from the present case.

[26] Neither of the cited cases is inconsistent with a sentence in this case of six years imprisonment with a declaration. It is true that the wounding in this case was inflicted by a single blow, that blow was not said to be premeditated, and the complainant's scarring was found by the sentencing judge not to be apparent by the time of sentence. The offence was nevertheless very serious. It was appropriately found to be "wanton and gratuitous", it caused the elderly complainant significant emotional distress, as should have been readily predictable if the appellant had paused for thought, and the appellant did not have the mitigating benefit of a plea of guilty. Importantly, the appellant's history of violent offences of a similar kind made protection of the community a very material consideration in the sentence. Overall, the circumstances are so serious that, without taking into account any of the additional criminality in count 1, and although the maximum penalty is seven years imprisonment, a six year term of imprisonment with parole eligibility deferred until after the appellant served 80 per cent of that term would have been within the sentencing judge's discretion.

[27] The appellant argued that this was not an offence "beyond the norm" such as could justify a serious violent offence declaration.[16] The appellant submitted that the offence of wounding is inherently violent, that the use of a knife in an offence of that kind is not uncommon,[17] and that the circumstances of this case could not be regarded as so violent that a declaration was warranted. The appellant also referred to statements by McPherson JA in *De Salvo*[18] which questioned whether previous offences could support a declaration and his Honour's conclusion in that case that the criminal record of the offender did not afford a basis for a declaration.

[28] As the respondent submitted, in *R v Orchard*,[19] Jerrard JA explained that a decision, cited by McPherson JA in *De Salvo*, *R v Keating*,[20] indicated that a declaration may be appropriate where there is a perceived need to protect the community and held that, "an offender's criminal history may tend to show the offence for which the sentence is being imposed in a serious light, so that a need is perceived to protect the community". McPherson JA agreed with Jerrard JA. In *R v Parker*,[21] Gotterson JA, with whose reasons I and Flanagan J agreed, reasoned that McPherson JA's observations in *R v Orchard* concerned a case where the offender's record of violent crime was the

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16 *R v De Salvo* [2002] QCA 63 at [15] (Williams JA); *R v McDougall & Collas* [2007] 2 Qd R 87 at [19].
17 As was said of manslaughter in *De Salvo* at [9].
18 At [10].
19 [2005] QCA 141 at [26].
20 [2002] QCA 19.
21 [2015] QCA 181 at [44].

decisive consideration for making a declaration and there was no error in making a declaration upon the basis that it was justified by the scale of the trafficking offence in *Orchard* and that being the second occasion of like offending on parole.

[29] In any event, the appellant's use of a knife was not the only justification for a declaration. The sentencing judge found that the appellant's insulting demand to the elderly and defenceless complainant to get out of his way was made even though she was not in fact barring the appellant's exit from the house, the appellant struck a blow with the knife at her face, he did so recklessly and without any regard for the consequences, it was highly likely that by acting in that way he would cut and disfigure her as he did, and the striking with the knife in these circumstances was wanton and gratuitous. Upon those facts, a serious violent offence declaration was not outside the sentencing discretion. Taking the appellant's record of previous offences of violence into account provides further support for that conclusion.

[30] Having concluded (correctly in my opinion) that a notional sentence of six years imprisonment with a serious violent offence declaration for count 2 alone would have been appropriate, the trial judge indicated that it also would have been appropriate to add a cumulative sentence for count 1 (which could not be the subject of a serious violent offence declaration). The question arising under the appellant's contention that the effective sentence of ten years imprisonment is manifestly excessive may therefore be re-framed as being whether it was within the sentencing discretion to add to six years imprisonment for count 2 (whilst omitting the declaration) a cumulative term of four years imprisonment for count 1.

[31] The appellant submitted that *R v Thomas*[22] and *R v Maguire*[23] demonstrate that a sentence of not more than six years was appropriate to take into account the criminality in both counts. The respondent submitted that there were few truly comparable cases but that 10 years imprisonment was an appropriate sentence for the criminality in both counts, having regard to *R v Slade*,[24] *R v Whelan*,[25] and *R v Jackson*.[26]

[32] In *Thomas*, the Court refused an application for leave to appeal against an effective sentence of six years imprisonment with parole eligibility after two years, imposed upon a plea of guilty to a variety of offences, including house-breaking with actual violence and robbery with personal violence. In addition to the significant distinguishing circumstance that the offender pleaded guilty, although he had a substantial criminal history extending over 17 years and was regarded as a persistent long term offender in breaking and entering offences, it appears that he did not have any previous convictions for offences of violence and the longest sentence he had previously been given was six months imprisonment (imposed upon three occasions). The 32 year old offender entered a house occupied by a 37 year old woman and her pre-school aged daughter, emerged from a wardrobe, knocked the complainant to the ground, ransacked the house, and stole what he found whilst she lay on the floor after he had taped her eyes, mouth, hands and feet. Notwithstanding the seriousness of that offence and the longer period of time it occupied, the present offence could not be regarded as less serious. Taking into account the plea of guilty in *Thomas* and the present applicant's significantly worse criminal record, the decision in *Thomas* that six years

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22 [2000] QCA 411.
23 [2001] QCA 55.
24 [2003] QCA 191.
25 [1998] QCA 151.
26 [1998] QCA 265.

imprisonment with parole eligibility after two years upon a plea of guilty was not manifestly excessive does not imply that ten years imprisonment with parole eligibility after five years was outside the sentencing discretion for the totality of the offending in counts 1 and 2 in the present case.

[33] In *Maguire*, the Court allowed an appeal against sentence only to give effect to the sentencing judge's intention in relation to the parole eligibility date. For present purposes, it is necessary to refer only to the head sentence of five years imprisonment, which was imposed cumulatively upon pre-existing sentences for one count of armed robbery with personal violence and other offences, including burglary. That head sentence was found to be not manifestly excessive. The offender entered a house after breaking a window. The 65 year old owner confronted the offender and pulled him into the kitchen. The offender struggled fiercely after the complainant's wife announced that police were on their way and produced a knife. In the ensuing scuffle, the complainant suffered a minor laceration and bruising to his right forearm. The offender escaped, taking $150. Although that offence was serious, it was not as serious as the present offence. Furthermore, that offender was only about 20 years old and, although he was described as having an extensive criminal history, the most severe sentence previously imposed upon him appears to have been the pre-existing sentence of four and a half years imprisonment with the recommendation for parole after 18 months. Those circumstances, and particularly the circumstance that the offender pleaded guilty, reduce the significance of *Maguire* as a comparable sentencing decision.

[34] Of the cases referred to by the respondent, I think it necessary to refer only to *Slade*, in which the Court refused leave to appeal against a head sentence of seven and a half years imprisonment with a recommendation for parole after three years. That sentence was imposed on each of eight separate offences, including four counts of breaking and entering premises and stealing. Lesser concurrent sentences were imposed in respect of many other offences and hundreds of other offences of dishonesty were taken into account. The offender had committed an enormous number of offences of dishonesty after having been arrested and released on bail for a period of six months. On the other hand he admitted involvement in numerous offences and cooperated with police in clearing them up and he pleaded guilty. The offender was addicted to methylamphetamine and was 27 years old when he was sentenced. He had a criminal history including convictions for offences of dishonesty, but his history appears to have been much less significant than that of the present applicant. In particular, it was not suggested that he had committed any offences of violence. Of relevance is the reference by Holmes J (as the Chief Justice then was, with whom de Jersey CJ and Williams JA agreed) to the statement by Dowsett J in *Whelan* that a range of seven to ten years might be appropriate for cases involving a cluster of offences, but much depended on the previous history of the offender and the degree of cooperation with police.

[35] In this matter, the appellant was a persistent offender in property offences over a great many years, sentences designed to assist his rehabilitation had failed to achieve that, and substantial sentences of imprisonment had failed to deter him. The appellant did not have the benefit of any mitigating circumstances. With those matters in mind, and since the appellant did not plead guilty, he was not entitled to expect that for count 1 he necessarily would be given a concurrent sentence or a heavily discounted cumulative sentence. The maximum penalty for count 1 was 14 years imprisonment. I conclude that it would have been within the sentencing discretion to impose a four year term of imprisonment for count 1 cumulatively upon a six year term of imprisonment for count 2 (whilst omitting the declaration).

[36] In my opinion the sentence of ten years imprisonment on count 1, which also took into account the appellant's criminality in count 2, is not manifestly excessive when considered without reference to its accumulation upon the existing three year term. The effect of that accumulation is considered under the remaining ground of the sentence application.

Ground 2: "The learned sentencing judge erred by improperly considering the issue of totality"

[37] As will already be apparent, the appellant was convicted upon a re-trial. In 2014 this Court set aside the appellant's convictions following guilty verdicts at the original trial of burglary and wounding the complainant with a knife with intent to disfigure her: *R v Woods*.[27] For that reason the appellant's application for leave to appeal against sentence became irrelevant in relation to the head sentence of 14 years imprisonment which had been imposed for those offences. It remained necessary, however, for the Court to consider the appellant's challenge to the sentence of three years imprisonment for the 49 other offences upon which the 14 year term had been made cumulative. In my reasons in *R v Woods*, with which Morrison JA and Henry J agreed, I observed:

> "…In fixing upon the sentences for those 49 offences, committed on various dates between about September 2011 and about November 2012 and to which the appellant pleaded guilty (one count of receiving tainted property on indictment 1430 of 2013, two counts of receiving tainted property and one count of possession of a dangerous drug on indictment 1675 of 2013, and 45 counts – mostly burglary, stealing, and similar offences – on indictment 1573 of 2013), the sentencing judge adopted the approach of beginning with the sentence of 14 years imprisonment for the malicious wounding offence, and then adding "something which will reflect the other criminal behaviour, which will be significantly less than it would be were it standing alone…". After observing that, but for the matters set out in a confidential exhibit, he had thought of imposing a sentence of four years imprisonment, the sentencing judge imposed a sentence of three years imprisonment upon some of the burglary offences and six months imprisonment upon all of the other offences. The sentencing judge ordered that the sentences of three years imprisonment and six months imprisonment were to be served concurrently with each other but cumulatively upon the sentence of fourteen years imprisonment." [28]

[38] The Attorney-General had not appealed against the sentence of three years imprisonment and the Crown had not argued that it should be reduced upon the appellant's application. I observed:

> "Giving the fullest weight to all of the matters in mitigation upon which the appellant relied and also bearing in mind that the sentencing judge intended to defer parole eligibility until after 80 per cent of the three year term, the appropriate sentence should certainly be no less severe than the effective head sentence imposed by the sentencing judge of three years imprisonment, with parole release after half of

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27 [2014] QCA 341.

28 [2014] QCA 341 at [18].

> that term. A more severe sentence could be imposed; I accept that the sentencing judge significantly moderated what otherwise would have been an appropriate sentence for these offences to take into account that this sentence was imposed cumulatively upon the fourteen year term. …
>
> Accordingly, emphasising that all of the mitigating factors upon which the appellant relied are fully taken into account in this sentence, the appellant's sentence for these offences should be three years imprisonment with a parole release date fixed after eighteen months. …"[29]

[39] Under ground 2, the appellant argued that the sentencing remarks in the present matter reveal that the sentencing judge misapplied the totality principle by inflating the sentence for count 1 to take into account the circumstance that the sentence of three years imprisonment the appellant was currently serving was "significantly less than it would be were it standing alone".

[40] In *Mill v The Queen*,[30] the High Court referred to the succinct description of the totality principle in Thomas, *Principles of Sentencing*,[31] as requiring a sentencing judge "who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'." The High Court observed that, where the totality principle was to be applied in relation to sentences imposed by a single sentencing court, the appropriate result might be achieved by making sentences wholly or partially concurrent or by lowering individual sentences below that which would otherwise be appropriate. The High Court also referred to *R v Knight*,[32] in which the Full Court of the Supreme Court of South Australia referred with approval to a statement by Lord Parker LCJ in *R v Faulkner*,[33] that "at the end of the day, as one always must, one looks at the totality and asks whether it was too much".

[41] Consistently with that authority, the respondent did not contest the appellant's submission that the totality principle did not permit the sentencing judge to inflate the sentence on account of a perception that the sentence of three years for the 49 offences was unduly lenient. The respondent contended that the sentencing judge did not adopt that approach.

[42] The appellant's argument initially struck me as being persuasive, but on reflection I accept the respondent's submission that the sentencing judge instead adopted the legitimate approach of not discounting the otherwise appropriate cumulative term of 10 years imprisonment under the totality principle because the three year sentence was already sufficiently discounted. That view is consistent with my conclusion that the effective 10 year term is not manifestly excessive. Furthermore, the sentencing judge adopted the expression of the totality principle in *R v Holder*, in which Street CJ noted that the effect of the principle "is always to produce an ultimate aggregate which is less than that which would be arrived at by a straight forward adding up of the terms appropriate for the offences if each were viewed alone".[34] That makes it

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29 [2014] QCA 341 at [23]-[24].
30 (1988) 166 CLR 59 at 62-63 (Wilson, Deane, Dawson, Toohey and Gaudron JJ).
31 (1979), 2nd ed, pp 56 – 57.
32 (1981) 26 SASR 573 at 576.
33 (1972) 56 Cr App R 594 at 596.
34 [1983] 3 NSWLR 245 at 260; whether that view is correct is not in issue in this appeal.

seem most unlikely that the sentencing judge sought to impose a term of imprisonment on count 1 which was longer than was appropriate for the total criminality in both counts. The word "consequently" in paragraph 3 of the quoted sentencing remarks arguably points in the opposite direction, but I think the better view is that it was a reference to the consequence of there being pre-existing sentences which already had been discounted by application of the totality principle in the original sentence. In comparing the aggregate sentence of thirteen years imprisonment with the totality of the appellant's offending across the 49 offences and counts 1 and 2, the sentencing judge could take into account that the sentence of three years imprisonment had already been appropriately reduced to account for the more severe cumulative sentence of 14 years imprisonment which was later set aside on appeal. The concluding clause in paragraph 10 merely reflects the sentencing judge's correct appreciation of the need to ensure no infringement of the totality principle in the cumulative sentence the sentencing judge imposed.

[43] Ground 2 is also not made out.

Proposed orders

[44] I would dismiss the appeal and refuse the application for leave to appeal against sentence.

[45] **PHILIPPIDES JA:** I have had the benefit of reading the reasons for judgment of Fraser JA. I agree with those reasons and the orders proposed.

[46] **BURNS J:** I agree with the reasons of, and the orders proposed by, Fraser JA.