SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gippo* [2012] QCA 232
PARTIES:	**R** **v** **GIPPO, Tuim Teddy** (appellant)
FILE NO/S:	CA No 318 of 2011 DC No 68 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	31 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2012
JUDGES:	Margaret McMurdo P and Gotterson JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where appellant pleaded not guilty to three counts of raping his former girlfriend (counts 1, 2 and 4) and one count of depriving her of her liberty (count 5) – where appellant was convicted on counts 1, 2 and 4 and acquitted of count 5 after a jury trial – where evidence was led at trial relating to a domestic violence protection order against the appellant that required him to have no contact with the complainant – where evidence of domestic violence order conflicted with evidence of Family custody order – whether verdict was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where on counts 1 and 2, appellant was sentenced to four years imprisonment; and, on count 4 to six and a half years imprisonment with parole eligibility after three years – whether sentence was manifestly excessive

Criminal Code 1899 (Qld), s 668E(1)

COUNSEL: The appellant appeared on his own behalf
D L Meredith for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant pleaded not guilty on 18 October 2011 in the District Court at Cairns to two counts of raping his former girlfriend on 12 February 2009 (counts 1 and 2), one count of raping her on 22 March 2009 (count 4) and one count of unlawfully depriving her of her liberty (count 5). He was discharged on a count of burglary of her home by breaking (count 3). He was convicted after a two day jury trial on counts 1, 2 and 4 and acquitted on count 5. On counts 1 and 2 he was sentenced to four years imprisonment. On count 4, he was sentenced to six and a half years imprisonment with an order that the date he be eligible for parole be fixed at 20 October 2014, that is, after three years. He has appealed against his conviction and seeks leave to appeal against sentence.

[2] His grounds of appeal are:

> "1. The Crown relied on relationship evidence relating to a Domestic Violence Protection Order, the particulars of the conditions of which, namely that the Appellant have no contact with the Complainant, were not correct.
> 2. The Jury verdict was unsafe and unsatisfactory.
> As to sentence: -
> 1. Upon consideration of all of the circumstances, the sentence imposed was manifestly excessive."

[3] He is a Papua New Guinean national. He was legally represented at trial but is self-represented in this appeal. English is not his first language but he is well able to make himself understood in both oral and written English. He has provided lengthy type-written submissions and he made further lengthy submissions at the appeal hearing.

The evidence at trial

[4] Before discussing the grounds of appeal, it is necessary to review the evidence at trial. The complainant, a 27 year old woman at trial, had known the appellant since 2007. They had a sexual relationship and, although they did not live together, they had two children, S, born in 2008, and E, born in 2009. She described their relationship as one in which the appellant was aggressive, violent and controlling. She determined to end it and applied for a domestic violence order in late October 2008.

[5] On 19 December 2008, he tried to enter her house and argued with her about a Christmas payment she had received from Centrelink. She kept telling him to leave. Only when she threatened to call the police did he "take off". She reported this incident to police.

[6] On 12 February 2009, seven days after the birth of E, the appellant came to her home. E was crying. The appellant followed her when she went to her bedroom to feed and change E. He put E in her cot, shut the door, undressed, walked towards the complainant with his penis erect and put her on the bed. He said that this is what she got for teasing him. He got on the bed, placed his hand on her head and pushed his penis into her mouth, moving it in and out. She was crying but she could not say much because she was choking. She wanted him to stop and was struggling and trying to get away (count 1).

[7] When the appellant removed his penis, he sat astride her waist and began to masturbate. She covered her face with a pillow. He removed the pillow and put fingers from one hand in her mouth whilst masturbating with the other hand. He again put his penis in her mouth and this time ejaculated. She was telling him to stop (count 2). She was angry and upset; she felt sick. He left but returned shortly afterwards with S. He said, "Oh, you fucking sook" and "took off".

[8] A couple of days later she told her case worker, Melanie Spencer, about the incident. Ms Spencer took her to the police station where she reported the matter. She also telephoned her sister-in-law who lived in Normanton and told her about it.

[9] On 19 February 2009, she went to court and obtained a temporary protection order under the *Domestic and Family Violence Protection Act* 1989 (Qld).

[10] On 19 March 2009, the appellant came to her home to take S to day care but she told him she did not want to wake S. A woman whom she did not know arrived in a car, beeped the horn and asked for the appellant. Whilst he went out to speak to this woman, the complainant phoned police. He returned, grabbed her phone and threw it on the grass. She picked it up and told him the police were coming. He left but returned about lunch time. He then repeatedly asked her to go to the bedroom as he wanted sex. She reluctantly agreed as she thought it was the only way to get him to leave. (The prosecution did not contend that this was an episode of non-consensual sexual intercourse.)

[11] He next came to her home three days later on 22 March 2009. She was watching television in the lounge room with her brother and sister-in-law who were visiting from Normanton. He walked through the lounge room to her bedroom and grabbed E. He wanted to stay for three nights as this was convenient for his work. She did not want him to stay and they argued. She told him to leave. She thought he had left and went into her bedroom where she found the appellant, going through details on her mobile phone. He questioned her about its contents. She kept telling him to leave. He told her she was "angry all the time because [she] want[ed] to fuck all the time". He told her to take off her pants and shut and locked the door and removed his clothing. He took his penis out and told her to give him a head job. She said she did not want to. He said he did not "want to go through this fucking shit again". He held her down on the bed, "sort of like flipped [her] over the bed" so she was lying on her stomach and held her down whilst he was behind her. He removed her underwear, gripped her shoulder and put his penis inside her vagina. She was struggling and trying to wriggle off the bed. She told him to let her go but he persisted (count 4).

[12] Whilst she was looking for her underwear, he wiped himself on one of her shirts which he threw at her and told her to wipe herself. She put her underwear back on.

She told him she wanted to leave the room "but … he sort of just held" her. They were both lying down on the bed. He held her back down on the bed with his leg wrapped around her waist. She said she wanted her phone to call the police. He said, "Yeah, go on, see what happens." After a while he rolled off and she went outside to the front of the house where she smoked a cigarette. The TV was on in the lounge room. She heard E cry and walked back inside. The appellant asked her where she had been and told her that E was crying. She was really scared of him because of what had happened previously. She picked up E and fed her. She and the appellant went to sleep together on the bed. She was too scared to leave the room (count 5).

[13] The next morning after he left for work she told her brother and sister-in-law that the appellant raped her. He returned the following night and they argued. He took S and E for a drive and she called the police. He said if she complained to the police he would tell them that they "fuck all the time and … have two children together and no-one's going to believe a simple nutcase like [her]." The police arrived and she told them what had happened.

[14] In cross-examination, she denied that she drank alcohol during the period of her relationship with the appellant. She maintained that the appellant was aggressive, controlling and violent towards her. She denied that after their separation in October 2008, he came to her house with food, nappies and supplies. When he visited, he did so uninvited. She agreed that she had consensual sex with him in her bedroom on 19 March 2009 as well as once or twice in January 2009 and once in February 2009. She agreed that part of the reason for their separation was the appellant's relationship with another girl who was pregnant to him.

[15] When the incidents on 12 February occurred, her four school age children would have been at school. The younger ones may have been home; she could not remember. S was away with members of her family. She thought that only E was home. She denied her bedroom door had a faulty lock. She maintained that all the alleged offences occurred as she explained in her evidence-in-chief. She agreed that when counts 1 and 2 occurred the appellant was working in the Army Reserve and wearing his uniform. Her house was around the corner from the army barracks.

[16] On 16 February 2009, she spoke to police about obtaining a domestic violence order and described the incidents of 12 February 2009 (counts 1 and 2). She conceded that she told police that two of her children aged three and four were present watching TV in lounge room at the time of these incidents.

[17] The appellant obtained a Family Court order after which S lived with the appellant most of the time. S visited her once or twice a month but not as often as she wanted. She denied that she was happy to have the appellant at her home on 19 March 2009.

[18] When the incident on 22 March 2009 occurred (count 4), her brother and sister-in-law had been living with her for a few days. Her house was a large four-bedroom house. The appellant was accusing her of sleeping with other men. She did not accuse him of anything but she was angry and wanted him to leave. He pushed her onto the bed. She was struggling with him and kicking him. Afterwards he fell asleep and she went outside for a cigarette. Her brother and sister-in-law were in the lounge room and the television was on but she made no complaint of rape to

them. Her house was in a suburban area. She returned inside to feed E. The appellant then kept her in the bed throughout the night whilst they slept. She was fearful and could not escape. She could not telephone the police because he had her phone. If her brother and sister-in-law had a phone, she would have told them immediately about the appellant's conduct. She feared that if she went to her neighbours after she smoked her cigarette he would "bash the fuck out of [her]", adding: "Well, who knows, he could have been standing in the dark." She agreed, however, that at this time she thought he was asleep in the bedroom.

[19] The appellant did not often stay overnight in February-March 2009 because of the domestic violence order. He took primary custody of S at about the time their relationship ended in October 2008 and the Department of Child Safety spoke to her about S. On 9 March 2009 the Family Court gave the appellant principal custody of S. She denied making false allegations because she was frustrated about losing custody of S. She maintained her account was true.

[20] The complainant's son, F, gave evidence under s 93A *Evidence Act* 1977 (Qld). His video recorded interview with police on Sunday, 27 March 2009 (when he was 10 years old), was tendered and played. He remembered an incident when he and his siblings were watching TV with her uncle and auntie. The appellant came to the screen door. He entered the house through the garage. He wanted to sleep at the house until Monday. F's mother told the appellant that she did not want him in the house. They argued. He swore at his mother and followed her inside her bedroom. They continued to "growl [fight] in there". He and his siblings did not like the appellant. His mother's bedroom door was locked; the appellant said to her: "Lock the door, you ain't going outside." His auntie and uncle were not at home. The appellant and his mother continued to "growl" and then they stopped and the appellant was nice. She told him she did not want him in the house and he left. They argued over the appellant taking S. He told his mother that if she did not let him take S he would break her neck.

[21] F gave prerecorded evidence on 24 August 2011 by which time he was 11 years old. He confirmed that what he told police in 2009 was true. In cross-examination, he said he remembered that the appellant often visited F's home wearing his army uniform. F confirmed that he saw the appellant and his mother arguing in his mother's room. He agreed that the appellant would bring items like milk, bread, and nappies to the house and would spend a lot of time in his mother's bedroom. He agreed that he was more interested in the computer games he was playing than in the argument between his mother and the appellant. He agreed that it was not possible to lock his mother's bedroom door. He thought his aunt and uncle were at home watching TV that evening. His mother told the appellant to leave and he did. He thought the appellant had taken his mother's phone because she could not find it to call the police after their argument. He did not like the appellant in the house; sometimes he bossed him around. He knew that the appellant and his mother had gone to court over S and that as a result S lived with the appellant for a time. He added that this was when the appellant told a lie about his mother.

[22] The complainant's son, D, also gave evidence under s 93A *Evidence Act*. His video-recorded interview with police, also on 27 March 2009 (when he was eight years old), was tendered and played. The other Sunday his mother and the appellant had a fight. His mother swore at the appellant and threw a saucepan which hit him on the forehead. He and his siblings were playing internet games in his mother's bedroom

when the appellant came in and told them to turn off the game and go to sleep. His uncle, auntie and all his brothers and sisters were home. The appellant was swearing at his mother at the table near the kitchen. They "growled" for about ten minutes. The appellant left and they returned to play games in their mother's bedroom.

[23] D also gave pre-recorded evidence on 24 August 2011. He remembered speaking to police in March 2009 and he told them the truth. In cross-examination, he agreed that at one time the appellant often came to the house in his army uniform. He remembered the appellant and his mother having an argument in the kitchen at about lunchtime. The appellant did not bring bread, milk or nappies to the house. His auntie and uncle were home watching football on TV. The appellant would spend a lot of time in his mother's bedroom. He did not see his mother throw the saucepan at the appellant but his mother told him about this. His mother's bedroom door could not be locked. He did not hear any arguing that night. His mother told him about the argument. She also told him about a court case concerning the appellant and S.

[24] The complainant's son, W, also gave evidence under s 93A *Evidence Act*. His video-recorded interview with police, conducted when he was seven years old, was tendered and played. He was asked what happened to his Mum the other weekend. He said that she and the appellant got into a fight and then the appellant went away. The appellant came in the morning and was at the house a long time. The appellant did not like the complainant and said he was going to kill her. W thought this happened on another occasion a long time ago.

[25] W, too, gave prerecorded evidence on 24 August 2011 by which time he was nine. He confirmed that what he told the police officers in March 2009 was true. He remembered that the appellant sometimes came to the house in army uniform and that his mother told the appellant to go away, but he was not sure. He heard an argument in the kitchen but he did not hear what it was about. He probably heard something smash on the kitchen floor but he was not sure. His uncle and aunt were not home that night. He thought the appellant probably came over after lunch. When the cross-examiner stated that he told the police the appellant came over in the morning, he agreed. The appellant often visited the house to collect and drop off S. He sometimes brought bread, milk and nappies. His mother told him that the appellant said he was going to kill her with a knife and about a court case involving the appellant, S and her.

[26] The complainant's 26 year old brother gave evidence that on 22 March 2009 he and his girlfriend were staying at the complainant's house. Whilst they were watching TV in the lounge room, the appellant walked straight through into the complainant's bedroom and grabbed E. The complainant followed him, and told him to give E back and to leave. She repeated this a couple of times. She took E into the lounge room. The appellant and complainant went out for a walk. She returned but by this time his girlfriend was asleep and he was dozing off. The complainant went into her room and that was the last he saw of her that evening. He saw the appellant the next morning in the driveway. In cross-examination, he agreed that the complainant and appellant were in the bedroom at some stage. He heard them arguing in the kitchen he but kept watching TV and did not get involved. He heard the door slam. He went to bed about 11.30 pm.

[27] The complainant's de facto sister-in-law gave the following evidence. On 16 February 2009 she was in Normanton when the complainant telephoned. She said she had just returned from the police station. She was crying and needed to talk to somebody. She said that she was feeding E when the appellant arrived, walked into her bedroom, took E from her and put her in the cot. He locked the bedroom door, took his clothes off and masturbated. He then threw her on the bed and put his penis in her mouth.

[28] On 22 March 2009, she was at the complainant's house watching TV. She heard the appellant yelling out at the front. He walked through the garage door and went straight to the complainant's room, took E and walked outside. The complainant told him he should not be at the house and that he had to go or she would ring the police. The appellant and the complainant went outside and had a bit of an argument. She was telling him to leave or she would ring the police. They walked back inside to the kitchen. The complainant went outside and the appellant followed her. They came back inside again and went to the bedroom. She heard nothing more and went to bed. The next morning the complainant looked upset. She and the complainant went outside and had a cigarette. The complainant asked her if she had heard anything last night. She responded, "No". The complainant said, "He actually done it again." The sister-in-law asked, "What?" The complainant responded, "Raped me again."

[29] Ms Melanie Spencer gave evidence that she had known the complainant since about 2007 when she became her case worker at a women's centre. On 16 February 2009, she telephoned the complainant who said that the appellant had been over on the weekend and something had happened about which she was unhappy. Ms Spencer asked whether she wished to speak to the police and arranged to take her later that day. On the way to the station, the complainant said that the appellant had come over when some of the children were at school or day care and she was home with E. Some of her children may have been at home. He came to spend time with E. She went into the bedroom to change E's nappy and he followed, closed the door and made her have oral sex. She tried to stop it by burying her head in pillows. She said he ejaculated and this particularly disgusted her.

[30] The appellant gave evidence. He was a 47 year old man at trial, born in Papua New Guinea. English was his second language. He began a sexual relationship with the complainant in 2007. They did not live together but visited each other. Their relationship ended on 13 October 2008. It produced two children, S and E. On 13 October 2008, he made a complaint to the Department of Child Safety and attempted to get custody of S.

[31] In December 2008, they had an argument over a lump sum payment for the children. Early in 2009, he drove the complainant to the Family Court for a hearing concerning the custody of S. As a result of the court hearing, he had principal custody of S.

[32] On 12 February 2009, he went to pick S up from the complainant's place to take him to day care. He brought bread, milk and cigarettes. Some of the complainant's children told him he could come inside. He saw the complainant's brother and sister-in-law. He left and went to work but returned in his lunch break with cigarettes and chips. The complainant went outside to have a smoke. She came back into her bedroom where the appellant was spending time with E. She asked to

give him a "headjob". They "had sex by consent. She was happy and [he] was happy." By sex, he meant that she sucked his penis. She told him to stop and gave him a shirt from a drawer which she called a "come rag". She told him not to ring her that morning because she was going to town to change E's birth certificate to his surname. The following day he saw the complainant again when he dropped in with more milk and nappies on his way to work.

[33] In March, he remembered an occasion when he was at the complainant's house to pick up S to take him to day care when a woman who knew him pulled over in her car and he was talking to her. The complainant was screaming about why the woman was at the premises. He left for work. The next day he again visited the complainant's house to pick up S and take him to day care. The complainant, her children, her brother and his girlfriend were present. He could not recall the time. He did not argue with the complainant.

[34] On 22 March, they had penile vaginal sex in her bedroom by consent. He was in the bedroom for between 20 to 50 minutes. The lock on the door was broken and could only be secured by putting a chair against it.

[35] He left for Townsville on 24 March to return to his base in Cairns. He only became aware the complainant had alleged that he had oral sex with her without her consent when he came to pick up S on 1 April and he was arrested. He did not recall that the complainant screamed and he left.

[36] During cross-examination, he agreed he was served with a domestic violence protection order after the incidents on 12 February but to the best of his recollection it did not allege that he had forced the complainant to have oral sex. He maintained that the first time he became aware of that allegation was on 1 April 2010. He denied forcing her to have oral sex on 12 February and maintained that this was consensual.

[37] On 22 March 2009, they did not argue when he was at the complainant's house. He always left whenever she told him because of the domestic violence order. He agreed that he had wanted to stay over at her place because of its convenience to his work but he did not stay because she did not want this. He maintained that they had consensual sex that day. He could not remember the exact words that passed between them.

[38] In re-examination, he stated that he knew the domestic violence order required that he have no contact with the appellant and that he should not go to her place. There was, however, a Family Court order which allowed him to drop off and pick up S at the complainant's place.

The appellant's contentions

[39] Essentially, the appellant contended in his lengthy written and oral submissions that the jury should have rejected the complainant's evidence and accepted his evidence, or at least have had a reasonable doubt about the reliability of the complainant's evidence. Many of his submissions were based on assertions of facts which were not supported by the evidence at trial. He attacked the character of the complainant in ways which were generally not supported by the evidence at trial. He emphasised his own good character about which there was also no evidence at the trial. He also emphasized his efforts to care for E and S. He submitted the

complainant had made false allegations because she wanted to regain custody of S and was angry with him for getting a custody order in his favour in the Family Court. She had set him up. He quoted from the Bible and emphasised that he was a Christian man who tried to lead a good life. He had forgiven the complainant for her false allegations but the Bible told him he must bring this appeal. He worked hard, did not drink alcohol and looked after and loved his children.

Ground 1 in the appeal against conviction

[40] This ground seems to turn on the fact that the complainant had taken out a domestic violence protection order against the appellant after counts 1 and 2 occurred and that this order required that the appellant have no contact with the complainant. At the same time, he was subject to an order of the Family Court allowing him to attend at the complainant's house for the purposes of picking up or dropping off S.

[41] Evidence concerning the domestic violence protection order was relevant and admissible. It concerned the nature of their relationship at the time of the charged offences and was also an essential part of the relevant factual matrix. No doubt that is why defence counsel did not object to the evidence being led about it. Importantly, the trial judge gave clear directions to the jury not to misuse the evidence of the appellant's violence towards the complainant as propensity evidence.[1] The appellant agreed in evidence that he knew the domestic violence order required him to have no contact with the complainant. He also made clear that he left her house whenever she asked him, or at least when she threatened to call the police. Both the appellant and the complainant gave undisputed evidence that a Family Court order gave principal custody of S to the appellant. At least inferentially, this meant that he would attend the complainant's home to pick up or drop off S from time to time. It must have been crystal clear to the jury that whilst the domestic violence protection order required that the appellant have no contact with the complainant, it was in opposition to the Family Court order which allowed him to attend her house in connection with S with her permission.

[42] The appellant has not demonstrated that the admission of this evidence amounts to an error of law or a miscarriage of justice in terms of s 668E(1) *Criminal Code*. This ground of appeal is not made out.

Ground 2 in the appeal against conviction

[43] The appellant contends that the jury verdict was unsafe and unsatisfactory, that is, that it should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence: s 668E(1) *Criminal Code* 1899 (Qld).

[44] The jury verdicts can only be sustained if the jury were entitled to accept the complainant's evidence as to the elements of the three counts on which they convicted beyond reasonable doubt. The appellant admitted having oral sex in February and sexual intercourse in March with the complainant. The complainant and the appellant gave contradictory evidence as to the controversial element of consent on all three counts.

[45] It is true that the complainant agreed she had consensual sexual intercourse with the appellant on occasions after their relationship had finished, including in February 2009. But the judge gave careful and unimpugned directions to the jury about mistake of fact (s 24 *Criminal Code*).

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1 Transcript 2-29 – 2-30.

[46] It is also true that the complainant had a motive to bring false allegations against the appellant as they were in dispute over the custody of S. There were some inconsistencies in her evidence internally and inconsistencies when her evidence was compared to that of others. But these questions, together with consent and mistake of fact, were well ventilated by defence counsel in his closing address at the trial and in the judge's directions. The resolution of these issues was a matter for the jury.

[47] None of these matters, either alone or in combination, required the jury to accept the appellant's evidence or to have a doubt about the reliability of the complainant's evidence. The judge directed the jury that the crucial issues in the case turned on the complainant's evidence as to what happened in the bedroom on each occasion and that there was no other evidence which confirmed her version. The standard of proof was the high standard of proof beyond reasonable doubt and the jury must scrutinise her evidence carefully before they could be satisfied of the appellant's guilt beyond reasonable doubt. If not so satisfied, they must acquit.

[48] Despite these careful warnings, the jury were entitled to reject the appellant's evidence. The complainant's evidence received some modest support from the evidence of others at her home when the various events seem to have occurred to the effect that the appellant and the complainant were arguing. The jury may have perceived that this made it less probable that she would freely consent to sexual relations with him. Her credibility also received some support from the manner and form of her complaints about counts 1 and 2 to her case worker and counts 1, 2 and 4 to her sister-in-law. They jury were entitled to accept her evidence on counts 1, 2 and 4 beyond reasonable doubt and to convict him on those counts.

[49] The appellant has not contended that the guilty verdicts are inconsistent with the not guilty verdict on count 5. But, in any case, the complainant's evidence as to count 5 (deprivation of liberty) was weak. There was evidence from some witnesses that, contrary to the complainant's evidence, there was no lock on her bedroom door. On the complainant's own evidence, she left the bedroom and went outside for a cigarette, alone. She did not enlist the assistance of her brother or sister-in-law who were home at the time. The house was in a suburban area so that she had the opportunity to get assistance from neighbours whilst the appellant was asleep. She made no complaint the next morning to her sister-in-law of any deprivation of liberty when she said she was raped. By contrast, the complainant remained unshaken as to her contention that she did not consent when counts 1, 2 and 4 occurred and complained to Ms Spencer and her sister-in-law about counts 1 and 2, and to her sister-in-law about count 4. The not guilty verdict on count 5 is logically reconcilable with the guilty verdicts on counts 1, 2 and 4.

[50] After reviewing the whole of the evidence, I am satisfied it was well open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty on each of counts 1, 2 and 4.

The application for leave to appeal against sentence

[51] The appellant contends the sentence of six and a half years imprisonment with parole eligibility after three years was manifestly excessive.

[52] He was aged between 44 and 45 at the time of the offences and 47 at sentence. He had a concerning criminal history between 1992 and 2009, including some for

violence. Most relevant was a conviction for attempted rape in 1992 when he was sentenced to two years imprisonment. He had also twice previously breached other domestic violence protection orders. He did not have the mitigating circumstance of a plea of guilty or cooperation with the authorities. He spent 163 days in presentence custody which could not be the subject of a declaration as time served under the sentence.

[53] The complainant's victim impact statement reported that the offences have had a detrimental psychological effect and she was receiving intermittent counselling.

[54] The prosecutor submitted that a sentence of seven years imprisonment was appropriate, relying on *R v Pickup*;[2] *R v Edwards*[3] and *R v Taiters*.[4]

[55] Defence counsel at sentence made the following submissions. The appellant was born in a traditional village in central Papua New Guinea. He came from a close family of five brothers and four sisters. His father was a doctor. He could not remember when he left school, but he was between 13 and 16 years old. He continued his education in a vocational centre in Kiunga, near the Indonesian border. A man whom he knew as Mr Taylor arranged for him to come to Australia to work. He was sexually abused. He returned to New Guinea and worked building roads for two years. He married an Australian woman and returned to Australia under a spousal visa when he was about 22 years old. He renewed his contact with Mr Taylor. He went to TAFE, obtained skills and gained employment as a tyre fitter and inspector. In 1996 he joined the Army Reserve where he reached the rank of corporal and received an award. An excellent reference from his commanding officer was tendered which referred to his hard work and ability. He was presently in a relationship with a woman with whom he had been intermittently involved for about 10 years.

[56] His counsel tendered a statement from Relationships Australia setting out his contact with S and E between January and April 2011 and a Certificate of Attendance in a parenting course dated June 2010. Counsel emphasised the absence of any physical violence in the offending. The cases relied on by the prosecution suggested the range was between six and six and a half years imprisonment. A suspension date[5] rather than eligibility for parole date would provide him with more certainty. The head sentence should be lowered to take into account his presentence custody which could not be declared as part of his sentence.

[57] The primary judge in his reasons for sentence set out the circumstances of the offending and its effect on the victim. His Honour also referred to the appellant's personal circumstances including his highly regarded work for the Army Reserve. His criminal history, including the 1992 offence for attempted rape, was concerning although there had been no serious offending in recent years. The judge determined to take into account the time spent in presentence custody which could not be declared as part of the offence both in the head sentence and by fixing a parole eligibility date a little earlier than otherwise, given that the matter went to trial. The cases referred to by the prosecution were a little more serious than the facts of the

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2 [2008] QCA 350.
3 [1997] QCA 472.
4 [2001] QCA 324.
5 Defence counsel did not apparently appreciate that a suspended sentence could only be imposed if the head sentence was no more than five years: see *Penalties and Sentences Act* 1992 (Qld), s 144(1).

present case but they generally supported the head sentence contended for by the prosecution. Relevant sentencing principles were rehabilitation and personal and general deterrence.

Conclusion on the sentence application

[58] The appellant did not cooperate with the authorities, show remorse or insight into his conduct or have the mitigating benefit of a timely guilty plea. His submissions to this Court confirmed his lack of remorse and his limited insight into the offending. He was a mature man with some relevant criminal history, including minor offences of violence and two breaches of a domestic violence order. He also had a prior conviction for attempted rape, albeit 30 years ago. The primary judge gave proper recognition to the lengthy time spent in custody which could not be declared as time served under the sentence by reducing both the head sentence and setting a parole eligibility date six months earlier than normal.

[59] It is true the comparable cases relied on by the prosecutor below and the respondent in this appeal were somewhat more serious than this. A slightly more lenient sentence than that given here could have been imposed to reflect the appellant's impressive service with the Army Reserve, the high regard in which he was held by his commanding officer, his solid work history and his committed parenting. But the offending was serious and persistent and has had significant detrimental consequences for the complainant. In all the circumstances, a head sentence in the range of six to seven years imprisonment was appropriate with a reduction to five and a half to six and a half years imprisonment to reflect the presentence custody. The undeclarable pre-sentence custody also required the parole eligibility date to be set six months earlier than the statutory half way point. It follows that the sentence imposed is within the appropriate range.

[60] The application for leave to appeal against sentence must be refused.

ORDER:

1. The appeal against conviction is dismissed.

2. The application for leave to appeal against sentence is refused.

[61] **GOTTERSON JA**: I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.

[62] **DOUGLAS J:** I agree with the President’s reasons and the orders proposed by her Honour.