SUPREME COURT OF QUEENSLAND

CITATION:	*R v Eveleigh* [2002] QCA 219
PARTIES:	**R** **v** **EVELEIGH, Allan John** **(applicant)**
FILE NO/S:	CA No 356 of 2001 DC No 3207 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2002
JUDGES:	McMurdo P, Fryberg and Mullins JJ Separate reasons for judgment of each member of the Court; Fryberg and Mullins JJ concurring as to the orders made, McMurdo P dissenting in part.
ORDERS:	**1. Subject to paragraph (2), application for leave to appeal against sentence dismissed** **2. Leave granted for both parties to make further submissions in writing within seven days regarding whether a declaration as to the operation of s 135(2) of the *Corrective Services Act 2000* should be made**
CATCHWORDS:	CRIMINAL LAW – Judgment and Punishment – Sentence – Factors to be taken into account – Totality – Sentences for several offences – Where serious violent offence declaration made under s 161B(3) *Penalties and Sentences Act 1992* – Whether declaration made sentence manifestly excessive CRIMINAL LAW – Judgment and Punishment – Non-parole period or minimum term – Queensland – Where applicant serving four terms of imprisonment – Where one offence declared to be a serious violent offence – Where trial judge made no recommendation for post-prison community based release – Interpretation of s 135(2) *Corrective Services Act* 2000 *Corrective Services Act* 2000 (Qld), s 134, s 135(2) *Penalties and Sentences Act* 1992 (Qld), s 3, s 9, s 13, s 157,

s 161B

R v Bird and Schipper [2000] QCA 94, considered
R v Bojovic [2000] 2 Qd R 183, applied
R v Booth [2001] 1 Qd R 393, considered
R v B; ex parte Attorney-General [2000] QCA 110, considered
R v Bui [2002] QCA 151, considered
R v Collins [2000] 1 Qd R 45, considered
R v Crossley (1999) A Crim R 80, considered
R v Daphney [1999] QCA 69, considered
R v DeSalvo [2002] QCA 63, considered
R v Hardie [1999] QCA 352, considered
R v Herford [2001] QCA 177, considered
R v Irving [2001] QCA 472, considered
R v Jones [2000] QCA 84, considered
R v Keating [2002] QCA 19, considered
R v Lovell [1999] 2 Qd R 79, considered
R v Lund [2000] QCA 85, considered
R v McCartney [1999] QCA 238, considered
R v Moore; ex parte Attorney-General [2002] QCA 116, considered
R v Newcombe and Middleton [1999] QCA 408, considered
R v Palmer [2000] QCA 15, considered
R v Shillingsworth [2002] 1 Qd R 527, applied
R v Stinton [1999] QCA 15, considered
R v Taylor and Napatali; ex parte Attorney-General (1999) 106 A Crim R 578, considered
R v Vanderwerff [1999] QCA 169, considered

COUNSEL: J R Hunter for the applicant
D L Meredith for the respondent

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

[1] **McMURDO P:** The facts and issues are set out in the reasons for judgment of Fryberg J.

[2] On 30 November 2001, the applicant was sentenced to a term of imprisonment of eight years with a declaration that he was convicted of a serious violent offence[1] and a cumulative sentence of 12 months imprisonment, being the unserved portion of an earlier suspended sentence. The effect of the declaration is that the applicant must serve 80 per cent of that eight year sentence before becoming eligible to apply for post-prison community based release (parole): see s 135(2) *Corrective Services Act* 2000 (Qld) ("2000 Act"). The eight year sentence was concurrent with a two years sentence imposed 14 days earlier for offences of supplying a dangerous drug. The

1 *Penalties and Sentences Act* 1992 (Qld), Part 9A.

question for this Court is whether, balancing all the circumstances, that cumulative sentence, including the serious violent offence declaration under s 161B(3) *Penalties & Sentences Act* 1992 (Qld), was manifestly excessive: see *R v Bojovic*.[2] That issue may be in part addressed where the Court has a discretion to make a declaration by questioning whether the offence has features warranting a sentence which required the offender to serve 80 per cent of the head sentence before being able to apply for release on parole, as it was by the majority in *R v de Salvo*.[3] That approach is not necessarily inconsistent with the integrated approach to sentencing favoured in *Bojovic*. But the ultimate question is that I first posed and the sole ground of the proposed appeal here, namely whether, balancing all the circumstances, including the consequences of the declaration, the cumulative sentence is manifestly excessive.

[3] I agree with Fryberg J, generally for the reasons he gives in paras [113]–[131] of his reasons, that the sentence of eight years imprisonment with a serious violent offence declaration, was not manifestly excessive and that the learned sentencing judge gave sufficient reasons for making the declaration.

[4] When the 12 month cumulative sentence for the breached suspended sentence is also considered, the overall sentence (nine years imprisonment with a requirement that 80 per cent of eight of those years be served before he can apply for parole), whilst not lenient, does not become manifestly excessive. The various offences to which the applicant pleaded guilty were serious, especially the home invasion, which, predictably, had unpleasant consequences for the victims. The applicant at 32 was not a youthful offender and his significant criminal history included prior convictions for violence. These were amongst the offences the subject of the suspended sentence. Consideration for his early pleas of guilty and his considerable cooperation with the authorities did not dictate a lighter sentence.

[5] But what is the practical effect of the sentence under the 2000 Act? As I understand it, the applicant's counsel, Mr Hunter, is content with the Department of Corrective Services' sentence calculation which states that the applicant's post-prison community based release eligibility is 18 October 2008, just under seven years from the date of his sentence, the subject of this application. Mr Hunter is, however, uncertain of the legislative basis for that calculation. Mr Meredith for the respondent contends that the calculation is incorrect.

[6] In the absence of an application for a declaration and thorough argument as to the meaning of s 135(2) 2000 Act, it seems unnecessary to decide this question. But, in the light of what has been written by Fryberg and Mullins JJ, I make the following observations.

[7] The 2000 Act came into force on 1 July 2000 and repealed the *Corrective Services Act* 1988 (Qld) ("1988 Act").[4] Chapter 5 2000 Act provides for the applicant's eligibility to apply for post-prison community based release. Other than an exceptional circumstances parole order,[5] his eligibility for release on parole depends on s 135(2) 2000 Act which relevantly provides:

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2 [2000] 2 Qd R 183, [28]-[35].
3 [2002] QCA 63, CA No 284 of 2001, 15 March 2002.
4 2000 Act, s 275.
5 2000 Act, s 133.

> "A post-prison community based release order, … may start once the prisoner has –
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> …
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> (c) for a prisoner serving a period of imprisonment for a serious violent offence – served 80% of the period, or 15 years, whichever is the less; or
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> …
>
> (e) otherwise – served half of the period of imprisonment to which the prisoner was sentenced."

[8] The words "period of imprisonment" are defined by Sch 3 2000 Act in the same terms as the definition contained in s 4 *Penalties and Sentences Act* 1992 (Qld), namely

> "… the unbroken duration of imprisonment that an offender is to serve for two or more terms of imprisonment, whether –
>
> (a) ordered to be served concurrently or cumulatively; or
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> (b) imposed at the same time or different times;
>
> and includes a term of imprisonment."

[9] The expression "term of imprisonment" also has, under Sch 3 2000 Act, the meaning given to it in s 4 *Penalties and Sentences Act* 1992 (Qld), relevantly

> "the duration of imprisonment imposed for a single offence, …"

[10] Here, the applicant was serving a "*term* of imprisonment" for a serious violent offence but a "*period* of imprisonment" for a serious violent offence and an offence which was not a serious violent offence. The applicant's "*period* of imprisonment" is not obviously within s 135(2)(c) or (e).

[11] In this respect, s 135 differs from the comparable provision in the 1988 Act, s 166(1) of which relevantly provided:

> "**166. (1)** … a prisoner … is not eligible for release on parole –
>
> …
>
> (c) if the prisoner is serving a term of imprisonment for a serious violent offence – until the prisoner has served the lesser of the following –
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> (i) 80% of the term of imprisonment to which the prisoner was sentenced;
>
> (ii) 15 years; or
>
> (d) otherwise – until the prisoner has served half of the term of imprisonment to which the prisoner was sentenced."

[12] Under the 1988 Act the applicant would, as calculated by the Department of Corrective Services sentence calculation here, be eligible to apply for parole after serving the combined period of 80 per cent of the *term* of imprisonment for the serious violent offence and half the cumulative *term* of imprisonment imposed for the offences which were not declared to be serious violent offences.[6]

[13] There is nothing in the Explanatory Notes to the 2000 Act[7] which suggest the change from the words "*term* of imprisonment" to "*period* of imprisonment" in

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6 1988 Act, s 122.

7 *Corrective Services Bill* 2000 Explanatory Notes No 63 of 2000, vol 3, pp 2116-2324; s 14B *Acts Interpretation Act* 1954 (Qld).

s 135 was deliberate. The Explanatory Notes record that the 2000 Act became necessary following the Queensland Corrective Service Reviews report, *Corrections in the Balance*, which identified 50 legislative issues as requiring resolution. None of the issues identified in the Explanatory Notes related to eligibility for parole or post-prison community based release. None of the examples given in the Explanatory Notes to s 135 2000 Act[8] cover a factual situation as here, where the *period* of imprisonment includes a *term* of imprisonment for a serious violent offence and a cumulative *term* of imprisonment for an offence which is not a serious violent offence.

[14] I can fathom no reason for the legislature to have changed "term of imprisonment" in s 166 1988 Act to "period of imprisonment" in s 135 2000 Act. I am inclined to the view that the drafter of the 2000 Act inadvertently used the expression "period" instead of "term" and that the legislative intent in the 2000 Act was that, in cases such as this, the applicant would be eligible for post-prison community based release after serving the combination of the term of 80 per cent of the serious violent offence sentence and the term of 50 per cent of the cumulative sentence.[9] Such an interpretation almost certainly reflects the intention of the primary judge; it also coincides with the Department of Corrective Services' sentence calculation based, Mr Meredith tells us, on an advice from Crown Law. Section 135(2) may require legislative intervention to clarify the matter but, so as to make some sense of the provisions in an instance such as this, I would be inclined to regard the drafter's use of the word "period" instead of the word "term" in s 135(2)(c) and (e) 2000 Act as a drafting oversight and interpret "period" where it there occurs as "term".[10] As I have indicated, however, in the absence of an application for a declaration and thorough argument on the issue, I do not wish to express a concluded view.

[15] I agree that the application for leave to appeal against sentence should be refused.

[16] **FRYBERG J:** On 30 November last year, in the District Court, the applicant was convicted of and sentenced to imprisonment for four offences as follows:

2 Feb 2001	Entering dwelling with intent with circumstances of aggravation	8 years + SVO declaration
	Armed robbery in company with actual violence	3 years
26 Apr 2001	Armed robbery	5 years
	Unlawful use of motor vehicle with circumstances of aggravation	2 years

[17] That imprisonment was ordered to be served concurrently with a term of two years which he was already serving for drug offences. At the same time, Judge Newton ordered that the unserved portion of an earlier suspended sentence, namely 12 months, be served cumulatively upon the other sentences he imposed. Four days of presentence custody were ordered to be regarded as imprisonment already served. The applicant now appeals against the first of those sentences on the ground that it is manifestly excessive, by reason of the declaration that the offence was a serious violent offence. By an amendment, he also appeals against the order made in relation to the suspended sentence.

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8 At 2245.

9 2000 Act, s 81.

10 See *Sandvik Australia Pty Ltd v Commonwealth* (1989) 89 ALR 213, 216 and s 14A, *Acts Interpretation Act* 1954 (Qld).

The February offences

[18] The circumstances of aggravation in relation to the first offence were that the offence was committed at night, that the applicant was armed with a dangerous weapon, that he threatened to use actual violence, that he was in company with another and that he damaged property. The robbery charge in respect of the same occasion alleged that he was armed with a rifle, was in company with another person and used personal violence. The two offences were committed at about 9.30pm on the day charged. The applicant and another man entered the home of a Mr Mark Bricknell at Chelmer wearing balaclavas and gloves. Mr Bricknell and his de facto spouse, Ms Kym Aspinall, were asleep and Ms Aspinall's daughter, Leah, was in bed, reading and listening to music. The two men entered Leah's bedroom carrying shortened shotguns. When she screamed, one of the men put his hand over her mouth and said, "Shut up, shut up. We're not going to hurt you. Where's the safe?" He removed his hand and she replied, "It's in my parents' room". The men then took Leah into her parents' bedroom. Both parents awoke. One of the men said, "We don't want to hurt anyone. Where's the safe?" Mr Bricknell got up from his bed and said, "It's in the cupboard. Don't hurt anyone. Take whatever you want." He went to a cupboard in the bedroom and opened it. He said, "Just don't hurt anyone. You can take what you want. There's no money in there, only jewellery." The two men said, "Open it." One of the men then took Mr Bricknell at gunpoint to another part of the house to obtain the code and key for the safe, while the other gave duct tape to Leah and told her to start taping up her mother. Leah taped her mother's feet and hands together and was then told to tape herself. Mr Bricknell returned to the bedroom and opened the safe. One of the men then took jewellery and other items including personal papers from the safe and put them into a brown handbag belonging to Ms Aspinall. Leah and Ms Aspinall were then told to lie on their stomachs. Mr Bricknell was told to put more tape on their ankles and wrists. The men then bound Mr Bricknell's arms and legs with tape. They searched through cupboards in the bedroom and took other belongings from these cupboards. They told their victims that someone would be watching the house for the next 20 minutes and that the police should not be contacted or they would return. They cut a telephone line in the house and left, taking their victims' property. The handbag and some personal property were found by a member of the public on the banks of the Logan River three days later. The jewellery was not recovered.

[19] Victim impact statements referred to lasting and severe emotional and financial effects on the victims.

[20] On 5 July 2001, police officers were at the Indooroopilly BP service station on Moggill Road when they recognised the defendant, a man named McLeod and another person in a car. As a result of a conversation between police and the other persons, the car was searched and a quantity of drugs and a firearm were located. The three accompanied police to the Indooroopilly CIB where the applicant participated in a recorded interview in relation to the drugs and the firearm. In the course of that interview, the applicant volunteered information about his involvement in the four offences, although in relation to at least the later two, he was acting in the mistaken belief that McLeod had already implicated him. He told police that he had been informed that there was $100,000 in cash and $150,000 worth of jewellery in the safe. He said that he had gone to the house with another male but claimed he could not remember the person's name. He said that he had

demanded that Mr Bricknell open the safe. He falsely claimed that the jewellery had not been taken. He claimed that his firearm was not loaded.

The April offences

[21] Since there is no appeal in respect of the April offences, it is unnecessary to describe the circumstances in detail. The applicant and another man stole a motor vehicle and drove to a bakery at Milton Road, Auchenflower. The applicant, wearing a stocking over his head and carrying a knife, entered the bakery and demanded money. The female employee gave him $98. He ran outside and entered a waiting vehicle which drove away.

The proceedings below

[22] The learned sentencing judge was not told when the applicant indicated his intention to plead guilty to the offence, but I infer from the fact that the indictment was presented *ex officio* that it was an early indication and that there were no committal proceedings. That plea of guilty must be taken into account in the sentencing process: *Penalties and Sentences Act* 1992, s 13. Unfortunately, the judge did not, when imposing sentence, comply with s 13(3) of the Act. That provision required that he state in open court that he took account of the guilty plea. That omission does not invalidate the sentence but is a matter which may be considered by this Court in the present application. In my view, it is a matter which should be considered by the Court. In doing so, I cannot believe that His Honour overlooked the option, provided by s 13, of reducing the sentence which he would have imposed had the offender not pleaded guilty. His Honour twice referred to the fact of the guilty pleas during his sentencing remarks. While he did not expressly state that he took those pleas into account in determining the sentence, there is, I think, no doubt that in fact he did so. Counsel for the applicant did not rely on the omission. I do not think that it has caused the sentencing discretion to miscarry.

[23] His Honour took into account the multiplicity of offences for which he was sentencing and the effect of the order for the service of the balance of the suspended sentence. He said, "The exercise really becomes one of trying to impose a sentence that reflects the overall criminality of your conduct in respect of all matters including the activation of the suspended sentence." He also took the applicant's admissions to police into account as mitigating circumstances. He did so on the basis that these admissions were quite unprompted and that they reflected "some significant cooperation" on the applicant's part.

The applicant's background

[24] The applicant was aged 31 at the time of the offence and 32 when sentenced. He left school in year 10 in 1985 and found employment as a storeman. After two years in that occupation, he worked for a further three years at what his counsel described as "odd jobs". Thereafter he had a poor employment history, coinciding with the heavy use of amphetamines. With the assistance of friends he was able to "go cold turkey", but towards the end of 2000 he became involved in the drug trade. At the time of the offences he was again using the drug. At the time of sentencing he remained in touch with his mother, his sister and his de facto wife, who was visiting him in prison. He had enrolled in various prison courses aimed at rehabilitation.

Criminal history

[25] The applicant's criminal history was relatively short, but displayed a sharp degradation from 1997. His only conviction until that year was in 1990, when he was convicted of possession of a pipe and fined $200. In December 1997, he was convicted of possessing a weapon while under the influence of alcohol or a drug, and was fined. In September 1998, he was convicted in the District Court of entering a dwelling and committing an offence in company (an offence with some similarities to the present) and of assault occasioning bodily harm. He was sentenced to 15 months imprisonment, suspended after three months for an operational period of three years. In April 2000, he was convicted in the Magistrates Court of possession of a prohibited item and possession of a weapon, and was fined. In July 2001, he was convicted in the Magistrates Court of possession of tainted property and was sentenced to one month's imprisonment. That conviction took place after his arrest for the offence the subject of this appeal, but was in respect of an offence committed in March 2001, that is, between the dates of the two events which were before the judge in the present case. On 16 October 2001, he pleaded guilty in the Trial Division to three counts of supplying a dangerous drug in October-November 2000 and was sentenced to two years imprisonment.

The original ground of appeal

[26] Before us, Mr Hunter for the applicant did not suggest that the head sentence of imprisonment for eight years was excessive. Indeed, in submitting that the range within which sentence should have been imposed was eight to nine years imprisonment, he tacitly conceded that it was at the bottom of the range. However, he argued that the sentence was manifestly excessive (originally, the sole ground of appeal) by reason of the declaration that the applicant was convicted of a serious violent offence. He relied upon three points:

(a) although extremely serious, the offence did not bear features that took it "beyond the norm"; and,
(b) the sentencing judge gave no reasons for making the declaration;
(c) the circumstances of the applicant's confession amounted to substantial cooperation, suggestive of a high level of remorse.

In the context of the last matter, he relied on a number of comparable cases.

[27] The manner in which the first two of those points were developed in oral argument demonstrates that each was put forward as an error of law made by the sentencing judge. In the cavalier way in which matters of procedural law are dealt with on the criminal side, no application to amend the grounds of appeal to reflect this change was made. Conformably with that approach, the respondent raised no objection. Doubtless it would be seen as the vilest pedantry for a judge to complain of this violation of the integrity of the record of a Court of record. It is convenient then to deal first with those points of law.

The 1997 amendments to the *Penalties and Sentences Act* 1992

[28] The applicant submitted that as interpreted in *R v DeSalvo*[11], s 161B(3) of the *Penalties and Sentences Act* 1992 required the identification of special features

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11 [2002] QCA 63.

taking the offence "beyond the norm" to justify the making of a declaration. Section 161B was one of a number of amendments made to the *Penalties and Sentences Act* by the *Penalties and Sentences (Serious Violent Offences) Amendment Act* 1997. The amendments were made in four areas, two of which are presently immaterial. The two relevant areas were first, the sentencing guidelines and the purposes of the Act; and second, serious violent offences and mandatory cumulative sentencing.

Amendments to the purposes of the Act and the sentencing guidelines

[29] The purposes of the principal Act were set out (but not exclusively) in s 3. There were eight of them, of which three are presently relevant. They were:

> "(b) providing for a sufficient range of sentences to balance protection of the Queensland community with appropriate punishment for, and rehabilitation of, offenders; and
>
> (c) promoting consistency of approach in the sentencing of offenders; and
>
> ...
>
> (e) providing sentencing principles that are to be applied by courts."

[30] Sentencing guidelines were set out in s 9. Factors to which a court was required to have regard were in subs (2). It is unnecessary to set them all out, but para (a) should be noted:

> "(a) principles that -
>
> (i) a sentence of imprisonment should only be imposed as the last resort; and
>
> (ii) a sentence that allows the offender to stay in the community is preferable."

[31] Section 9(3) provided (among other things) that a court could impose a sentence only if satisfied it was no more severe than was necessary to achieve the purposes for which it was imposed; and subs (4) restricted the power of a court to impose imprisonment on offenders under the age of 25 years.

[32] The main amendments to these provisions are revealing. First, s 3(b) was replaced. The range of sentences was no longer provided to balance protection of the community and appropriate punishment. The amended purpose was:

> "(b) providing a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders, and, in appropriate circumstances, ensuring that protection of the Queensland community is a paramount consideration."

In other words, the range of sentences was no longer intended to facilitate balance. Henceforth, it was solely for punishment and rehabilitation; and in appropriate cases ensuring community protection.

[33] The amendments to the sentencing guidelines reflected this shift. Sections 9(3) and (4) were repealed. In practice, the repeal of subs (3) was probably of only didactic or symbolic effect, since the subsection did little more than reflect the common law. The same is largely true of the repeal of subs (4), although at common law, judges had regard to youth rather than to the strict age of 25 years.

[34] New provisions bearing the same numbers were enacted, but they had very different purposes. These provisions identified and affected a new class of offence. The class was identified as any offence:

> "(a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or
>
> (b) that resulted in physical harm to another person."

[35] For offences falling in this class, two consequences followed. First, the principles referred to in subs (2)(a) were not to apply. Second, a sentencing court was required to "have regard primarily" to a further 11 factors. It is unnecessary to set them all out. There is some overlap between them and those in subs (2). Most of them seem designed for "protection of the community". The first two were:

> "(a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;
>
> (b) the need to protect any members of the community from that risk."

Before the amendments, these matters were not enunciated as relevant factors in s 9. Despite this, it was probably always legitimate for courts to take them into account provided that a sentence was not increased beyond what was proportionate to the crime in order merely to extend the period of protection. That followed from the fact that s 9(2) did not provide an exclusive list of factors to be considered - indeed, the last factor was a catchall provision. It was, therefore, legitimate to adopt the approach of the majority in *Veen v The Queen [No 2]*[12]. Doubtless the amendments increased the relative importance of protection of the community in sentencing; but I very much doubt whether they authorised a departure from the doctrine in that case.

Introduction of provisions relating to "serious violent offences" and mandatory cumulative sentencing

[36] Under this heading I refer to the new Part 9A, entitled "Convictions of Serious Violent Offences", the new s 156A, an amendment to s 157 and the new schedule to the Act. I shall not describe these provisions in detail. That has been done elsewhere[13] and I see no need to add to the descriptions. However, there are some features to which I would draw attention.

[37] First, the words "serious violent offence" are not used in their ordinary sense in the English language. To begin with, they generally do not apply to serious violent property offences. Next, they may be applied to offences which may involve no violence, nor any threat of violence, whatsoever;[14] yet they are not applied to some offences closely associated with serious violence.[15] Finally, under s 161B(4), they may be applied to offences which, viewed on the scale of all offences to which that provision could apply, are not serious offences, despite the fact that in s 161A,

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12 (1988) 164 CLR 465 at p 472.

13 See, for example, *R v Collins* [2000] 1 Qd R 45.

14 For example, unlawful assembly, incest, procuring, burglary in company or with damage to property and the drug offences: see ss 161A(a)(i) and 161B(3)(a), read with the schedule. See also s 161B(4)(a)(ii), where the reference to "serious harm" imposes no requirement that the harm be the result of violence.

15 For example, administering an oath to commit murder, piracy and assault with intent to kill while intending piracy.

"serious" is an adjective qualifying "offence".[16] These difficulties raise doubts about what inferences may be drawn from the words themselves.

[38] Second, offences covered by s 9(3) are not necessarily serious violent offences, nor are serious violent offences necessarily covered by s 9(3). Section 9(3) contains no requirement for *serious* violence or harm such as is to be found in s 161B(4). Since the Schedule does not list "Assault", many assaults would fall under s 9(3) but not constitute a serious violent offence. On the other hand, as mentioned above, many serious violent offences as defined will not involve violence against or physical harm to a person, so will not fall under s 9(3).

[39] Third, the provisions are silent about whether their intent is to increase the amount of actual imprisonment served or merely to restructure it. Some indication of the intent can be gathered from the new s 3(b). The only change in the range of sentences made by the 1997 amendments was the introduction of the serious violent offence provisions. It is not difficult to infer that these provisions were included for the purpose of ensuring the protection of the community by their use.[17] The most likely and direct mechanism for such protection is increasing the total period spent in prison for the offences covered, not restructuring sentences of imprisonment without increasing their burden.

[40] Fourth, as was pointed out soon after the provisions came into force,[18] the Act gives no specific guidance as to what factors should be considered by a sentencing judge exercising the discretion conferred by s 161B(3). In particular, it contains no express requirement that "special features" of an offence be identified to justify making a declaration. If there is to be any such requirement, it must be derived by implication. Determining whether the Act contains such an implication requires an examination of cases in which its proper interpretation has been considered.

Decisions relating to serious violent offences

R v Lovell - 6 March 1998[19]

[41] The first case which I have found in which the relevant 1997 amendments were considered in this division is *R v Lovell*, a decision handed down on 6 March 1998. That case involved s 9. Byrne J observed that the changed emphasis in s 9 "diminishes somewhat the value of the guidance to be derived from cases of violence decided under the previous sentencing regime," commenting:

> "The 1997 amendments reflect a legislative conviction that less hesitation by the courts in requiring a violent offender to undergo the rigours of imprisonment conduces to the protection of the community from the offender and from others who might be tempted to commit similar offences."[20]

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16 Indeed, the reference to "serious violence" in s 161B(4) might suggest a different reading of s 161A. How much weight one can put on grammatical analysis is open to question when one looks at s 161B(4)(a)(i).

17 That is the conclusion which is indicated by the second reading speech of the Attorney-General in relation to the 1997 Act. However, care must be exercised in using that speech, as the provisions described in it seem different from those enacted. Perhaps the Attorney was referring to a different version of the bill.

18 *R v Collins* [2000] 1 Qd R 45.

19 [1999] 2 Qd R 79.

20 *Ibid* at 83.

Pincus JA said:

> "As appears from the analysis of the legislative changes in question in the reasons of Byrne J, the sentencing law has been altered, so far as it applies to cases like the present, in the direction of encouraging the imposition of prison sentences."[21]

While these observations were made in relation to s 9, not in relation to Part 9A, they reflect the approach suggested in para [26].

R v Collins - 18 September 1998[22]

[42] The discretionary provisions in s 161B were considered in *R v Collins*. That was an application for leave to appeal against a sentence of seven years imprisonment with a declaration for the offence of armed robbery, on the ground that the sentence was manifestly excessive. All members of the Court agreed that the head sentence of seven years was within the range open to the sentencing judge. The majority (McPherson JA and Ambrose J, McMurdo P dissenting) held that the making of a declaration did not render the sentence manifestly excessive. The reasoning in the judgments is different. Both McPherson JA and McMurdo P analysed the section on the basis that it conferred a distinct discretion to be exercised judicially. McPherson JA said:

> "It is clear that, in using the word 'may' in s 161B(3), the intention was not to confer a power which is to be applied mechanically or automatically, but rather to invest a discretion to be exercised judicially and with proper regard for all relevant circumstances including the consequences of making the declaration."[23]

His Honour then proceeded to analyse the structure and grammar of the section. He observed that to have arrived at the stage of considering a declaration, "the judge must already have concluded at least that a sentence of imprisonment of not less than five years ought to be imposed. Otherwise the jurisdiction to make the declaration under s 161B(3) would not exist."[24] For this reason, his Honour concluded that the considerations set out in ss 9(4)(a) and (b), having already been considered in deciding the jurisdictional fact, were spent and could not properly be considered in relation to the exercise of the discretion. His Honour left open the question whether the remaining paragraphs of s 9(4) could be considered, finding that even if they were, there was no error on the part of the sentencing judge.

[43] The President said, "Once those two matters[25] are established the sentencing judge 'may' (that is, the judge has a discretion to) declare the offender to be convicted of a serious violent offence as part of the sentence."[26] She then sought to find in the Act an indication of how the discretion was to be exercised:

> "The Act gives no specific guidance as to what factors should be considered by a sentencing judge exercising the discretion ... In the absence of guidance from the Act one would expect that normally no such declaration would be made unless there were reasons to justify

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21 *Ibid* at 81.
22 [2000] 1 Qd R 45.
23 *Ibid* at p 56.
24 *Ibid* at 58.
25 In ss 161B(3)(a) and (b).
26 *Ibid* at 47-48.

> the making of a declaration. Some particular reason or reasons must exist to satisfy the Court that the declaration is warranted and that in all the circumstances the appropriate sentence is one ... without remissions and with no parole eligibility until 80 per cent of the sentence is served."[27]

She held, "In the absence of specific guidelines in the Act as to what considerations should be taken into account when exercising this discretion, the general sentencing principles including those set out in s 9 of the Act should be considered."[28] She further held that since it was conceded that the offence was one which came within s 9(3) of the Act, the principles mentioned in s 9(2)(a) did not apply and those in s 9(4) did.

[44] Although their Honours differed on the applicability of ss 9(4)(a) and (b), both of them approached the process of sentencing where the discretion was involved as a two-stage process: first, the identification of an appropriate head sentence and second, the exercise of the discretion. They differed only in what they considered to be factors relevant to the second step.

[45] Ambrose J adopted a different approach. He saw an analogy between the making of a declaration and the making of a decision to vary the period for parole eligibility under s 157 of the Act. He held that the propriety of the sentence must be considered as a whole:

> "In my view, to succeed upon his application the applicant must show that in imposing the sentence of seven years and in making the declaration under s 161D(3) [*sic*] of the *Penalties and Sentences Act* the sentencing discretion of the learned sentencing judge miscarried ... In my judgment it is unhelpful to compartmentalise factors relevant to imposition of the sentence in this case by reference to the various provisions of the *Penalties and Sentences Act*. One must approach the balancing of the serious nature of the offence committed by the applicant against matters of his background, remorse and employment prospects etc. which are personal to him. These, of course, are all matters upon which the proper exercise of a sentencing discretion must be based - both in selecting the length of sentence and in determining whether or not the declaration be made. The declaration is merely part of the sentence. It is the whole of the effective sentence which in my view must be considered to determine whether or not it is manifestly excessive."[29]

Thus, in his Honour's view, one overall sentencing discretion fell to be exercised. Despite the wording of the section, the process did not involve distinct steps. On this basis, there was no need to search for factors relevant to the exercise of the separate discretion to make a declaration.

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27 *Ibid*.
28 *Ibid* at p 49.
29 *Ibid* at p 63.

R v Daphney - 16 March 1999[30]

[46] Daphney applied for leave to appeal against sentences of 15 years imprisonment and mandatory declaration for breaking and entering a dwelling house with intent and rape. He applied on the basis that such a high sentence, coupled with the effects of the declaration prevented proper recognition of a number of mitigating circumstances by an earlier parole date. In the course of an *ex tempore* judgment, White J said, "This factor [the requirement to serve 80 per cent of the sentence] does not permit any reduction of what is otherwise a proper sentence."[31] McPherson and Thomas JJA agreed.

R v Booth - 30 March 1999[32]

[47] The relationship between ordinary sentencing principles (in this case, the totality principle) and the serious violent offence provisions fell to be considered in *R v Booth*. Booth was sentenced to 12 years imprisonment on each of four counts of aggravated burglary and armed robbery. A declaration was mandatory. Because the offences were committed while he was on parole, the terms of imprisonment were made cumulative upon an existing term totalling nine years and three months, of which five years and four months remained outstanding at the time of sentencing. This meant that the offender would be subject to a further period of imprisonment of 17 years and four months and would not be eligible for parole for all but about two and a half years of that sentence. Two questions arose for consideration. The first was whether the sentencing judge was required to consider adjusting the sentence so as to offset the cumulative effect of it. The second was whether he was required to adjust the sentence so as to offset the principal effect of the serious violent offence declaration, namely his ineligibility for parole until he had served 80 per cent of the subject sentences. It is the second question which is relevant here.

[48] McPherson JA, who gave the principal judgment, referred to the decision of the High Court in *Siganto v The Queen*.[33] In that case the majority of the High Court specifically rejected a submission that "equal justice" required that the offender should not be punished more severely if he were being sentenced after a change in the relevant legislation rather than before it. McPherson JA said:

> "The fact that, after the statutory changes to the sentencing system, he would now be treated differently from others who had previously offended and been sentenced was, their Honours said, 'not relevantly inequality before the law. It is a consequence of a change in the law' ... The same observation applies, perhaps with even greater force, in the applicant's case before us. He cannot insist on the same level of sentence, or the same expectation of early release, as that which prevailed before the statutory sentencing regime was changed in 1997. In his case, the harsher or more severe sentence, to which he is now required to submit, was not the consequence of any error in sentencing discretion on the part of the judge below, but of a change in the law, which it is not part of the proper function of the sentencing court to be astute in avoiding by imposing a reduced sentence designed to defeat or frustrate it.

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30 [1999] QCA 69.
31 *Ibid* at p 6 of the transcript.
32 [2001] 1 Qd R 393.
33 (1998) 194 CLR 656.

> ... Mr Martin may be correct in characterising [the sentence] as a 'crushing' burden on the applicant. But it may well be that it was precisely with the intention of imposing such a crushing burden on an offender in circumstances like this that the amending legislation was enacted. Particular provisions of s 9(2) and especially of s 9(4) strongly suggest that it was the interests and the protection of victims and of the public that were prominent factors in precipitating the legislative amendments."[34]

[49] The other members of the Court agreed with this analysis, although White J also said, "It must be kept in mind that notwithstanding the new serious violent offence provisions, s 9(1) still applies when sentencing such an offender who must be punished 'in a way which is just in all the circumstances'."[35]

R v Vanderwerff - 14 May 1999[36]

[50] The totality principle was the subject of an *obiter dictum* in *R v Vanderwerff*. In that case, a declaration was a matter of discretion, and the sentencing judge decided not to make a it. After noting that decision, the Court said:

> "His decision in that regard seems to have been motivated at least in part by a concern to avoid the impact on [the co-offender's] parole prospects of recent amendments to the sentencing legislation, considered in *R v Collins* and *R v Booth*. Consistently with what was said in those two decisions it is perhaps questionable whether it is legitimate to tailor the duration of a sentence by reference to a consideration of that kind; but ... the matter was not the subject of specific submissions and it is therefore preferable not to attempt to determine it on this application, in which the Crown did not in this Court seek a declaration under that provision."[37]

R v Bojovic - 8 June 1999[38]

[51] In *R v Bojovic*, the appellant had been convicted of manslaughter and sentenced to 10 years imprisonment, with the necessary consequence of a declaration. After reviewing comparable cases the Court unanimously concluded that the sentence was manifestly excessive. It held that consistency with those cases "would suggest that a sentence in the order of eight years imprisonment would be appropriate."[39] It then proceeded to consider the proper approach to s 161B(3). After referring to *Collins* and *Booth*, their Honours said:

> "It should not, however, be thought that the Court's sentencing discretion is compartmentalised into separate exercises of first determining the quantum of the imprisonment and then, having decided on that, considering the further question whether a declaration should be made under s 161B. The sentencing process is

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34 [2001] 1 Qd R 393 at 401-402.
35 *Ibid* at 403.
36 [1999] QCA 169.
37 *Ibid* at para [8].
38 [2000] 2 Qd R 183.
39 *Ibid* at 190.

a single integrated one in which the combination of all available options needs to be considered.

> 'In the sentencing process a court must consider all available sentencing options and impose that option or combination of options that is most appropriate in the particular case. In the end it is the total order that matters to the offender and community alike ... The combined effect of the orders needs to be looked at before a court decides that a sentence is appropriate. If it is not appropriate the court should not make it and should look for some other option or combination of options.' (*R v Briese* [1998] 1 Qd R 487, pp 489-490, per Thomas and White JJ.)

In the absence of positive guidance in the legislation, the courts should act according to principles which they have traditionally followed in imposing sentences. Sentencing is a practical exercise. Courts have traditionally fashioned sentences to meet circumstances of the particular offence, having regard to the needs of punishment, rehabilitation, deterrence, community vindication and community protection. They did so before legislative expression was given to such factors in s 9.

The power given by s 161B(3) is simply another option that has been placed in the Court's armoury."[40]

[52] In that passage, the Court unequivocally rejected the two-step approach favoured by McMurdo P and McPherson JA in *Collins*. Since the Court made explicit reference to the judgment of McPherson JA in that case, it must be assumed that his Honour's grammatical analysis of s 161B(3) was not persuasive.

[53] One corollary of the decision is that there is no need to search for special factors justifying the exercise of a distinct statutory discretion to make a declaration. An overall sentencing discretion is to be exercised; the discretion to make a declaration is simply an aspect of this overall discretion and is unfettered. Like every aspect of that discretion, its exercise must be warranted by the circumstances of the case and supported by proper reasons. However, the reasons may be interrelated, as what is required is an integrated sentence. A second corollary is that the sentencing judge is not free to disregard the consequences of making a declaration. Those consequences must be taken into account in assessing whether the overall outcome is a just sentence.

[54] *Bojovic* also addressed the question whether the protection of the community was a proper of objective of a declaration. It held that it was, referring to s 9(1)(e) of the Act.[41] It made no reference to ss 9(4)(a) and (b), the question which had divided McMurdo P and McPherson JA in *Collins*.

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[40] [2000] 2 Qd R 183 at 191. *R v Briese* was concerned with the discretion not to record a conviction.

[41] In support of this view their Honours could also have cited the preamble to the *Penalties and Sentences Act* 1992, which was not amended in 1997:

"WHEREAS -

(1) Society is entitled to protect itself and its members from harm.

(2) The criminal law and the power of courts to impose sentences on offenders represent important ways in which society protects itself and its members from harm.

[55] *Bojovic* was concerned with sentencing in circumstances where s 161B(3) applied. Its outcome depended upon the characterisation by the Court of the nature of the sentencing process in such a case. That process was non-compartmentalised and integrated; the declaration was merely another tool to be employed at the judge's option. The decision gives rise to the question: apart from the fact that the tool *must* be employed, why should the nature of the sentencing process be any different in a case to which s 161B(1) applies? That question becomes particularly pointed when it is noticed that the large paragraph quoted above[42] refers to s 161B, whereas the two paragraphs preceding it and the paragraph following it are careful to refer to s 161B(3). Nothing in the wording of the section suggests that the nature of the sentencing process or of the overall sentencing discretion is dependent on whether a declaration is mandatory or discretionary.

[56] The difficulty in answering that question stems from the second corollary referred to above.[43] When *Bojovic* was decided, *Booth* apparently stood as authority prohibiting the Court from taking those consequences into account. It seemed to follow from that decision that it was not "legitimate to tailor the duration of a sentence" (to use the expression in *Vanderwerff*) by reference to the effects of a declaration. However, *Bojovic* approved some limited tailoring:

> "While the mandatory requirements of s 161B(1) will inevitably interfere with the courts' capacity to maintain parity and consistency, the same problem does not exist in relation to sentences under s 161B(3) where an additional sentencing discretion has been conferred. In such matters the courts have the power to maintain reasonable consistency between sentences, although they will of course heed the additional emphasis that has now been placed on protecting the community from violent offenders. As an example, if 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 toward 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 s 9(e) of the Act."[44]

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(3) Society may limit the liberty of members of society only to prevent harm to itself or other members of society."

Regard may properly be had to the preamble in interpreting the Act: *Attorney-General v Prince Ernest of Hanover* [1957] AC 436 at 461-463 per Simonds CJ, 467 per Norman LJ; approved by the High Court in *CIC Insurance Limited v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. See also *Wacando v Commonwealth* (1981) 148 CLR 1 at 23 per Mason J.

42 At para [51].

43 At para [53].

44 *Ibid* at pp 191-2.

R v Crossley - 18 June 1999[45]

[57] Ten days after the decision in *Bojovic*, the Court gave judgment in *R v Crossley*. *Crossley* was sentenced to ten years imprisonment on each of four counts, two of armed robbery with personal violence in company, one of armed robbery in company and one of attempted armed robbery causing wounding. The mandatory declaration was made, with the result that he could not be granted parole until at least eight years of the sentence had been served. His co-offender was sentenced to three years imprisonment, with a recommendation that he be eligible for parole after 12 months. On appeal, it was argued that the sentencing judge should have adjusted the sentence imposed on Crossley to avoid such a gap.

[58] Pincus JA rejected this argument. He held that the Court should follow the trend of authority in *Booth* and *Daphney*, as well as in the judgment of Gaudron J in *Siganto v The Queen*,[46] concluding, "In my opinion, the law requires that where one of two co-offenders but not the other is caught by the 80 per cent requirement, that circumstance is to be ignored in considering parity between the two." McPherson JA agreed, adding:[47]

> "Once the conclusion was reached that a 10 year sentence of imprisonment was appropriate in all the circumstances for the appellant's offences, the Act took over and dictated what the result should be. It was not for the sentencing judge to anticipate or evade that statutory consequence by imposing a sentence less than appropriate in an effort to maintain parity between the two co-offenders of whom the applicant happened to be one."[48]

[59] McMurdo P agreed in the dismissal of the application, but on the basis that there was no disparity on the facts, the gap between the sentences being justified by various considerations.

[60] There is no reference in the judgments to *Bojovic*, and it appears likely that it was not cited to the Court.

R v McCartney - 22 June 1999[49]

[61] *McCartney* was decided four days after *Crossley*. McCartney had been sentenced to seven years imprisonment in respect of one count of attempted armed robbery in company and one count of armed robbery with personal violence in company, arising out of the one incident. A declaration had been made. The circumstances of the offence led Thomas and Derrington JJ to say, "There is no doubt but that this was a serious and violent offence."[50] However, after considering all relevant factors, their Honours concluded that the sentence was manifestly excessive. In the course of re-sentencing, they said:

> "It is the Court's duty to carry out the requirements of the new sentencing regime introduced in 1997 by Part 9A of the *Penalties and Sentences Act* 1992, and sentences are not to be designed to

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45 (1999) 106 A Crim R 80.
46 (1998) 194 CLR 656 at 667.
47 (1999) 106 A Crim R 80 at p 87.
48 *Ibid* at p 88.
49 [1999] QCA 238.
50 *Ibid* at para [14].

> avoid it. However, a sentencing judge must not be blind to the consequences of the sentence being imposed, for the provisions of Part 9A do not destroy the overall sentencing discretion."[51]

[62] Citing *Bojovic*, their Honours imposed a sentence of five years imprisonment and made a declaration. Five years was at the bottom of what was found to be the relevant range of imprisonment. Their Honours also described a passage in *Bojovic* as stressing the need for the existence of some proper purpose for the making of the declaration, rather than the mere existence of seriousness and violence in the commission of the offence. McMurdo P reached the same conclusion, also relying on *Bojovic*.

[63] Again it seems that a relevant authority was not cited to the Court. This time the decision which apparently was overlooked was that in *Crossley*.

R v Taylor and Napatali; ex parte Attorney-General - 20 August 1999[52]

[64] The respondents in that case were offenders with no previous convictions who together held up a service station at Kingston at night, armed with a rifle and a replica pistol. They had made full and frank confessions and pleaded guilty upon an *ex officio* indictment. The Attorney-General appealed against the sentences of imprisonment "to be served by way of intensive correction in the community" imposed under s 113 of the *Penalties and Sentences Act*. It was observed in the course of the appeal that describing such sentences as imprisonment was "a form of 'double-speak' involving the legislative fiction that someone is imprisoned when quite plainly they are not."[53] It was argued on behalf of the Attorney that "if the offence of armed robbery with violence in company is committed at a service station at night, then those offending must be sentenced to a substantial term of imprisonment, regardless of the fact that they are young, first offenders with prospects of rehabilitation."[54]

[65] Unsurprisingly, this bold submission did not succeed. After pointing out that the proposition would have to be established as a matter of law for the Attorney-General to succeed, McPherson JA reviewed a number of the cases. In the course of that review, he cited *Lovell, Collins, Booth* and *Crossley* with approval, the last three as examples of cases where the court "has faithfully given effect to the amending legislation irrespective of previous sentencing practice."[55] He concluded that the proposition was not established and that the appeal should be dismissed. McMurdo P, with whom Thomas JA agreed, reached the same conclusion, but did not agree with McPherson JA's reasons and did not refer to those cases. Despite the fact that it had been decided some two months earlier, *McCartney* was not cited to the Court.

R v Hardie - 24 August 1999[56]

[66] Hardie sought leave to appeal from a sentence of imprisonment for 14 years for attempted murder. Pincus JA delivered an *ex tempore* judgment with which

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51 *Ibid* at para [18].
52 (1999) 106 A Crim R 578.
53 *Ibid* at p 581.
54 *Ibid* at p 582.
55 *Ibid* at p 586.
56 [1999] QCA 352.

Thomas JA and Chesterman J agreed. After referring to penalties imposed in comparable cases where the offence was committed prior to the 1997 amendments, he said:

> "I note that, because of the nature of the offence and the state of the law since the insertion of Section 9A [*sic*] in the *Penalties and Sentences Act* 1992, the appellant will not be eligible for release on parole until he has completed 80 per cent of his head sentence. But for the changes wrought by the provisions contained in Part 9A of the *Penalties and Sentences Act* 1992, he would have been eligible for parole at a substantially earlier date. That was the situation which had pertained in the case of *Lepp* to which I have referred, and the Court did not in that case treat it as justifying any reduction of the head sentence. In this connection, I also mention the remarks which this Court made in *Robinson* (CA No 72 of 1998, 26 May 1998); in *Booth* (CA No 338 of 1998, 30 March 1999), in particular in the reasons of McPherson JA at page 14; and in *Bojovic* (CA No 4 of 1999, 8 June 1999), in particular at page 11 of the Court's reasons. These authorities show, in my view, that the Judge was right not to reduce the sentence, below the range which would otherwise have been applicable, because of the application to the appellant at Part 9A."[57]

R v Newcombe and Middleton - 28 September 1999[58]

[67] The actual facts in *R v Newcombe and Middleton* are not important. What makes the case noteworthy is the existence of several statements of principle by McMurdo P with Pincus and Thomas JJA agreeing. First, her Honour echoed the view expressed in *McCartney* that *Bojovic* established "the need for the existence of some proper purpose for the making of the declaration rather than the mere existence of seriousness and violence in the commission of the offence."[59] Her Honour did not attempt to identify all such purposes, but accepted the view in *Bojovic* that they included protection of the community. She held that this extended "to imposing a sufficiently heavy sentence to deter these applicants and other criminals who would commit serious offences of this type."[60] That was an extension of what was said in *Bojovic*, where only the protection of the community from the offender was referred to in the relevant passage.

[68] Second, her Honour considered the question whether actual violence was a precondition for the making of a declaration. After reviewing the offences in the schedule to the *Penalties and Sentences Act*, she concluded "that Parliament did not intend to limit the circumstances where a declaration might be made to offences where actual violence is committed, although this is a relevant factor in deciding whether to make the declaration."[61]

[69] Third, her Honour held that a violent criminal history would be a relevant consideration in deciding whether to make a declaration. In more recent times, that has become controversial.

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57 *Ibid* at p 8 of the transcript.
58 [1999] QCA 408.
59 *Ibid* at para [36].
60 *Ibid* at para [37].
61 *Ibid* at para [38].

R v Lund - 17 March 2000[62]

[70] Lund was convicted on his own plea of guilty of one count of armed robbery of a fish shop for which he was sentenced to six years imprisonment and a declaration was made. Lund himself did not carry out the robbery; he masterminded it and procured Jessop, a much younger man, to effect his plan. He supplied the latter with a pair of scissors to carry it into effect and acted as lookout during the robbery. Jessop presumably used the scissors to threaten the two female shop attendants, but there was no actual violence and no injury to any person. The robbery produced a lasting psychological effect on the shop attendants. Jessop took $1,166 and gave it to Lund, who decamped with it. Lund had a number of convictions for robbery and similar offences committed in 1988 and one of breaking and entering and stealing in 1991.

[71] The question on the application for leave to appeal was whether the sentence was manifestly excessive by reason of the declaration. All the members of the court thought that it was. The leading judgment was given by McPherson JA, but neither Pincus JA nor Davies JA agreed with his Honour's reasons. Giving separate reasons, they decided the application on the simple basis that the circumstances did not justify the making of the declaration. McPherson JA explicitly sought an identifiable reason why the declaration should have been made, consistently with the general purposes for which Part 9A exists. In an examination of the facts of the case, he found no such reason. In the course of that examination his Honour observed that all robberies are serious and by definition involve violence or threats of violence. "It is regrettably true," he said, "that the offence in this case does not differ much if at all from so many others of its kind." A little later, he said:

> "In terms of actual violence and seriousness, this offence was really no worse than most others of its type. In my respectful opinion, exercise of the declaration-making power under s 161B(3) should, in general, be reserved for cases of robbery possessing some special feature that marks them off from others and calls for the additional punishment that is involved in these cases."[63]

[72] His Honour left open the question whether the applicant's criminal history was a relevant consideration, whereas Pincus JA held that it was.

R v Bird and Schipper - 24 March 2000[64]

[73] Bird was sentenced to imprisonment for 20 years for attempted murder and a declaration was made. On her application for leave to appeal against sentence, her counsel argued that she should have been sentenced to a period of imprisonment at the lower end of the appropriate range on the basis set out in *Bojovic*.[65] That, it was submitted, did not have the effect of artificially reducing an otherwise appropriate sentence to defeat the purpose of the legislature, an approach condemned in the line of cases beginning with *Booth*.

[74] McMurdo P dealt with that submission:

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62 [2000] QCA 85.
63 *Ibid* at paras [19] and [20].
64 [2000] QCA 94.
65 See para [56] above.

> "The former line of cases relied on by the applicants do not *require* a sentencing judge to sentence at the lower end of the range where a declaration is made that the conviction is of a serious violent offence, either discretionarily or mandatorily. The effect of any declaration is simply that it is one of many competing factors for the sentencing judge to consider in fixing a sentence within the appropriate range; this is not to design a sentence to avoid or reduce the effect of s 161B, an approach forbidden by the latter line of cases."[66]

Her Honour did not specify why sentencing at the lower end of the range by reason of the effect of the declaration did not amount to designing a sentence to reduce the effect of the declaration.

R v B; ex parte Attorney-General - 4 April 2000[67]

[75] B was sentenced to imprisonment for seven years for torture and a declaration was made. He received lesser sentences for numerous other counts, mainly involving assaults, committed as part of the same course of conduct. All of the offences related to acts of violence, including stabbing, directed at his teenage daughter. The Attorney-General appealed. The Court held that the appropriate sentencing range was imprisonment for 7 to 10 years with a declaration, and consequently dismissed the appeal. Moynihan and Atkinson JJ said:

> "It is likely that a person who is convicted of the crime of torture particularly where it involves the intentional infliction of pain or suffering on more than one occasion will be declared a serious violent offender. To do so reflects the nature of the offence. It was clearly appropriate in this case. This declaration is part of the exercise of the sentencing discretion which is an integrated process rather than a series of discrete steps. When such a declaration is made it is likely to have consequences on the rest of the sentencing discretion. Firstly, the sentencing judge may impose a sentence towards the lower end of the applicable range. Secondly if there is a plea of guilty, the appropriate reduction in sentence will reduce the head sentence rather than require a recommendation for parole earlier than half the sentence to be served."[68]

[76] McPherson JA agreed with the joint reasons for dismissing the appeal. He made an additional comment in relation to the passage quoted:

> "Their Honours refer to the decision in *R v Bojovic* [1999] QCA 206 as showing that the exercise of the sentencing discretion is 'an integrated process rather than a series of discrete steps'. That is the effect of that decision in relation to sentencing in a matter in which a discretion arose under s 161B(3) of the *Penalties and Sentences Act* 1992 to make a declaration as to a serious violent offence. On that point, I took a different view of the relevant provisions in *R v Collins* (CA 238 of 1998; 18 September 1998); but I accept, as I must, that the decision in *R v Bojovic* decides that, to that extent at least, my view in *Collins* was wrong."[69]

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66 *Ibid* at para [19], emphasis added.
67 [2000] QCA 110.
68 *Ibid* at para [52] (footnotes omitted).
69 *Ibid* at para [2].

He then drew attention to the differences in approach required by *Bojovic* in relation to discretionary declarations; and *Crossley* and *Booth* in relation to mandatory ones.

R v Shillingsworth - 11 May 2001[70]

[77] *Booth* again arose for consideration in *R v Shillingsworth*. That was a case where the operation of the doctrine in *Booth* in relation to what I have described above[71] as the first question would have produced particularly harsh results. It is unnecessary to describe the mechanism by which that outcome would have occurred. The outcome presented by the various sentences was described by Thomas JA as a "dismal picture". It was an outcome created by the imposition of a cumulative sentence of three years imprisonment on a charge of unlawful wounding. In the circumstances of the case, the three-year cumulative sentence resulted in a full time discharge date almost eight years into the future, with bleak prospects of parole and limited rights of remission. These circumstances led the court, comprised of Thomas and Williams JJA and White J to reexamine *Booth*.

[78] The leading judgment was written by Williams JA, with whom the other members of the Court agreed. His Honour referred to *Booth* at some length, particularly to the reasons for judgment of McPherson JA and briefly to the passage in the judgment of White J quoted above.[72] White J had pointed out that notwithstanding the serious violent offence provisions, s 9(1) of the *Penalties and Sentences Act* continued to apply. Williams JA now took this one step further, holding that the 1997 amendments "must be read as *subject to* the guidelines set out in s 9".[73] He said:

> "The legislature must be taken to have recognised that those guidelines would continue to apply to the new sentencing regime. In addition to s 9(1)(a) referred to by White J in *Booth*, for present purposes s 9(2)(l) and (m) are of particular significance. When imposing sentence in this case the court was obliged by those provisions to have regard to 'sentences already imposed on the offender that have not been served' and 'sentences that the offender is liable to serve because of the revocation of orders made under this or another Act for contraventions of conditions by the offender'. Those provisions were not expressly referred to in the majority judgment in *Booth*, and the reasoning in *Booth* must be read in the light of that."

[79] Having weakened of the authority of *Booth*, his Honour set out a different analysis of the relevant sections and their interaction with the totality principle:

> "The essential proposition in the passage from the reasoning of McPherson JA ... is that the 'totality principle' derived from *Mill* cannot directly apply. That is undoubtedly correct. The sentencing judge ought not endeavour to assess the overall criminality of the past and present offences and impose a sentence which reflects that total criminality. The function of the sentencing judge in the circumstances is to impose a sentence having regard to the criminality of the current offences. But in determining the

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70 [2002] 1 Qd R 527.
71 At para [47].
72 At para [49].
73 *Ibid* at p 544. Emphasis added.

> appropriate penalty for that criminality the sentencing judge is required by s 9 of the *Penalties and Sentences Act* to place the sentence in its proper context, namely that the sentence will be imposed in circumstances where it will be cumulative upon completion of the sentence imposed for the past offences."

[80] His Honour concluded that *Booth* is not an authority for the proposition that the sentencing judge cannot have any regard to the impact on the sentence to be imposed for the subject offences of the circumstance that the offender has to serve a balance of a term of imprisonment for earlier offences.

[81] Thomas JA supplemented his agreement with some short additional observations. Among them was this passage:

> "The sentence imposed in this particular case had to be cumulative, as demanded by s 156A of the *Penalties and Sentences Act*. But that did not require the sentencing court to be oblivious to the overall effect the sentence would produce on the applicant, or to fail to look at the wider picture. The passing of a sentence is a basic function belonging to courts in the exercise of their criminal jurisdiction whether the jurisdiction is inherent or statutory, or a combination of both. Section 9 of the *Penalties and Sentences Act* is, as its caption suggests, a legislative statement of 'sentencing guidelines'. It contains both a recognition of longstanding principles observed by the courts in exercising criminal jurisdiction, and, since the 1997 amendments, a requirement of greater emphasis upon deterrence and protection of the community in the case of violent offenders. The section does not purport to be a complete code of sentencing principles and *inter alia* recognises the right of the court to take into account "any other relevant circumstance". But overall it is an affirmation of the need of a sentencing court to look at all possible sentencing options and their potential effect. As noted in *Bojovic*, sentencing is a practical exercise."[74]

[82] These comments were made in relation to s 156A of the *Penalties and Sentences Act*, not in relation to Part 9A. It seems to me, however, that they apply equally to the latter. They spell out the qualification which was briefly expressed in *McCartney*. They imply a view that the integrated sentencing process described in *Bojovic* applies, not only in relation to discretionary declarations, but also in relation to mandatory ones.

[83] None of the judgments referred to *Hardie* or to the passage in the judgment in that case quoted above.[75] The case was not cited to the Court.

R v Herford - 11 May 2001[76]

[84] The applicability of what was said in *Shillingsworth* to Part 9A is confirmed by dicta in *R v Herford*. Although that decision was delivered on the same day as *Shillingsworth*, Williams JA was a member of both Courts and it is evident that the Court in *Herford* was aware of the decision in *Shillingsworth*. The ratio of *Herford*

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74 *Ibid* at p 528, footnotes omitted.
75 Para [66].
76 [2001] QCA 177.

is not presently relevant. However, in the course of giving his reasons, Williams JA said:

> "[*Booth*] was primarily concerned with s 156A of the *Penalties and Sentences Act* which made it mandatory to impose a cumulative sentence where a further offence was committed whilst the offender was on parole. That was another provision inserted into the Act on 1 July 1997 along with Part 9A. Speaking of that section, McPherson JA said at 400 that it would be a wrong exercise of the sentencing discretion to attempt to circumvent the quite specific legislative direction by reducing the sentence currently being imposed so as to reinstate a practice which existed prior to 1 July 1997. But that does not mean that in determining the appropriate sentence the court should disregard altogether the consequences of the various provisions inserted into the legislation on 1 July 1997 (see *R v Shillingsworth* [2001] QCA 172)."[77]

[85] Chesterman J agreed with Williams JA. McMurdo P agreed with him in relation to the ground constituting the ratio of the case, but made her own comments about *Booth*:

> "A sentencing judge should be cognisant of whether or not Part 9A of the *Penalties and Sentences Act* 1992 ("the Act") has application when exercising the sentencing discretion. Failure to recognise the applicability of Part 9A is an error entitling this Court to exercise its discretion afresh: see *R v Nguyen*.
>
> That is not to suggest that it would be proper for a court to structure a sentence to avoid the effect of Part 9A: *R v Booth* and *R v Daphney*. But *Booth* is not authority for the proposition that a sentencing judge cannot have any regard to the impact on the sentence of Part 9A: see *R v Shillingsworth*. Where the appropriate sentencing range includes a sentence of less than 10 years imprisonment, the court must consider, in deciding the appropriate sentence within that range in all the circumstances of the case, whether or not to make a declaration under s 161B(3) of the Act. See the comments of this Court in *R v Bojovic* and *R v McCartney*."[78]

R v Irving - 2 November 2001[79]

[86] The question whether the Court was obliged to take into account the consequences of the operation of the 1997 amendments in exercising the sentencing discretion again arose in *R v Irving*. The facts of that case are not relevant. On behalf of the applicant it was argued that the sentencing judge was so obliged. McPherson JA, with whom Ambrose and Cullinane JJ agreed, referred to the criticisms made of *Booth* in *Shillingsworth* and wrote:

> "Of course, I must accept that reproof, subject only to the qualification that, as a later and specific statutory provision, one would, according to ordinary rules of interpretation, expect s 197A [*sic*] to prevail over the earlier and general provisions of s 9. Indeed,

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77 *Ibid* at para [19].
78 *Ibid* at paras [2] and [3].
79 [2001] QCA 472.

> if it did not do so, the amendment in 1997 would not serve any function or purpose at all, and, in enacting it, Parliament would not have accomplished anything."[80]

[87] His Honour then accepted "that the effect of *R v Shillingsworth* stands at the least for the proposition that a sentencing judge must consider all sentencing options that are open in arriving at a sentence that, when taken in conjunction with the other statutory provisions including s 156A, is 'just'."[81]

R v Keating - 6 February 2002[82]

[88] Keating was convicted on seven counts including one of armed robbery and two of attempted armed robbery. On the three named counts, he was sentenced to imprisonment for eight years and a declaration was made. He appealed, apparently on the ground that the sentence was manifestly excessive, arguing that either the sentence was outside the appropriate range or the declaration should not have been made. Counsel submitted that in relation to armed robbery offences (or, I assume, at least in relation to those offences) there needed to be some exceptional or special feature before the discretion to make a declaration was exercised. It is not clear from the *ex tempore* judgment whether authority was cited in support of the proposition, but counsel might have cited the passage from the reasons of McPherson JA in *Lund* quoted above.[83]

[89] In the principal judgment Thomas JA, with whom McPherson JA and Ambrose J agreed, said in relation to that submission:

> "I do not think that armed robbery cases fall into any special category for the exercise of the discretion conferred by Part 9A of the *Penalties and Sentences Act*. It is true that examples may readily be found of convictions for armed robbery where it was considered that there was no adequate basis on which to exercise the discretion. Generally speaking, a serious violent offender [*sic*] declaration may be appropriate when a need is perceived to protect the community and where circumstances of the commission of the offence and particularly the violence accompanying its commission may make such a declaration appropriate. A single isolated act of violence may sometimes be thought to be less likely to attract a declaration than a case involving repeated commission of offences or a case where an offender's criminal history is one that tends to show the offence in a serious light so that a need is perceived to protect the community. These are mere random observations on the application of an unfettered discretion."[84]

[90] As I interpret the passage, it implies a rejection of counsel's submission. That rejection was necessarily part of the ratio of the case. That is because, as a result of another error, it was necessary for the Court of Appeal to re-sentence the applicant; and it gave no effect to the submission in so doing.

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80 *Ibid* at para [7].
81 *Ibid* at para [8].
82 [2002] QCA 019.
83 At para [71].
84 *Ibid* at p 6.

R v DeSalvo - 15 March 2002[85]

[91] DeSalvo was found guilty of manslaughter by a jury on an indictment charging murder. The circumstances were that he had by arrangement gone to a railway station to meet his victim in relation to a drug deal that was a source of some animosity between them. When the victim spoke to him in an aggressive manner, he alighted from his car, lunged at the victim with a knife and delivered a single stab wound from which the victim died. He drove off but soon turned back to the scene to provide help and give himself up. He was sentenced to imprisonment for eight years and a declaration was made.

[92] It was not argued on his behalf that the sentence was excessive by reason of the head sentence of eight years imprisonment. The question was whether the declaration could be justified. McPherson JA said:

> "The decision to make the declaration is a matter for the discretion of the sentencing judge, and, except for good reason, it ought not to be disturbed. The difficulty here is to identify the circumstances that lifted this particular offence outside the general range of manslaughter cases and called for the imposition of the additional punishment involved in deferring eligibility for parole until 80% rather than only 50% of the sentence has been served.
>
> It is true that, on the factual findings made by his Honour in sentencing, the applicant intended, at least to some extent, to hurt his victim and, using a knife to do it, went further than he intended. That is, however, a tragically frequent feature of offences of this kind, and one that is seldom absent from unintended homicides in general.
>
> It seems to me that, if in this case we were to uphold the declaration, it would be tantamount to saying that most, if not all, manslaughter offences, or at least those involving use of a knife, ought to attract a punishment of this dimension; that is to say, a declaration under s 161B(3). For my part, I am inclined to think that the current level of sentencing for manslaughter in cases like this may perhaps be somewhat lower than it should be. But the way in which to correct that state of affairs is to raise the general level of sentences for the crime, and not to use s 161B(3) of the Act as a means of correcting the deficit. All but a few offences of manslaughter are, in a sense, serious and violent; but making general use of the declaration procedure in such cases will leave very little scope for severely punishing those that are much worse than others. If the legislature had intended declarations to be made in all or most cases of manslaughter committed by a deliberate act but without meaning to kill or inflict grievous bodily harm, it would surely have said so instead of leaving the matter of a declaration under s 161B to the judge's discretion."[86]

He regarded it as "open to question" whether offending behaviour on earlier occasions could properly be used to support a declaration. He held that in the case

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85 [2002] QCA 63.

86 *Ibid* at paras [6]-[8].

before the Court, there was nothing to distinguish the offence "from so many others of the same kind" and that "in making the declaration … , the discretion of the sentencing judge miscarried". His conclusion was that the declaration should be set aside. Considering the matter anew, he thought that a sentence of eight years without a declaration would not sufficiently reflect the gravity of the offence, and proposed imprisonment for nine years.

[93] Williams JA agreed with all that McPherson JA had said. He added:

> "There is no definition of "serious violent offence" in the *Penalties and Sentences Act 1992*, and the inclusion of a particular offence in the Schedule of Serious Violent Offences clearly does not mean that the mere commission of such an offence warrants the making of a declaration that the conviction was of a serious violent offence. So much is made clear by the wording of s 161B(3) of the Act. The court is given an express discretionary power to declare the commission of an offence specified in that Schedule to be a conviction for a serious violent offence. That must mean that there is something about the circumstances of the offence in question which takes it beyond the norm and justifies the making of the declaration; such circumstance though need not be categorized as exceptional. Given the concentration on the "offence" in ss 161A and 161B rather than on the "offender", the criminal history of the offender will not ordinarily be a decisive consideration on the exercise of that discretion: *R v Keating* [2002] QCA 19.
>
> Almost by definition manslaughter is an offence involving violence, and more often than not the use of some weapon is involved in that violence. In consequence it is not sufficient to say that the mere presence of either or both violence and use of a weapon as one of the circumstances justifies the making of the declaration."[87]

[94] Byrne J dissented. He said:

> "No other matters are expressed to be prerequisites for the exercise of the discretion. The specified conditions apart, the discretion s 161B(3) confers therefore is, as Thomas JA has said, "unfettered" (*R v Keating* [2002] QCA 19, at p 5, McPherson JA and Ambrose J concurring). It is a discretion to be exercised judicially: that is to say, rationally, on proper considerations. But it is not one dependent on special, or any particular, circumstances.
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> So it is a sufficient justification for the making of a declaration pursuant to s 161B(3) that it contributes to a sentencing outcome which accords with the s 9 "sentencing guidelines" and such other statutory provisions and sentencing principles as may matter in the particular case."[88]

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87 *Ibid* at paras [15] and [16].

88 *Ibid* at paras [19] and [20].

R v Moore; ex parte Attorney-General - 26 March 2002[89]

[95] Moore committed seven armed robberies in 11 months in a spree which began barely four months after he was released on parole after serving three years and three months of 10 year sentences imposed for a number of armed robberies. He was sentenced to imprisonment for seven years cumulative (because of s 156A of the *Penalties and Sentences Act*) upon the balance of his existing imprisonment, and a declaration was made in respect of the later offences. It was accepted on appeal that taking into account all relevant factors except his loss of parole on the earlier sentences and the cumulative effect of the sentences, the proper penalty was not less than 10 years imprisonment. The Attorney-General argued on appeal that the imposition of the sentence of less than 10 years on "totality" considerations ignored, impermissibly, two legislative mandates: loss of parole on the earlier sentences on the commission of the later robberies; and the fact that the subsequent sentences, having been committed while on parole, must be served cumulatively.

[96] Byrne J held that this submission conflicted with ss 9(2)(l) and (m) of the Act and rejected the appeal. He applied this statement from *Shillingsworth*:

> "A sentencing judge must consider all sentencing options that are open in arriving at a sentence that, when taken in conjunction with the other statutory provisions including s 156A, is 'just'."

He also said that the weight which on ordinary "totality" considerations might be accorded to cumulative sentences was necessarily affected by the specific provision in s 156A. His Honour gave no reasons for imposing this qualification on arriving at a just sentence, and is difficult to reconcile it with the stated principle.

[97] McPherson and Williams JJA agreed, although McPherson JA added:

> "It is plain that provisions like s 156A(2) of the *Penalties and Sentences Act* are having the effect of distorting standard sentencing tariffs by encouraging lower head sentences with a view to avoiding their stringent consequences."

R v Bui - 30 April 2002[90]

[98] In *Bui*, the Court dismissed applications for leave to appeal against sentences of imprisonment for nine years with declarations imposed for manslaughter. In the course of his reasons, Williams JA said:

> "I turn now to consider the position of Bui and Quoc. As noted above each contends that the head sentence imposed should remain, but that the serious violent offence declaration should be removed.
>
> There are a number of cases (*R v Moodie* CA 439 of 1998, judgment 14 April 1999 and *R v DeSalvo* [2002] QCA 63 are sufficient examples) wherein it has been said that the sentencing judge should articulate reasons justifying the making of a serious violent offence declaration. The sentencing remarks here implicitly detail the reasons why it was considered that such a declaration was called for on the facts of this case.

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89 [2002] QCA 116.

90 [2002] QCA 151.

> Each of Bui and Quoc pleaded guilty to the offence of manslaughter involving on the facts here:
> (i) the luring of the deceased to an isolated place;
> (ii) a prearranged plan to use violence evidenced by the obtaining of weapons and taking them to the scene;
> (iii) a planned intention to intimidate or terrorise the deceased;
> (iv) the overall involvement of six in the attack and its aftermath;
> (v) the use of extreme violence by more than one person;
> (vi) dumping the body of the deceased in a callous way and in circumstances where it would be difficult to find.
> Given those features of this offence of manslaughter I am not persuaded that the learned sentencing judge erred in making the declaration or that including the declaration as part of the sentence made the overall sentence manifestly excessive."[91]

Mullins J and I agreed.

The interpretation of the 1997 amendments

[99] The foregoing extracts disclose a considerable variety, indeed inconsistency, in the interpretations of the 1997 amendments adopted by various members of the Court. Although in several instances judgments were given in apparent ignorance of the existence of earlier judgments affecting the reasoning on a point, that is not an explanation of the divergences of reasoning which have developed. In my view, these result from underlying differences of interpretation of the amendments. Two streams of thought are identifiable.

[100] The first finds its clearest articulation in the decision of the Court in *Booth* and in the approaches earlier adopted by the President and McPherson JA in *Collins*,[92] and has its explication in *Lovell* (perhaps), *Daphney*, *Crossley*, *Hardie*, *Lund* and *DeSalvo*. According to this approach, the serious violent offence provisions and the cumulative sentencing provision were intended to produce the result that offenders caught by them would spend more time in jail than they would have done had the provisions not been enacted. This was to be achieved by the making sentencing a two-step process: first, determining the sentence which would have applied apart from the amendments; and then giving effect to the amendments, whether mandatory or discretionary. The existence or likely consequences of the second step were not to be used as reasons for reducing the sentence which would otherwise have been imposed. Where the second step involved an exercise of discretion, it was necessary to identify specific factors which may or may not legitimately be taken into account in the exercise of that discretion. In this exercise, the focus was on the offence, not the offender. The seriousness and the violence of the offence were relevant but it was doubtful whether the criminal history of the offender could be taken into account. Seriousness and violence were to be assessed not by reference to some general standard of community behaviour, but by reference to the sorts of circumstances commonly encountered in offences of the particular

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91 *Ibid* at paras [41]-[44].

92 Although their Honours reached opposite results in *Collins*, and differed on the interpretation of the 1997 amendments in some important respects, their approaches to the form of s 161B of the *Penalties and Sentences Act* were similar: see para [44] above.

type charged. It was not open to make a declaration unless the particular offence involved a departure from the norm for offences of that type.

[101] The second view is reflected in the other cases referred to above, or at least in the reasons in them. Its clearest articulations occur in *Bojovic* and *Shillingsworth*. On this view, the 1997 amendments were designed to furnish sentencing judges with an additional sentencing tool. This tool was to be used as part of the sentencing process, but that process remained an integrated one. Where the declaration was discretionary, the exercise of that discretion was but a part of the overall sentencing discretion, not a separate discretion to be exercised after a period of imprisonment had been determined. Consequently there was no need to identify special circumstances whose existence was necessary to justify a declaration. While a declaration (like all aspects of sentencing) could not be made arbitrarily and reasons for making it had to be stated, all circumstances, including the need for community protection and the offender's history, could be taken into account. Because sentencing was an integrated process, it was not only legitimate but essential for the sentencing judge to take account of the consequences of a declaration in fixing the period of a head sentence, even in cases where the declaration was mandatory. Somewhat inconsistently, supporters of this view seem to accept that sentences imposed prior to the 1997 amendments are an unreliable guide for subsequent sentencing; and they accept that where the declaration is mandatory, its consequences can only be taken into account by adjusting the head sentence within "the range", not by reducing it below that level.

[102] If the proper interpretation of the amendments were free from authority, I would favour the first view. To say why would be argumentative and otiose: the condition is unfulfilled, as the issue is not free from authority. My examination of the authorities satisfies me that the second view has prevailed. It is true that no binding precedent has been established. It is not difficult to distinguish most of the cases on their facts or to characterise large portions of the reasoning as obiter. To do so would only complicate the position further, perpetuate the inconsistencies and make the task of sentencing judges even more difficult. Injustice would be the outcome. The prevailing view should be applied. If it is wrong, the Crown must seek its remedy from the High Court or the Parliament.

The relevance of violence

[103] As noted above,[93] it is quite possible for a declaration to be mandatory in cases involving no violence and to be impossible in cases closely associated with serious violence. That does not mean that violence is irrelevant. The use of violence has been a very significant factor in deciding whether to make a declaration in many cases. It might be suggested that in all but transitional cases[94], making a declaration has no greater significance than making a recommendation under s 157 for eligibility after 80 per cent of the term. While there is some force in this suggestion, I would not accept it. Not only are the transitional cases still a significant exception, but also there is an element of social opprobrium attached to a declaration, by reason of its terms, which is not present under s 157. That is material to the sentencing purpose specified by s 9(1)(d) of the Act.

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93 Para [37].

94 Where loss of remissions is also relevant.

[104] In the present case, the offence charged was burglary with circumstances of aggravation. I have already described those circumstances. The applicant was not charged in relation to this offence with actual violence; only with threatening to use violence. It is true that he was also charged with robbery and that actual violence was nominated as a circumstance of aggravation in relation to that charge. However, the conduct relied upon for that circumstance was binding Mr Bricknell with tape. Assuming that it is legitimate to take that into account in relation to a possible declaration on a different charge, it is in my opinion of much less importance than the threatening conduct itself an element of that charge.

[105] As far as I am aware, there has been no explicit consideration of whether a mere threat may be taken into account in determining whether to make a declaration. In my judgment it may. The expression "serious violent offence" does not, as has been seen, connote violence. The question is not whether the offence involved the use of violence. It is whether in deciding about a declaration having the statutory consequences already described and conveying the element of social opprobrium already referred to, a threat of violence is a relevant consideration. If the declaration may be made in circumstances where there is not the slightest suggestion of any violence, nor any threat of it, there is nothing logically offensive in taking a threat of violence into account as a relevant factor in deciding whether to make it. Moreover, sentencing is an integrated process. It could not be doubted that threats of violence could be taken into account in determining the head sentence. Why should they not also be taken into account in determining whether to make a declaration of the nature described?

[106] In fairness to Mr Hunter, I should record that he did not submit otherwise.

The need for special circumstances to justify the declaration

[107] The applicant did rely upon the reasons for judgment of McPherson and Williams JJA in *DeSalvo*. The relevant passages are set out above.[95] The key parts of them are the statements by McPherson JA:

> "The difficulty here is to identify the circumstances that lifted this particular offence outside the general range of manslaughter cases and called for the imposition of the additional punishment involved in deferring eligibility for parole until 80 per cent rather than only 50 per cent of the sentence has been served";

and by Williams JA:

> "The Court is given an express discretionary power to declare the commission of an offence specified in that schedule to be a conviction for the serious violent offence. That must mean that there is something about the circumstances of the offence in question which takes it beyond the norm and justifies the making of the declaration; such circumstance need not be categorised as exceptional."

[108] The difficulty with the first passage is that it depends upon characterising the making of a declaration as "additional punishment". That characterisation is correct only on the basis of what I have described above as the "first view".[96] I have

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95 At paras [92] and [93].

96 Para [100].

already given my reasons for not following this view. Once it is accepted that the decision in relation to a declaration is simply a part of an integrated sentencing process designed to determine the appropriate sentence for the particular offence and offender, the idea that it involves additional punishment is untenable. What is involved is a determination of whether making a declaration is conducive to the fulfillment of the purposes for which sentences may be imposed and is warranted by relevant considerations manifest in the particular case.

[109] As to the second passage, I must, with great respect and consistently with my acceptance of the "second view", dissent from the proposition that merely because the Act confers a discretionary power to make the declaration, there must be something about the circumstances of the offence in question which takes it beyond the norm. In the first place, assuming that the norm in question is the norm for the particular offence (whatever that may be),[97] it does not follow that a general discretion exerciseable in relation to many offences should be more or less likely to be exercised depending upon whether the circumstances differ from the norm for a particular offence. Some offences, by the very nature of the conduct involved in committing them, will attract a declaration more frequently than others because statistically, relevant considerations are more likely to be manifest in them. If this view be taken to its extreme, one would not make a declaration in the majority of armed robbery cases because in such cases violence or the threat of it is the norm. That would be an incongruous outcome. In the second place, in my judgment his Honour's reasoning is negated by the fact that the declaration would have been mandatory in *DeSalvo* had the sentence been imprisonment for ten years, as it might have been had the current level of sentencing been somewhat higher (as his Honour was inclined to think it possibly should have been in such cases).[98] In that event, the circumstances of the offence would have been exactly the same. A declaration is justified not by the fact that the circumstances take the offence beyond the norm, but by the fact that the circumstances of the offence and of the offender warrant the declaration as part of the proper sentence.[99]

The need for reasons

[110] That still means that there must be good reasons for making the declaration. That is true of every part of a sentence. The reasons must be found in the relevant sentencing principles, including the matters set out in s 9 of the Act, and the sentencing judge must articulate those reasons.[100] Failure to do so is an error of law, although it will not necessarily found a successful appeal, particularly where the reasons are implicit in what was said by the judge.[101]

The current state of the law

[111] In my judgment, the present position can be summarised as follows:

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97 This assumption is justified by the context and by his Honour's agreement with all that was said by McPherson JA.

98 I agree with this suggestion.

99 It should be noted that I have not considered whether the actual outcome in *DeSalvo* would have been any different had the approach which I favour been adopted. My view is that some parts of the reasoning of the majority should not be followed. It is unnecessary and inappropriate to consider whether the decision should be overruled.

100 *R v Moodie* [1999] QCA 125.

101 *R v Bui* [2002] QCA 151.

1. The exercise of the sentencing discretion is an integrated process involving a consideration of all of the circumstances of the case.
2. The 1997 amendments provided judges with additional sentencing tools to use in the course of this process.
3. Those tools must be used as part of the overall sentencing process, not applied in the course of a separate step taken after the balance of the sentence is determined.
4. In considering what head sentence to impose, a judge should take into account the consequences of any exercise of the powers conferred by those amendments.
5. However, on the authorities as they presently stand, where that exercise of power is mandatory, adjustments may be made to the head sentence only within "the range".
6. The judge should also take into account all relevant sentencing principles, including relevant considerations set out in s 9 of the *Penalties and Sentences Act* 1992, in formulating all aspects of the sentence, not solely in relation to the head sentence; but subject of course to the explicit terms of s 9.
7. Where the making of a declaration is discretionary, the considerations which potentially may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing.
8. Where the making of a declaration is discretionary:
   (i) seriousness of and violence in the course of the offence are not essential conditions for the making of a declaration;
   (ii) seriousness of and violence (actual or threatened) in the course of the offence are relevant factors in deciding whether a declaration is appropriate;
   (iii) seriousness of and violence (actual or threatened) in the course of the offence do not require the making of a declaration.
9. Where the making of a declaration is discretionary, the discretion is unfettered. In particular, it is not necessary that the circumstances of the case should take it beyond the "norm" for cases of its type.
10. All aspects of a sentence must have a legitimate purpose.[102]
11. The sentencing judge should state the reasons for the sentence, both in terms of the nature of the components of the sentence and their severity. If the reasons are implicit in the remarks of the judge, the sentencing discretion will not be held to have miscarried.

Conclusion regarding alleged errors of law

[112] From what I have already said, it will be apparent that the ground of appeal based upon the offence not bearing features that took it "beyond the norm" must be rejected.

[113] I turn to the ground based upon the assertion that the sentencing judge gave no reasons for making the declaration. In passing sentence, his Honour gave substantial reasons. However, he did not explicitly differentiate between those which supported the head sentence and those which supported the declaration. He identified features of the offence which he said were "of particular concern". Those

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[102] See s 9(1) of the *Penalties and Sentences Act*.

concerns are listed below.[103] In the context of this case, I do not think the failure to state expressly that these concerns constituted his Honour's reasons for making the declaration constituted an error of law. Even if it did, it was certainly of no consequence. The reasons are plainly to be discerned from the judgment. This ground also should be rejected.

Was the sentence manifestly excessive?

[114] The last original ground of appeal was that the sentence was manifestly excessive by reason of the declaration. This ground was advanced on two bases.

[115] First, the applicant argued that insufficient weight was given by the sentencing judge to the high level of remorse suggested by the substantial cooperation with the authorities constituted by his confession. The judge did not ignore this factor. He said:

> "It is in your favour that you, when spoken to by the police in respect of the Auchenflower matter, made admissions relating to the home invasion of Chelmer, which, no doubt, came as somewhat of a surprise to the investigating officers as there was nothing on the material before me to indicate that you were suspected in being involved in that matter. So to that degree there is some significant cooperation on your part."

The applicant's submission was that this not only demonstrated significant cooperation in the administration of justice; it also demonstrated remorse. That was confirmed by the early plea of guilty.

[116] The first question is whether the judge in fact failed to take the applicant's remorse into account. It is true that he did not expressly refer to remorse as a factor. However, as his reasons show, he clearly had in mind the two primary facts from which remorse was to be inferred. He gave weight to these facts, to the credit of the applicant. It is true that he did not expressly characterise the credit as due to remorse. It must be remembered the sentencing system which exists in Queensland requires District Court judges to undertake a ridiculous number of sentences on sentencing days. It is far more likely that his Honour inadvertently omitted to mention the factor in his *ex tempore* reasons than that he overlooked it completely. Moreover, the applicant was legally represented. It was open to his counsel to request the judge to make an express finding regarding remorse and to indicate what weight he had giving it as a distinct factor, had there been any suggestion at the time that it was overlooked. No such request was made.

[117] In any event, the amount of additional credit which the applicant deserved for his remorse was limited because his remorse was limited. The admissions to the police and the early plea of guilty were not the only matters relevant to the question. The admissions could not be described as full and frank: the applicant falsely claimed to the police that jewellery had not been taken. That jewellery, which included Ms Aspinall's engagement ring and her wedding ring for her forthcoming marriage, was not recovered and it is not suggested that the applicant gave or even offered any assistance in having it traced, despite the devastating emotional and financial impact of the invasion and theft upon the victims. Nor did the applicant volunteer any information to assist in identifying his accomplice. Remorse is a state of mind.

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[103] Para [118].

Only one person could have given direct evidence about how remorseful he really was: the applicant himself. He did not do so, nor was any explanation for his omission advanced. If his remorse was substantial, it would have been easy for him to say so, and to demonstrate it in the witness box. As it was, the judge was left to draw inferences. He was not obliged to allow the applicant much credit over and above what was allowed for the factors to which he expressly referred.

[118] The second submission for the applicant was that the sentencing process must have miscarried because no adequate reasons existed for making a declaration. In his reasons, the judge set out the features of the case which he thought were of particular concern. They were:

- the applicant was in company
- both men were wearing balaclavas
- each man was carrying a sawn-off shot gun
- when they entered the dwelling house, a fifteen year old girl had her mouth covered by the hand of one of them
- the victims were tied up with ducting tape
- demands were made with the implicit threat of use of the guns.

Other factors to which reference might have been made, but was not, are:

- the victims were assailed at night, in their own home while dressed in their nightwear
- implicit threats to harm Leah were made to her parents
- threats to return if the victims called the police were made and were backed up by cutting a telephone line.

Those are all factors which on their face would support the use of a declaration as part of the sentence. Knowledge that the declaration resulted from such conduct might well deter others from it.

[119] For the applicant, Mr Hunter emphasised the applicant's cooperation, his plea of guilty and the fact that there was an absence of any real violence and of any express threats of violence. He conceded that the use of the tape amounted to violence.[104] He supported the argument for an inference of miscarriage by reference to three comparable cases.

R v Stinton[105]

[120] The unreported decision of *R v Stinton* was decided by the Court of Appeal on 5 February 1999, the offences having been committed before the commencement of Part 9A of the *Penalties and Sentences Act*. Stinton was convicted of burglary,

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[104] As the point was not argued, I leave for another day the question whether the use of trivial force amounts to violence for the purposes of the *Penalties and Sentences Act* 1992. The point would be important if there were a real dispute about whether ss 9(3) and (4) apply to the case. It is quite arguable that they do not: *R v Dawson* (1977) 64 Cr App R 170; *R v Lew* (1978) 40 CCC(2d) 140; *R v Jerome* [1964] Qd R 595 at p 601; *R v De Simoni* (1981) 147 CLR 383 at p 393; *R v Butcher* [1986] VR 43. In *R v Collins* [2000] Qd R 45, the applicability of s 9(4) was dealt with by the President on the basis of a concession (at p 49). McPherson JA left the question open (at pp 58-59) and Ambrose J did not deal with it. There is an associated question whether "violence" in s 9(3) of the Act includes threats of violence: see *De Simoni* and *Butcher*. The latter question was referred to but not answered by Pincus JA in *R v Lovell* [1999] 2 Qd R 79.

[105] [1999] QCA 15.

armed robbery in company, two counts of deprivation of liberty and one count of unlawful possession of a motor vehicle. He was sentenced to imprisonment for 10 years for the burglary and the armed robbery in company. He was one of three masked men who broke into the home of an elderly couple shortly before midnight, apparently in the belief that they would find a quantity of money. One of them, not Stinton, carried a shotgun with which he threatened the owner of the house. They remained in the house for 40 minutes, ransacking it and threatening the occupants. Stinton took the female occupant's jewellery. A total of approximately $25,000 worth of property was stolen, of which only about $5,000 worth was recovered. The female occupant was tied to her bed. The male occupant already suffered a disability which prevented his sitting up in bed without great pain and difficulty. The men cut the telephone wires and stole the occupants' vehicle to escape.

[121] Stinton was 19 years of age at the time of the offence and had an extensive criminal history. His plea of guilty was rather late, but there were not implausible reasons for this. He was not the instigator of the offence. No physical harm was caused to the occupants of the house but they were subjected to a frightening and terrifying reign of terror in their own home for quite some time, which had an adverse effect on them and their lives. Stinton gave evidence on behalf of his co-offenders in the course of which he frankly admitted his own role in the offences.

[122] The Court of Appeal reduced Stinton's sentence from 10 years to eight years imprisonment because the trial judge's sentence and his sentencing remarks failed to reflect the pleas of guilty made by the applicant. Making a declaration was, of course, not an option.

[123] For the applicant, it was submitted that *Stinton* was a worse case than the present, yet the total punishment was imprisonment for eight years. I would accept that had the applicant been sentenced at the same time as Stinton, he would have deserved no greater punishment, and probably a slightly lesser punishment, than Stinton. But the applicant was sentenced after the 1997 amendments came into force. I have set out above the remarks of Byrne J and Pincus JA in *R v Lovell.*[106] In the period since that case, sentencing levels for violent offences have increased. The case does not suggest error on the part of the sentencing judge in this case.

R v Jones[107]

[124] Jones was aged 55 when, with an accomplice, he ambushed a married couple aged 61 and 53. They ran a service station. The offenders were lying in wait for them as they returned home with the daily takings. Wearing balaclavas and armed with a sawn-off rifle and knife, they followed the victims into their home. During a struggle the rifle discharged and the applicant called on his co-offender to help him by knifing the male victim. The co-offender assaulted the victim who dropped his torch. Jones then struck him violently on the forehead with the torch causing him almost to lose consciousness, an attack which resulted in a sustained period of concussion and long-term effects. The female victim had a knife pressed against her throat and received cuts to her hands in trying to seize the knife. The consequences to the victims were shattering.

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106 Para [41].

107 [2000] QCA 84.

[125] Jones was 57 at the time of sentencing and had no prior history of offences of violence. He had a long criminal history, mostly of offences of dishonesty, but no history for the eight years prior to the offence. The Court of Appeal did not regard his plea of guilty as an early one, although there was a committal by way of hand-up brief which avoided the need for either of the complainants to give evidence – a matter of some importance in the case. He did not co-operate with the police and never identified his co-offender. The case against him was overwhelming, which he must have realised.

[126] The Court held that the sentence of imprisonment for eight years with a declaration was not manifestly excessive. It noted that the sentence was a high one and that having regard to the seriousness of the violence the declaration was appropriate.

[127] Some features of that case make it more serious than the present. Most obviously, both victims suffered actual violence and there was a struggle. The Court referred to the level of violence as at least the primary factor making the declaration appropriate. However, it was closer to the cases involving armed robbery of small businesses than to those involving home invasions. More importantly, Jones was sentenced for offences committed on only one occasion, whereas in the present case the sentence was affected by the total criminality involved on two separate occasions. Despite these factors, one would have expected that Jones would have received a more severe punishment than the applicant. Whether that is sufficient to support the inference which the applicant would have the Court draw (i.e. that the making of the declaration must reflect a miscarriage of the sentencing discretion) can be considered after referring to the other case cited.

R v Palmer[108]

[128] The Court of Appeal re-sentenced *Palmer* to imprisonment for 11 years and made a declaration on a charge of entering a dwelling house and committing an armed robbery in company. Palmer forced his way into the house of the 70 year old widow and threatened her, her daughter and granddaughter with a knife, actually breaking her skin with the knife. He manhandled her and destroyed property. He and his accomplice eventually decamped in the daughter's vehicle. The residual effect on the victims was profound, prolonged and devastating – they suffered serious psychological harm. Like the applicant in the present case, Palmer had been sentenced to lesser terms of imprisonment for other offences committed on other occasions. The most relevant of these was an armed robbery of a service station at which he fired shots from a gun terrorising a family and the service station attendant. For that offence he had been sentenced to seven years imprisonment.

[129] Palmer was aged 29 and suffered from a personality disorder which led the sentencing judge to recommend psychiatric care in jail. There is no indication that the Court took any previous criminal history into account, although Mr Hunter informed us that Palmer had a substantial criminal history in New South Wales. He pleaded guilty, but it does not appear whether the plea was an early one. The Court of Appeal imposed its own sentence due to an irregularity in the proceedings below. It did not specifically indicate why it made the declaration.

[130] When all of the present applicant's offending is considered, that case was hardly more serious than the present. It clearly negates the dictum in *Jones* that the

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[108] [2000] QCA 15.

sentence in that case was a high one. Taking the two cases together it seems that the range for this type of offence (where there is a plea of guilty) has extremes as low as perhaps seven years imprisonment with a declaration and as high as 11 years imprisonment with a declaration. In this light, I do not think that it is open to the Court to conclude that the making of the declaration in the present case must reflect a miscarriage of the sentencing discretion.

[131] In summary, I am satisfied that there were adequate reasons for making the declaration and that the declaration does not produce a manifestly excessive sentence.

The additional ground of appeal

[132] By his amended application for leave to appeal, the applicant seeks to appeal against the order to serve the unserved portion of the suspended sentence (12 months) cumulatively upon the other sentences imposed. The sentencing judge said:

> "So far as the suspended sentence is concerned, I order that that unserved portion of the sentence, namely, 12 months, be activated and that that is to be served cumulatively upon the sentences passed in respect of the charges to which you have pleaded guilty today."

That form of order does not conform strictly with s 147 of the Act. It is, however, clear enough what the sentencing judge meant.

The right of appeal

[133] A person convicted on indictment may appeal, with the leave of the Court, "against the sentence passed on the person's conviction[109]." In that context, " 'sentence' includes any order made by the Court of trial on conviction of a person with reference to the person's person".[110] That insult to the English language was inserted into the Code not by Sir Samuel Griffith, nor even by the Parliament of Queensland, but by the Parliamentary Counsel in pursuit of political correctness.[111] As far as I am aware, there is no decision about whether an order under s 147(1)(b) is a "sentence" as so defined. There are differences between that provision and the former proviso to s 19(7) of the *Criminal Code*, under which suspended sentences were imposed until 1992 and it does not necessarily follow that cases relevant to the latter now apply.[112] For the purposes of the present appeal, however, I am prepared to assume that an appeal lies; counsel for the respondent did not argue otherwise.

The submissions

[134] For the applicant, Mr Hunter submitted:

> "Of the nine years total that was imposed, the applicant will serve between 8½ and 8□ years imprisonment before becoming eligible for release [on parole]. At best, he will be under supervision in the community on parole for six months ... These difficulties could be

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109 *Criminal Code* s 668D(1)(c).

110 *Criminal Code* s 668.

111 Pursuant to s 7 and s 24 of the *Reprints Act* 1992; see Reprint No 1 (26 March 1994) of the *Criminal Code Act* 1899.

112 Particularly *R v Blow* [1963] QWN 1. It has been held that such an order does not constitute the imposition of a term of imprisonment under s 157(2): *R v Waters* [1998] 2 Qd R 442.

> avoided by ordering the eight years sentence to be served cumulatively upon the activated suspended imprisonment ..."

[135] He argued that as the sentences stand, the applicant will not commence to serve the activated suspended imprisonment until the expiration of the eight years sentence. That will not occur until the full term discharge date, because the applicant will not be entitled to remissions. Consequently, he submitted, any parole (post-prison community based release) granted could not be granted until six months into the suspended imprisonment, and remissions of one-third could be granted two months later. This, he submitted, was manifestly excessive and not in accordance with the intentions of the sentencing judge.

[136] When he prepared this submission, Mr Hunter did not have the benefit of a sentence calculation by the Department of Corrective Services. During the hearing, such a calculation was procured from the department by Mr Meredith, who appeared for the respondent. It showed among other things that the applicant's period of imprisonment (which it did not define) was 9 years 1 month 14 days. It also stated that his date for post-prison community based release eligibility is 18 October 2008. Mr Hunter said that if that approach were correct, the applicant had no argument on this ground.

[137] The submission on behalf of the Crown was that the date for post-prison community based release set out in the departmental calculation was incorrect. Mr Meredith informed the Court that the date had been calculated on the basis of advice from Crown Law, by combining ss 135(2)(c) and (e) of the *Corrective Services Act* 2000, but he did not provide us with any detail of the calculation. His submission was that s 135 did not apply to the present case; the calculation by the department, while logical, was not justified by the legislation. Consequently, both terms of imprisonment must be served and served cumulatively.[113] It made no difference whether the suspended sentence was ordered to be served first or second. That outcome, he conceded, "would make the sentence manifestly excessive and probably not what the sentencing judge had in mind."

Statutory provisions relating to post-prison community based release orders

[138] To understand that submission, it is necessary to refer to several statutory provisions. The right to apply for a post-prison community based release order is conferred by s 134 of the *Corrective Services Act* 2000:

> "(1) A prisoner may apply, in the approved form, for a post-prison community based release order, other than an exceptional circumstances parole order, if-
>
> (a) the prisoner was sentenced to a period of imprisonment (the relevant period)–
>
> (i) of any length, for an offence committed before the commencement of this section; or
>
> (ii) of more than 2 years, for an offence committed after the commencement of this section;"

[139] Section 135 specifies when such an order may start. It provides:

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[113] *Corrective Services Act* 2000, s 81.

> "(2) A post-prison community based release order, other than an exceptional circumstances parole order, may start once the prisoner has–
>
> (a) for a prisoner serving a term of life imprisonment to whom the *Criminal Code*, section 305(2) applies – served 20 years or the longer time ordered under that section; or
>
> (b) for a prisoner serving a term of life imprisonment to whom the *Criminal Code*, section 305(2) does not apply – served 15 years; or
>
> (c) for a prisoner serving a period of imprisonment for a serious violent offence – served 80% of the period, or 15 years, whichever is the less; or
>
> (d) for a prisoner being detained in an institution for a period fixed by a judge under the *Criminal Law Amendment Act 1945*, part 3 – been detained for half of the fixed period; or
>
> (d) otherwise – served half of the period of imprisonment to which the prisoner was sentenced.
>
> (3) Subsection (2) is subject to the *Penalties and Sentences Act 1992*, section 157."

[140] Both provisions use the expression "period of imprisonment" and s 135 also uses the expression "term of imprisonment". These are defined terms. The dictionary set out in Schedule 3 to the Act invokes the definitions of the same terms in s 4 of the *Penalties and Sentences Act* 1992. In that Act:

> " 'period of imprisonment' means the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether—
> (a) ordered to be served concurrently or cumulatively; or
> (b) imposed at the same time or different times;
> and includes a term of imprisonment."

[141] That definition is distinct from the definition of "term of imprisonment":

> " 'term of imprisonment' means the duration of imprisonment imposed for a single offence, and includes the imprisonment an offender is serving, or is liable to serve—
> (a) for default in payment of a single fine; or
> (b) for failing to comply with a single order of a court."

Section 157 of the Penalties and Sentences Act 1992

[142] I turn first to s 135(3) of the *Corrective Services Act* 2000, which states that subs (2) is subject to s 157 of the *Penalties and Sentences Act* 1992. Section 157 is the section which empowers the sentencing judge to make a recommendation for post-prison community based release in cases to which it applies. No such recommendation was made in the present case and Mr Hunter did not argue that one should have been. However, Mr Meredith addressed the question whether there was a requirement for such a recommendation. He "admitted" that there was no such requirement.[114] He submitted that the only interpretation which would have required a recommendation was one by which it was held that the applicant was "at

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[114] Perhaps that was a typographical error disguising "submitted".

the time serving the term of imprisonment under the suspended sentence but it had yet to be activated"; and that this was not justified by the legislation.

[143] The relevant provisions of s 157 are subss (2) and (3). The former confers a discretion upon the sentencing judge; the latter requires the making of a recommendation. An element of the latter is that at the time of sentencing, the offender "is already serving imprisonment for an offence". I would accept the Crown submission that while the suspended sentence was "yet to be activated" it could not constitute imprisonment for the purposes of this section. However, it does not need to. At the time the applicant was sentenced, he was already serving a term of two years imposed on 16 October 2001. That is enough to satisfy this element of s 157(3).

[144] Despite this, it cannot be held that s 157(3) applies to this case. That is because at the time of sentencing, there was no current recommendation for parole attached to the earlier sentences. When those sentences were pronounced, no recommendation was made. In *R v Doyle*,[115] this Court held that s 157(3) did not impose an obligation to make a recommendation unless there had been a recommendation attached to the existing sentence. That decision has consistently been applied for eight years and has survived the passage of numerous amendments to the Act. We must follow it and hold that in the present case, the sentencing judge was under no obligation to make a recommendation.

[145] It is unnecessary to consider whether he had power to do so under s 157(2). That is a question upon which differing opinions have been expressed.[116] It is related to the question whether s 157(3) confers an additional power or simply identifies an occasion when the power conferred by s 157(2) must be exercised. It is unnecessary to consider these question is because no one has suggested that by not exercising it, the sentencing judge was in error.

[146] It follows that s 135(3) of the *Corrective Services Act* 2000 has no relevance in this appeal.

Section 135(2) of the Corrective Services Act 2000

[147] If, as the Crown submits, s 135(2) did not apply to the applicant, his only hope for early release would lie in obtaining an "exceptional circumstances parole order" under s 133. If this result were caused by the absence of clear provision in the Act, the applicant would have a strong case for demonstrating exceptional circumstances. But is it correct that s 135(2) does not apply to the applicant? We were not favoured with any detailed explanation of why this should be so. The argument seemed to be that paras (a), (b) and (d) could not possibly apply because they were by their terms irrelevant; that para (c) did not cover the case because only part of the applicant's period of imprisonment was for a serious violent offence; and para (e) could not apply to a period of imprisonment which included a term for a serious violent offence. The first of these propositions is plainly correct. The argument depends upon the second and third.

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115 [1996] 1 Qd R 407.

116 In *R v Burton* (1995) 83 A Crim R 453, McPherson JA thought that there was no such power; I thought that there was; and Thomas J (as he then was) expressly reserved his opinion.

[148] The most obvious difficulty which the argument must confront is the wording of para (e). If para (c) does not apply, why should the wording of para (e) not cover the case? It is true that an outcome which meant eligibility for a serious violent offender after serving half his period of imprisonment (instead of 80 per cent) by reason of the fact that the imprisonment included a term for another offence would be incongruous. It would however not be unworkable, for s 135 prescribes only when a post-prison community based release order "may" start, not when it must start. It would be far less incongruous than an interpretation which completely or even partially denied the offender eligibility for such an order. Such an outcome would seem to be inconsistent with the terms of s 134. It is unlikely that the legislature would have provided by that section that a prisoner may apply for an order, but then have negated this provision in a section dealing only with when such an order might start. As I have observed elsewhere, prisoners' rights are not regulated by the writings of Joseph Heller.[117] Whatever changes there may have been in recent years, the courts have not abandoned the principle that penal statutes should, when ambiguous, be construed in favour of the citizen.[118] Nor has the interpretation process becomes so result-driven that a clear word like "otherwise" in para (e) must be denied its plain meaning merely because one might guess that the meaning was not what the drafter intended. The rule of law requires citizens (including judges) to respect the supremacy of the law as enacted, not as the judges think the legislators would have enacted it if only they had thought of doing so.

[149] That leaves the question of whether the case is covered by s 135(2)(c). Like para (e), but unlike paras (a) and (b), this provision uses the expression "period of imprisonment", not "term of imprisonment". The applicant's total period of imprisonment comprised a number of terms of imprisonment. If "period of imprisonment" in para (c) refers only to this total period, it cannot be said that the period is "for" a serious violent offence. Only part of the total answers that description.

[150] At first sight, one might think that the inclusion of "a term of imprisonment" in the definition of "period of imprisonment" was only intended to permit the defined term to be used to apply both to cases where an offender was serving multiple terms and to cases where he was serving only one term. Semantically, there is no compulsion to restrict the use of the definition in this way. Usage can be affected by context.[119] Whatever might be its usage in the *Penalties and Sentences Act* 1992, I see no sufficient reason why the term as used in s 135(2)(c) should not in appropriate cases refer to a particular term of imprisonment, being part of a period of imprisonment. So interpreted, para (c) applies to the present case. In my judgment, it should be so interpreted.

The application of section 135(2)(c)

[151] How is s 135(2)(c) to be applied in the present case? In particular, does it apply to all of the imprisonment which the applicant must serve or only to the imprisonment imposed for the serious offence? It provides that an order may start once the applicant "has served 80 per cent of the period". The use of the definite article before "period" suggests that the period spoken of is the same period as that referred

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117 *R v Maxfield* [2000] QCA 320.

118 *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134 at p 139; *Waugh v Kippen* (1986) 160 CLR 156 at p 164.

119 *Acts Interpretation Act* 1954, s 32A.

to earlier in the paragraph. Since the word used earlier in the paragraph refers to the term being served for a serious violent offence, it must do so when it recurs in the operative part of the paragraph. Not only is that the natural construction of the words of the sentence, but it also avoids the obvious unfairness which would result if the 80 per cent requirement were applied to imprisonment being served for offences which were not serious violent offences.

[152] It follows that in my view, the paragraph should only be applied to the imprisonment being served for the serious violent offence. I note that neither party argued that it should be construed to require the applicant to serve 80 per cent of his total imprisonment.

Can the paragraphs of s 135(2) be combined?

[153] The departmental calculation applied paras (c) to the serious violent offence imprisonment and para (e) to the other imprisonment. It is legitimate? The paragraphs of subs (2) are linked by the disjunctive "or". At first sight, this suggests it is not possible to add amounts calculated under the different paragraphs. But the question cannot be resolved by grammar alone. There are plenty of cases in which "and" has been construed as "or" and vice versa, although there are not many examples of "or" being construed as "and" in a statute.[120] One must look to the context. At this point, it is convenient to return to Mr Hunter's argument.

[154] Mr Hunter was correct in submitting that the applicant was not entitled to remission of the eight year sentence because it was imposed for a declared serious violent offence.[121] He was also correct in submitting that the term of 12 months imprisonment would not commence until the eight year term was completed.[122] If "or" were read as "and" at the end of each paragraph in s 135(2), the third step in his argument would also seem to be correct. A post-prison community based release order would not start until the applicant had served half of the period of imprisonment referred to in para (e). It would be impossible for the applicant to have served half of that period until after he had completed the eight year sentence.[123] Reversing the order in which the cumulative sentences must be served would not eliminate the incongruity, although it would reduce the impact which it would have on the applicant. Equally incongruous results can be imagined in relation to other combinations of paragraphs of the subsection. Moreover, the construction under discussion would have to be limited to cases where the different periods of imprisonment were cumulative or even stranger outcomes can be imagined.

[155] On the other hand, if "or" is interpreted as a disjunctive, there remains the problem of which paragraph to select in cases where multiple choices are available. That problem does not arise internally in para (c); there, the options are qualified by "whichever is the less". I do not think that the choice between the paragraphs of subs (2) is to be determined by selecting either whichever is the greatest or whichever is the least. The paragraphs are deliberately arranged in descending

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120 *Gill v Department of Industry, Technology and Resources* [1987] VR 681 at p 685.

121 *Penalties and Sentences Act* 1992, s 161D.

122 *Corrective Services Act* 1988, s 122; *Corrective Services Act* 2000, s 81.

123 Quite complex calculations would be involved in identifying the relevant period of imprisonment and in determining how much of it had already been served prior to the commencement of the eight-year term for the serious violent offence.

order, not only of severity of punishment, but also of importance. That order dictates the priority of application of the paragraphs. In other words, para (a) is to be applied if it can be applied; only if it cannot be applied it is necessary to consider para (b); and so on. That interpretation is confirmed by the catchall effect of para (e). While it is possible theoretically to imagine incongruous results from that approach, in practice such cases are unlikely to arise. I therefore do not think that potential difficulty in selecting among the paragraphs provides sufficient reason not to interpret "or" as a disjunctive.

[156] In my judgment, the context does not support interpreting "or" as a conjunctive ("and") or as a mixture of conjunctive and disjunctive ("and/or"). It should be given its primary meaning. Paragraph (c) is the only applicable paragraph and it is applicable only to the serious violent offence. The applicant is, therefore, entitled to a post prison community-based release order after he has served 6.4 years of the 8 year term. The departmental calculation is not correct; but the applicant is in an even better position than the calculation indicated. The additional ground of appeal discloses no basis for interfering in the sentence imposed below.

Conclusion

[157] The application for leave to appeal against sentence should be dismissed. However it may be that in view of the uncertainties which have been exposed in relation to the calculation of the date when a post-prison community based release order may start, a declaration should be made relating to that matter.[124] I would permit the parties to make further submissions in writing on whether such a declaration should be made and if so, on its terms, within seven days from the date of this judgment.

[158] **MULLINS J:** I have had the benefit of reading the reasons of Fryberg J.

[159] I rely on his Honour's summary of the facts.

[160] The applicant relied on a statement taken from *R v DeSalvo*[125] to submit that, by reason of the making of the declaration that the applicant was convicted of a serious violent offence, the sentence was manifestly excessive.

[161] The judgments of the majority in *DeSalvo* applied *R v Bojovic*[126]. It is not apparent that there was an intention by the majority in *DeSalvo* to modify the approach taken in *Bojovic* to the making of a declaration under s 161B of the *Penalties and Sentences Act* 1992.

[162] Applying the approach in *Bojovic*, the applicant cannot show that the making of the declaration that he was convicted of a serious violent offence made the sentence manifestly excessive, for the reasons given by Fryberg J.

[163] I also agree with his Honour's conclusion that the learned sentencing judge's reasons for making the declaration are disclosed in the sentencing remarks, even though the learned sentencing judge did not expressly state which of his reasons applied to the imposition of the head sentence and which applied to the making of the declaration.

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124 Compare *R v Irving* [2001] QCA 472.

125 [2002] QCA 63 at paras [9] and [15]

126 [2000] 2 Qd R 183

[164] The additional ground of appeal was based on what the applicant perceived to be the difficulty caused by the learned sentencing judge ordering the activation of the balance of 12 months of the suspended term of imprisonment to be served by the applicant cumulatively upon the term of 8 years which the learned sentencing judge imposed on 30 November 2001 for the offence of entering dwelling with intent with circumstances of aggravation.

[165] During the course of the hearing of this application, the production of the Department of Corrective Services' calculation of the post-prison community based release date for the applicant of 18 October 2008 (which is a period of 6 years 10 months 19 days from the date of sentencing of 30 November 2001) indicated that the Department, at this stage, had not approached the calculation of this date in the manner which the applicant had anticipated and was the basis for raising the additional ground of appeal.

[166] Mr Meredith who appeared for the respondent conceded at the hearing of the application and in his supplementary written submissions furnished after the hearing that the Department's calculation accorded with what Mr Meredith had thought the position would be about effective prison time served by the applicant at the time that Mr Meredith made submissions on sentence before the learned sentencing judge and was probably what the learned sentencing judge had in mind as the effect of the sentences and orders which he imposed.

[167] Mr Meredith drew the court's attention to his difficulty in putting forward a legislative basis for the Department's calculation. He also conceded that if the effect of the *Corrective Services Act* 2000 ("*CSA*") was that the applicant had to serve the whole of the sentence of 8 years and half of the suspended term of imprisonment, the effective prison time would make the sentence manifestly excessive.

[168] This application has thrown up the possibility of an anomalous operation of s 135 of the *CSA* where an offender is sentenced to a term of imprisonment for a serious violent offence which is cumulative with another term of imprisonment.

[169] The intention of s 135(2) of the *CSA* is to provide for when a post-prison community based release order may operate in relation to all prisoners who are covered by s 134 of the *CSA*. The applicant is covered by s 134 of the *CSA*. An interpretation must be given to s 135 of the *CSA*, if possible, which enables it to apply to all prisoners covered by s 134 of the *CSA*.

[170] Fryberg J's interpretation of s 135 of the *CSA* allows for that provision to be given an operation which is consistent with the apparent intention of the provision and does not produce an absurd result in respect of this applicant. I therefore agree with his Honour's reasons for rejecting this additional ground of appeal.

[171] I also agree that the application for leave to appeal against the sentences should be dismissed, but that the parties should be given an opportunity to make submissions on whether a declaration should be made as to the operation of s 135(2) of the *CSA* in respect of the applicant's sentences.