SUPREME COURT OF QUEENSLAND

CITATION:	*R v TY* [2011] QCA 261
PARTIES:	**R** **v** **TY** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 91 of 2011 DC No 463 of 2010 DC No 525 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2011
JUDGES:	Muir and Fraser JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent was sentenced on his pleas of guilty to serve a head sentence of six years imprisonment for State offences – where the State offences involved one count of maintaining a sexual relationship with a child with a circumstance of aggravation, five counts of indecent treatment of a child under 12 as a guardian, one count of rape, 16 counts of indecent treatment of a child under 16 as a guardian, one count of making child exploitation material, five counts of indecent treatment of a child under care and one count of possession of child exploitation material – where the complainant the subject of the maintaining count was the daughter of the respondent's de facto partner – where the complainant was five years old when the offending conduct commenced – where the offending conduct occurred over a lengthy period – where the sentence imposed was within the range submitted by prosecution and defence at the sentencing hearing – whether

the sentencing judge erred in imposing a six year term of imprisonment for the State offences – whether the sentence was manifestly inadequate

Criminal Code 1899 (Qld), s 669A(1)

Director of Public Prosecutions (Cth) v Gregory (2011) 250 FLR 169; [2011] VSCA 145, cited
Everett & Phillips v The Queen (1994) 181 CLR 295; [1994] HCA 49, cited
Hili v The Queen; Jones v The Queen (2010) 85 ALJR 195; [2010] HCA 45, cited
Lacey v Attorney-General of Queensland (2011) 85 ALJR 508; [2011] HCA 10, considered
Lowndes v The Queen (1999) 195 CLR 665; [1999] HCA 29, cited
R v C [2000] QCA 145, considered
R v Clarke [1996] 2 VR 520; [1996] VicRp 83, cited
R v HAN (2008) 184 A Crim R 153; [2008] QCA 106, considered
R v KU and Ors; ex parte A-G (Qld) (2008) 181 A Crim R 58; [2008] QCA 20, cited
R v Lacey; ex parte A-G (Qld) (2009) 197 A Crim R 399; [2009] QCA 274, considered
R v MAH [2005] QCA 13, considered
R v Major; ex parte A-G (Qld) [2011] QCA 210, cited
R v Myers [2009] QCA 14, considered
R v R [1998] QCA 268, considered
R v Tait and Bartley (1979) 46 FLR 386, cited
R v Walden [2010] QCA 13, considered
The Queen v Wilton (1981) 28 SASR 362, considered
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: A W Moynihan SC for the appellant
S R Lewis, with M J Holohan, for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Quinn & Scattini for the respondent

[1] **MUIR JA: Introduction** The respondent pleaded guilty to all offences on a 23 count indictment presented by the Queensland Director of Public Prosecutions, and to the offences on a nine count indictment presented by the Queensland Director of Public Prosecutions in respect of counts 1 to 6 and 9 and by the Commonwealth Director of Public Prosecutions in respect of counts 7 and 8. The counts on the 23 count indictment and the sentences imposed on 25 March 2011 were:

Count 1: Maintaining a sexual relationship with a child with a circumstance of aggravation – six years imprisonment;

Counts 2-4,7: Indecent treatment of a child under 16, under 12, as a guardian – three years imprisonment;

Counts 5,8: Indecent treatment of a child under 16, under 12 years, as a guardian – three years imprisonment;

Count 6: Rape – four years imprisonment;

Counts 8-23: Indecent treatment of a child under 16, as a guardian – three years imprisonment.

[2] The counts on the 9 count indictment and the sentences imposed on 25 March 2011 were:

Count 1: Make child exploitation material – 12 months imprisonment;

Counts 2-6: Indecent treatment of a child under 16 under care – 12 months imprisonment;

Count 7: Using a carriage service to access child pornography material – two years and six months imprisonment;

Count 8: Using a carriage service to make child pornography material available – two years and six months imprisonment;

Count 9: Possession of child exploitation material – 12 months imprisonment.

[3] A parole eligibility date of 15 May 2012 was stipulated for the State offences. For the Commonwealth offences, it was ordered that the respondent be released after serving 12 months of the term of imprisonment upon giving security by recognizance in the sum of $500 conditioned on his being of good behaviour for three years. Two hundred and fifty days spent in pre-sentence custody were deemed time already served under his sentences.

[4] The appellant Attorney-General of Queensland appeals against the sentences imposed for the State offences on grounds that the sentences were manifestly inadequate.

The offending conduct

[5] The sentencing proceeded by reference to an agreed statement of facts, which, in relation to the maintaining offence, may be summarised as follows. The complainant was the daughter of a woman with whom the respondent lived in a de facto relationship. From when the complainant was about five years and nine months old until when she was about seven years and nine months old, the respondent would bathe or shower her in the afternoon before her mother's return home from work. The respondent, after showing the complainant pornographic material almost daily, commenced having the complainant fellate him in the shower. On another occasion, he digitally penetrated her vagina. He also licked her "vagina" once or twice.

[6] The offending conduct ceased for about nine months in 2002 when the family moved into the respondent's mother's home. It recommenced in February 2003 when the complainant, her mother and the respondent moved to a house in Capalaba. The complainant was then eight years old. Over the three year period in which the family resided in Capalaba, the respondent continued to have the complainant fellate him in the shower. He would also frequently touch the complainant's genitals and rub around her buttocks and genitalia when saying goodnight to her.

[7] The indecent treatment of the complainant ceased in August 2006 when the family went back to live with the respondent's mother. The complainant was then almost 12 years old. The respondent continued, however, to expose the complainant to indecent objects such as vibrators and pornography.

[8] Count 2 involved showing the complainant a film taken by the respondent of a female cousin of hers, aged about 14, fellating the respondent. Count 5 was in respect of an incident which occurred between a date in June 2000 and 14 June 2002 when the appellant, naked below the waist, approached the naked complainant and instructed her to lie down and open her legs. She complied and the respondent approached her with his penis in his hand. Her recollection thereafter was a "bit fuzzy like as if, yeah like painful".

[9] The rape offence occurred when the respondent, having licked the complainant's vagina, inserted a finger moved it in and out, removed the finger, rubbed the complainant's vaginal region, re-inserted his finger and, again, licked the complainant's vagina. The complainant was unsure of whether more than one finger may have been used.

[10] Counts 8 to 23 concern the filming, on different occasions, by the respondent of the complainant and female friends of the complainant with hidden cameras installed in a bathroom.

[11] Police officers executing a search warrant at the subject property on 24 March 2009 found on the respondent's computer 13 video files containing images of the complainant undressing and showering. Other video files showed the naked complainant taking a bath, using a toilet to urinate, dressing, undressing and shaving her legs and underarms. The Commonwealth offences concerned child pornography videos downloaded from the Internet. The State offences on the nine count indictment all depict either the complainant or her female friends undressing, showering and/or dressing.

The respondent's antecedents

[12] The respondent was born in 1956 and was between 44 and 50 years of age during the maintaining a sexual relationship period and 52 years of age at the time of the offences in counts 8 to 23 of the 23 count indictment. He had been convicted in 1976 and 1977 of driving under the influence of liquor or a drug and driving whilst disqualified. His conviction for common assault in 2003 involved the touching of a 13 year old girl on the inside of her underwear as she slept at his house.

[13] The respondent's plea of guilty followed the cross-examination of the complainant at a pre-recording of her evidence. He was educated to Grade 10 and had a good employment history.

The sentencing submissions at first instance

[14] The Queensland prosecutor submitted that "taking a global approach to the offending…an appropriate head sentence would be that of five years' imprisonment." He submitted that the plea of guilty could be accommodated by a parole eligibility date fixed after one-third of the term of the head sentence had been served. The submission was made on the understanding that the Commonwealth prosecutor would be submitting that the sentence for the Commonwealth offences should be cumulative upon the sentences for the State offences.

[15] The Commonwealth prosecutor, who also fulfilled the role of Queensland prosecutor in respect of the counts other than 7 and 8 on the nine count indictment, submitted that it was appropriate to increase the sentences the judge had in mind for the State offences by six to 12 months and to require the respondent to serve up to 26 months actual imprisonment. He submitted that the appropriate sentence, after taking those matters into account, was two and a half years imprisonment to be served concurrently with the terms of imprisonment imposed for the State offences.

[16] Counsel for the respondent submitted that an appropriate sentence was five and a half years imprisonment with parole on 5 April 2012. That, he submitted, would take into account appropriately the 318 days served by the respondent in pre-sentence custody.

[17] The Queensland prosecutor did not make any submissions in reply.

The Attorney-General's submissions

[18] The Attorney-General submitted that the head sentence of six years was manifestly inadequate to reflect the respondent's offending against the four young complainants, particularly as the offending conduct concerned a breach of trust in respect of the respondent's de facto daughter over a very long period commencing when the complainant was very young. He pointed to the serious nature of the offending conduct which he submitted was relentless, involved fellatio, cunnilingus, an incident of digital penetration and groping as well as the clandestine watching and filming of the complainant and other young girls.

[19] Reliance was placed on *R v C*[1] and *R v HAN*[2]. It was submitted that the offending against the complainant alone warranted a sentence of seven years coupled with a serious violent offence declaration. Another argument advanced was that the allowance made for the belated plea of guilty was unduly generous.

The respondent's submissions

[20] Counsel for the respondent submitted that the sentence imposed was that which both prosecutors had submitted would be appropriate, and that the appellant should not be permitted to depart from the substance of the case advanced at first instance.[3] He stressed that no serious violent offence declaration was sought at first instance.

[21] Relying on *R v Walden*,[4] *R v Myers*[5] and *R v MAH*,[6] counsel for the respondent submitted that an appropriate sentencing range was five to six years with an accompanying early recommendation for parole. Consequently, it was submitted that no sentencing error had been revealed.

Comparable sentences

[22] The offender in *R v C*[7] was convicted after a trial of one count of unlawfully maintaining a sexual relationship with a child and five counts of indecent dealing. The complainant, the step-grandchild of the 68 year old offender, was between six and 11 years of age during the offending conduct which occurred over a period of

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1 [2000] QCA 145.
2 [2008] QCA 106.
3 *Director of Public Prosecutions (Cth) v Gregory* [2011] VSCA 145 and *R v Major; ex parte A-G (Qld)* [2011] QCA 210 at 56.
4 [2010] QCA 13.
5 [2009] QCA 14.
6 [2005] QCA 13.
7 [2000] QCA 145.

approximately three and a half years. The offender had a minor, but not particularly relevant, criminal history.

[23] The five counts of indecent dealing involved the offender: "playing with [the complainant's] vagina with his finger, tickling it and licking it"; requiring the complainant to manipulate his penis manually, then suck it; urinating in the complainant's mouth on one occasion; digital penetration of the vagina on one occasion; fellatio and rubbing an erect penis on the complainant's genitalia. This conduct was relied on to establish the maintaining count. An appeal against a sentence of five years with a recommendation for consideration for parole after two years was dismissed. The sentencing judge took into account the offender's lack of remorse and his view that, due to his age, the offender would find prison particularly hard.

[24] In the course of the Court's reasons, it was observed:[8]

> "The sentences imposed are within the range demonstrated in comparable cases such as *R v R*[9] where a sentence of five and a half years was imposed for the offence of maintaining an unlawful sexual relationship. The conduct included R's digital penetration of the vagina, oral sex with ejaculation into the complainant's mouth, vaginal intercourse, urination by the complainant into the applicant's mouth at his insistence and showing the complainant a pornographic movie featuring bestiality. R had no criminal convictions, had engaged in a sexual relationship with a girl between the ages of 8 and 13 years and had shown no remorse. He was a boyfriend of the complainant's mother and a father figure to the complainant."

[25] The offender in *R v HAN*[10] made the complainant, aged between 13 and 17, fellate him almost daily over a period of approximately three years. Generally, the complainant was obliged to swallow the offender's ejaculate. The one count of rape on the indictment concerned such an incident as did another count of sexual assault with a circumstance of aggravation. On appeal, it was held that the exercise of the judge's discretion had miscarried and a head sentence of six years imprisonment was substituted for the seven year sentence imposed by the sentencing judge for the maintaining offence. A parole eligibility date was fixed at the one-third point of the sentence. The appellant had made full admissions and had organised counselling for himself and his wife prior to being interviewed by police. He had expressed remorse to his daughter and had entered a timely plea. However, the fact that the offender was the complainant's natural father made the offending conduct particularly culpable.

[26] The 50 year old offender in *R v Walden*[11] was refused leave to appeal against a sentence of six years imprisonment imposed after a trial for maintaining an unlawful sexual relationship with the 13 year old complainant over a period of at least two months. The maintaining involved sexual intercourse three or four times a week. The complainant's mother acted as her child's pimp and the offender paid the mother for at least some of the complainant's sexual services.

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8 At para [37].
9 [1998] QCA 268.
10 [2008] QCA 106.
11 [2010] QCA 13.

[27] The offender in *R v Myers*[12] was the stepfather of the complainant, who was aged between 12 and 14 at the time of the offending, which took place over a period of 12 to 18 months. It included regular fellatio to ejaculation, digital vaginal penetration, cunnilingus, mutual masturbation and attempted penile intercourse. The offender had no prior convictions and was sentenced to five years imprisonment after a trial. The complainant was badly affected by the offender's conduct and was alienated from her mother and some of her siblings.

[28] The offender in *R v MAH*[13] was refused leave to appeal against a sentence of six years imprisonment with a recommendation for release after two years imposed after a guilty plea on a count of maintaining, over a period of about two years, a sexual relationship with his stepdaughter aged between seven and eight years. The offending conduct included three instances of rape, many instances of digital penetration, oral sex and indecent touching.

Relevant principles

[29] Before this Court can interfere with a sentence under s 669A(1) of the *Criminal Code*,[14] it is necessary that error on the part of the sentencing judge be demonstrated. Once error is demonstrated, the Court has an unfettered discretion to substitute the sentence it considers appropriate.[15]

[30] In *R v Lacey; ex parte A-G (Qld)*,[16] the majority in their reasons referred to "the importance of the consideration that appeals under s 669A must not be seen as a means for the prosecution to change its mind as to the level of sentence it is disposed to seek."

[31] On the High Court appeal from this Court, the majority reasons emphasised "[t]he exceptional character of the Crown appeal against sentence".[17] It was said:[18]

> "The treatment of Crown appeals against sentence as 'exceptional' indicated a judicial concern that criminal statutes should not be construed so as to facilitate the erosion of common law protection against double jeopardy."

[32] The reasons for the Court's traditional reluctance to allow appeals by prosecuting authorities against sentences within the range of the sentence contended for by the prosecution at first instance are explained in the following frequently cited passage from the judgment of King CJ, with whom Mitchell and Williams JJ agreed, in *The Queen v Wilton*:[19]

> "It is necessary to consider whether the prosecution should be allowed to raise on the appeal the contention that the sentence ought not to have been suspended when [that] contention was not put in the Court below. The consequences of allowing the prosecution to do so are serious. The respondent has faced the prospect of deprivation of his liberty by way of imprisonment and has been spared, subject to observance of the conditions of the bond. If the prosecution is

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12 [2009] QCA 14.
13 [2005] QCA 13.
14 (Qld).
15 *Lacey v A-G (Qld)* (2011) 85 ALJR 508 at para [62].
16 (2009) 197 A Crim R 399.
17 *Lacey v A-G (Qld)* (2011) 85 ALJR 508 at para [16].
18 At para [17].
19 (1981) 28 SASR 362 at 367-368.

> allowed to raise the contention he must again face the prospect of imprisonment. This is what the Federal Court meant in *R v Tait and Bartley*[20] by 'double jeopardy'. In my opinion, this Court should allow the prosecution to put to it, on an appeal against sentence, contentions which were not put to the sentencing Judge, only in exceptional circumstances which appear to justify that course. I endorse with respect what was said in *Tait and Bartley* as to the duty of prosecuting counsel before the sentencing judge. In particular where a submission is made by counsel for a convicted person that a sentence should be suspended or a possible suspension is mentioned by the judge, and this course is regarded by the prosecution as beyond the proper scope of the judge's discretion, a submission to that effect should be made. Generally speaking, if the submission is not made to the sentencing judge the prosecution should not be able to advance that contention successfully on an appeal by the Attorney-General." (some citations omitted)

[33] That passage was quoted with approval in *R v KU and Ors; ex parte A-G (Qld)*[21] and was referred to with approval in the joint reasons in *Everett & Phillips v The Queen*.[22]

[34] Where an appeal against sentence is based merely on manifest inadequacy:

> "…appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons."[23]

[35] In *Hili v The Queen; Jones v The Queen*,[24] French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ rejected the contention that "manifest error is fundamentally intuitive" and accepted the view of the Court below that manifest error "arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it."

[36] I will conclude this brief review of authorities by referring to *Lowndes v The Queen*[25] in which the Court remarked:

> "a court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. ... The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice."

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20 (1979) 46 FLR 386; 24 ALR 473.
21 [2008] QCA 20; (2008) 181 A Crim R 58 at [34].
22 (1994) 181 CLR 295 at 302.
23 *Wong v The Queen* (2001) 207 CLR 584 at [58].
24 (2010) 272 ALR 465 at [60].
25 (1999) 195 CLR 665 at 671-672.

Consideration

[37] *R v C*[26] may be thought to offer some support for the appellant's contention that the sentence was manifestly inadequate. The five year sentence with a recommendation for consideration for parole after two years was imposed after a trial in respect of a maintaining based on only five indecent dealing offences, although some of the conduct was particularly gross. *R v R*,[27] however, in which a sentence of five and a half years imprisonment was imposed, involved much graver offending conduct over a five year period.

[38] The conduct in *R v HAN*,[28] which was inflicted on the complainant by her natural father almost daily for three years, was also significantly worse than the subject conduct. That conduct was thought to merit a term of imprisonment of six years when there was obvious remorse, a very early plea and reasonable prospects of rehabilitation. Unlike the other cases relied on by both the appellant and the respondent in which the appellate court was not required to determine the appropriate sentence, the six year term of imprisonment was imposed on appeal.

[39] *R v Myers*[29] involved regular fellatio to ejaculation, cunnilingus and mutual masturbation over a 12 to 18 month period. The complainant, however, was much older than the complainant in this case when the offending conduct commenced.

[40] The complainant in *R v MAH*[30] was also quite young. Although the offending period in that case was far less than the subject period, the offending conduct included three instances of rape and many instances of digital penetration.

[41] As the Attorney-General pointed out, the respondent's offending conduct was grave, although it is significant that it did not involve penile and vaginal intercourse and that there was only one act of digital penetration. Abusing his position of trust, he set about corrupting the complainant and then used her without compunction or pity for his own sexual gratification for a lengthy period. The seriousness of his voyeuristic conduct was exacerbated by the making and retaining of video recordings. The complainant was very young when the misconduct commenced and, unsurprisingly, her ability to interact normally with males has been adversely affected.

[42] Although the comparable sentences discussed above suggest that the six year sentence imposed was light, having regard to its role as a head sentence reflecting the overall criminality of the State and Commonwealth offending conduct, I am not persuaded that the sentence reveals a misapplication of principle on the part of the sentencing judge. The comparable sentences do not make it apparent to me that the leniency of the sentence was such that it fell outside the range of sentences which could have been imposed. The parole eligibility date fixed by the sentencing judge effectively treated a late plea as an early one. The sentencing judge, consistently with prosecution submissions, concluded that the parole eligibility date should be "after one third of the head term imposed, that being a period of some 20 months."[31] His Honour further allowed for a period of about two months which the respondent had spent in pre-sentence custody which could not be declared as time served. Defence counsel's submissions, which led to this result, were unopposed.

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26 [2000] QCA 145.
27 [1998] QCA 268.
28 [2008] QCA 106.
29 [2009] QCA 14.
30 [2005] QCA 13.
31 The Queensland Prosecutor's submission, Record p33.

[43] To my mind, in a borderline case such as this, the fact that the sentence imposed is consistent with that sought by the prosecution, is of particular significance. I would not be disposed to accede to the appellant's contention that there should be a serious violent offence declaration. No such declaration was sought at first instance. It can hardly be said that if such a declaration had been sought the sentencing judge's exercise of discretion would have miscarried if he had not made it.

[44] Although the discretion conferred on this Court to intervene in the event that error on the part of the sentencing judge has been disclosed is unfettered, the principles discussed in *The Queen v Wilton*[32] are relevant to the exercise of that unfettered discretion. Also relevant are the following observations of Charles JA, Winneke P and Hayne JA agreeing, in *R v Clarke*:[33]

> "An appellate court has an over-riding discretion which may lead it to decline to intervene, even if it comes to the conclusion that error has been shown in the original sentencing process. In this connection, the conduct of the Crown at the original sentencing proceedings may be a matter of significance."

[45] That observation, which was one of five propositions advanced by Charles JA, was approved by the Court in *Lowndes v The Queen*.[34] More recently, in *Director of Public Prosecutions (Cth) v Gregory*,[35] the Court said:

> "The restriction of the Crown on appeal reflects the broad common law principle applicable to appeals including those which involve the review of a discretionary judgment, that a party is bound by the conduct of its case. A party will not ordinarily be permitted to depart from the substance of the case it advanced at first instance. It is fundamental to the due administration of justice, which is concerned with expedition, finality and justice, that the substantial issues between the parties are settled at the court of first instance, and that the powers of the appellate court are exercised within the framework of the issues as so settled. In this respect the Crown is in no different position to a private litigant.
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> Nonetheless, there have been limited circumstances where the Crown has been allowed to change its position where it has remained silent at first instance i.e. it did not make a positive submission. It is sufficient to state that in the absence of exceptional circumstances, a party will ordinarily be held to the position adopted on the plea and that this applies equally to Crown and offender appeals, as the above passage from *Romero* indicates. It is a necessary consequence of the supervisory function of this Court and the principles to which we have referred." (citations omitted)

[46] For these reasons, I would order that the appeal be dismissed.

[47] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the order proposed by his Honour.

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32 (1981) 28 SASR 362 at 367-368.
33 [1996] 2 VR 520 at 522.
34 (1999) 195 CLR 665 at 671.
35 [2011] VSCA 145 at para [76]-[77].

[48] **McMEEKIN J:** I have read the judgment of Muir JA in draft and agree with his reasons. I wish to say a few words about the penalty imposed by the learned sentencing judge.

[49] The case was a serious one. The aggravating features included the young age of the child the subject of the maintaining count, the length of the period over which the conduct extended, the digital rape count, the repeated nature of the conduct, the position of trust that the respondent abused, the corrupting effect on the child, and the filming, recording and preserving of images of four youngsters demonstrating deliberation and planning.

[50] The sentence imposed was plainly a lenient one in these circumstances, both in relation to the head sentence and the setting of the parole eligibility date. However there is no error shown and, as the reasons of Muir JA demonstrate, the sentence cannot be said to be outside the permissible range demonstrated by comparable sentences. In those circumstances the constraints imposed on this Court in relation to an appeal, particularly one by the Attorney-General,[36] and particularly one where the sentence largely reflects the submissions made by the prosecutors below,[37] prevent any intervention.

[51] My concern is to emphasise that this decision should not be seen as an endorsement of a sentence of six years imprisonment as the benchmark for offending conduct of this type. There was a deal of force in the submissions of the appellant that a longer sentence and, even more cogently, a longer non parole period, could have been justified. For myself I would wish to dispel any notion, a notion that presumably was held by the prosecutors who appeared in the court below, that a sentence of around five to six years imprisonment was all that they could properly advance.

[52] I agree with the orders proposed by Muir JA.

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[36] *Lacey v Attorney-General of Queensland* (2011) 85 ALJR 508; [2011] HCA 10 at [16]-[18] and [62]; *Griffiths v the Queen* (1977) 137 CLR 293 at 310 per Barwick CJ.

[37] *Director of Public Prosecutions (Cth) v Gregory* [2011] VSCA 145 at [73]-[77].