SUPREME COURT OF QUEENSLAND

CITATION:	*R v Williams; Ex parte Attorney-General (Qld)* [2014] QCA 346
PARTIES:	**R** **v** **WILLIAMS, Richard Quincy** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 90 of 2014 DC No 464 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2014
JUDGES:	Holmes JA and McMeekin and Henry JJ Separate reasons for judgment of each member of the Court, McMeekin and Henry JJ concurring as to the orders made, Holmes JA dissenting
ORDERS:	**1. The sentence imposed below be set aside.** **2. The respondent be sentenced to imprisonment for eight years**.
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent pleaded guilty to assault with intent to commit rape, deprivation of liberty and rape – where the respondent was sentenced to eight years imprisonment with eligibility for parole after three years – where the respondent committed the offences against the complainant in a public place when she was on an evening training run – where the appellant contends that the sentence was plainly unreasonable and unjust – where the appellant appeals the sentence on the basis that the sentencing judge should have declared this a serious violent offence under s 161B(3) of the *Penalties and Sentences Act* 2003 (Qld) – where the appellant contends the trial judge misapprehended an obligation to set a parole eligibility date and failed to give sufficient weight to

	the aggravated culpability of the respondent due to his self-intoxication at the time of the offence – where the appellant submits the parole eligibility date produced an exceptional result – whether the sentence was unjust or unreasonable – whether the sentence was manifestly inadequate
	Evidence Act 1977 (Qld), s 132C *Penalties and Sentences Act* 1992 (Qld), s 9(1)(e), s 9(2)(b)(i), s 9(3)(e), s 13(1), s 161B *Victims of Crime Assistance Act* 2009 (Qld), s 15
	Barbaro v The Queen; Zirilli v The Queen (2014) 88 ALJR 372; (2014) 305 ALR 323; [2014] HCA 2, applied *House v The King* (1936) 55 CLR 499; [1936] HCA 40, applied *Power v The Queen* (1974) 131 CLR 623; [1974] HCA 26, cited *R v Basic* (2000) 115 A Crim R 456; [2000] QCA 155, applied *R v Benjamin* (2012) 224 A Crim R 40; [2012] QCA 188, considered *R v Dowden* [2010] QCA 125, considered *R v GAR* [2014] QCA 30, applied *R v Harris* [1998] 4 VR 21, applied *R v Kahu* [2006] QCA 413, considered *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365, applied *R v O'Brien* [1998] QCA 80, considered *R v Purcell* [2010] QCA 285, considered *R v Shrestha* (1991) 173 CLR 48; [1991] HCA 26, cited *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64, applied
COUNSEL:	A W Moynihan QC, with B J Power, for the appellant J R Hunter QC for the respondent
SOLICITORS:	Director of Public Prosecutions (Queensland) for the appellant Moloney MacCallum Lawyers for the respondent

[1] **HOLMES JA:** I have had the advantage of reading the judgment of McMeekin J in draft. I gratefully adopt his Honour's account of the facts, although I consider it should be added for completeness that after the initial threat of violence the respondent assured the complainant a number of times that he would let her go and would not hurt her; recognising of course, that the circumstances would have made those assurances of little comfort to the complainant.

[2] I agree with McMeekin J's reasons for concluding that the case was not one for a declaration of a serious violent offence and with his rejection of the proposition that the sentencing judge was under some misapprehension as to a requirement to fix a parole eligibility date. However, I do not, with respect, concur with his Honour's view that the trial judge's decision to set an eligibility date for parole after three years produced such an exceptional result as to make the sentence unjust or unreasonable.

[3] McMeekin J has concluded that the sentence of eight years was justified, on the premise that it should be regarded as taking the mitigating features into account. In

that context he has referred to cases suggesting a range for offending the kind involved here of seven to ten years imprisonment. I would concur that the eight year sentence was appropriate, without the qualification as to mitigating features. As to the context of other comparable cases, I would sound a note of caution in respect of Keane JA's observation in *R v Kahu*[1] (which McMeekin J has set out more fully), to the effect that McMurdo P's review of the authorities in *R v Basic*[2] demonstrates a range of sentencing:

> "for the rape of a young woman alone in a public place where there has not been a brutal bashing of the victim, and where the offender had no like prior convictions…between seven and 10 years where the offender has pleaded guilty."[3]

[4] As a reflection of the three cases considered in *Basic* where sentences in that range were imposed – *George*,[4] *Sorby*[5] and *Q*[6] – the comment is something of an over-simplification. *George* in fact involved what would usually be considered a brutal bashing: the complainant was violently raped and sodomised, struck with a rock, hit in the head with a fist and had her shoulder dislocated. The appellant in *Sorby* may not have brutally bashed his victim, although he violently constrained her, sodomised her and left her in a condition requiring hospitalization; but he did not plead guilty. He was:

> "convicted after a trial in which he showed no remorse, staring intently at the complainant during her vigorous cross-examination."[7]

[5] The third case in the seven to ten year sentence group, *Q*, better fits the description in *Kahu* (although it did not occur in a public place): it did not entail a bashing (the victim was instead raped at gunpoint) and the offender pleaded guilty. *Q* and a fourth case outside that group which her Honour also cited, *O'Brien*,[8] are worth mentioning because both entailed the addition on appeal of a recommendation for earlier eligibility for parole, the aspect of the sentence essentially at issue here. While McMeekin J is correct to say that none of the cases cited in this Court involved a parole eligibility period as short as three years, the relevant non-parole periods in *Q* (three and a half years) and *O'Brien* (four years) are not so dissimilar.

[6] The applicant in *Q*, after a rift with his fiancée, assaulted her sister, a seventeen year old virgin, as a form of revenge. Having broken into her home, he took her by surprise on her arrival home from school. He threatened to shoot her with a loaded rifle (having already shot the family cat), tied her up, raped her and twice forced her to perform oral sex on him. He was sentenced to nine years imprisonment. On appeal, in light of his relative youth (he was 23), lack of relevant convictions and good prospects of rehabilitation, a parole recommendation after three and a half years was added.

[7] The applicant in *O'Brien* was sentenced to 11 years imprisonment, but his offences involved a significant degree of violence and he had a relevant previous conviction;

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1 [2006] QCA 413.
2 (2000) 115 A Crim R 456.
3 *Kahu* at [41].
4 Unreported, Court of Appeal, Qld, CA No 226 of 1991, 13 June 1991; *Sorbey* [1995] QCA 251.
5 [1995] QCA 251.
6 [1994] QCA 390.
7 *Basic* at 459.
8 [1998] QCA 80.

he had a prior criminal history for indecent assault, as well as for offences of theft and burglary. The indecent assault occurred when he broke into a house and assaulted a woman in her bed, sucking her breast and digitally penetrating her. The offences resulting in his application for leave to appeal commenced when he attacked a woman walking in a park. He took hold of her arms from behind and forced her first to a toilet block and then to an area of bushland. He bashed her head against the ground "a few times" and punched her in the head a number of times. Then he frog-marched her down a gully and through a stream before pushing her to the ground, squeezing her nipple hard and digitally penetrating her vagina. He forced her to walk a further distance before pushing her to the ground face-down and raping her. She told him, accurately, she was pregnant, but he continued his assault, making a further unsuccessful attempt to penetrate her.

[8] As the applicant was leaving his victim, he told her that if she moved he would shoot her. He was immediately apprehended, however, because a member of the public had seen the initial attack and called the police. The consequences for the victim were considerable; they included her having an abortion as the result of feeling, because of the rape's effect on her, that she could not cope with a child. This Court held that the head sentence of 11 years was within the range of sentences which could properly be imposed, but insufficient weight had been given to the applicant's plea of guilty, his remorse, his good work record and his prospects for rehabilitation. The head sentence was not interfered with, but a recommendation that the applicant be considered for parole after four years was added.

[9] The sentence in *Kahu* itself, which was described as consistent with the analysis of sentencing in *Basic*,[9] was eight and a half years. The appellant in that case had attacked a fifteen year old stranger, raping her vaginally and anally before forcing his penis into her mouth and ultimately ejaculating into her mouth. He went to trial three times, juries twice being unable to reach a verdict in relation to two of the charges, and cross-examined the complainant about her supposed consensual activity with him. I do not think the present sentence is disproportionate relative to that outcome.

[10] In any event, as the High Court has pointed out in *Barbaro v The Queen*,[10] other cases may establish a range of sentences which have been imposed, but they do not "mark the outer bounds of the permissible discretion". The history of other cases is no more than "a yardstick against which to examine a proposed sentence."[11]

[11] Insofar as *Dowden*[12] may be regarded as something of a yardstick, I disagree with respect, with McMeekin J's view that it displays such a discrepancy with the sentence in the present case as to indicate error. Some features of *Dowden*, it is true, were not as serious as some in the present case; but there were other features which were worse. *Dowden* told his victim that he had a knife and held something against her temple; her perception was that he had held a knife to her head. *Dowden* was younger, but he had already served a term of imprisonment for property offences and in the intervening decade before he was charged with, and extradited for, the rape, he had served another substantial sentence for property offences.

[12] In *Dowden*, the threat of a weapon produced the victim's compliance. In the present case, the threat of harm had the same result. I am not sure that there is much to be

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9 Per McKenzie J at [52].
10 [2014] HCA 2.
11 At [41].
12 [2010] QCA 125.

gained by comparing victim impacts of two horrific crimes; plainly both women underwent a terrifying experience with lasting effects in each case. What was significantly different in the present case was that the respondent, when arrested, immediately acknowledged his guilt and made it clear he would do nothing to challenge the complainant's version of events. The victim in *Dowden*, on the other hand, not only lived with the fear which she described of being found and harmed by the appellant but (like the complainant in Kahu) had to undergo the experience of being cross-examined at trial about her supposed consent to an act of casual sex with him as a stranger on the street, and the additional tension of awaiting the outcome of his appeal against conviction.

[13] The respondent here might have received a higher head sentence than that imposed in *Dowden*, but it does not follow that he must have; and his remorse and immediate indication that he would not defend the matter, together with the reasons for thinking that there were real prospects of rehabilitation, provided ample ground to warrant earlier eligibility for parole than the appellant in *Dowden*.

[14] I do not, with respect, think that the much longer period before eligibility for parole in *Benjamin*[13] aids in assessing the present sentence. *Benjamin* involved what was described as a "violent pre-meditated attack"[14] by an offender who had previously been imprisoned for offences including assault and breach of a domestic violence order. What McMeekin J describes as an anomaly is the inevitable result of a serious violent offence declaration, which requires service of 80 per cent of the sentence; the marked difference in parole eligibility exists between any two cases in one of which a declaration has been made and the other not. One might as well say that there is an anomaly between the sentences in *Dowden* and *Kahu* on the one hand and *Benjamin* on the other, because the offenders in *Dowden* and *Kahu* would have been eligible for parole around three years earlier than *Benjamin*. If there is an anomaly, it is the intended product of the different sentencing regime for serious violent offences. It does not follow that the custodial period before parole eligibility should be increased in other cases so as to reduce the relative onerousness of serious violent offence declarations.

[15] McMeekin J suggests that the sentencing judge was unduly optimistic as to the prospects of the respondent's rehabilitation. But the state of the respondent's relationship with his wife does not undercut either Dr Mann's opinion or the sentencing judge's view. Dr Mann factored in the likelihood that the respondent would have to seek support when suffering from relationship difficulties. Although there had certainly been significant difficulties in the marriage, the respondent and his wife were united at the time of sentence; and the respondent had not, over the three years since the offending, resorted again to the methylamphetamine use which had prefaced it.

[16] With respect, I do not think it really accurate to say that the setting of the eligibility date at three years amounts to a statement by the sentencing judge that the purposes of sentencing have been achieved after three years. Nor do I think the sentence is properly characterized as one which requires the respondent to serve only three years imprisonment. The eligibility date is no more than a recognition that after three years the respondent may be a suitable candidate for release into the community; whether he is will depend on his conduct to that point, on the review of the parole board. Nor does his ultimate release date necessarily mark the end of

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13 [2012] QCA 188.

14 At [84].

imprisonment; plainly any breach of parole renders him subject to return to custody over the eight years of the sentence. Finally, I have some difficulty with the notion that exceptional circumstances must be identified before offending conduct of the type here would result in a sentence entailing parole eligibility after three years. That seems to me a conclusion not warranted by statute or authority.

[17] The sentence imposed on the respondent was lenient, but it was imposed according to proper principles. The appellant has not shown that it was unreasonable or plainly unjust. I would dismiss the appeal.

[18] **McMEEKIN J:** The Attorney-General appeals a sentence of eight years imprisonment with eligibility for parole after three years, imposed in the District Court in April this year in respect of a count of rape, contending that it is manifestly inadequate.

[19] The respondent pleaded guilty to three counts arising out of the one incident that occurred on 23 May 2010 and involving the one complainant:

(a) Assault with intent to commit rape;
(b) Deprivation of liberty;
(c) Rape.

[20] Lesser concurrent sentences were imposed in respect of the first two counts.

[21] The familiar principles explained in *House v The King*[15] apply on this appeal,[16] the appellant emphasising this passage from *House*:

> "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[22] The Attorney-General contends that that second broad ground identified in *House* applies. The sentence imposed was, according to the appellant's submission, "plainly unreasonable and unjust." This was so, the appellant contends, because the sentencing judge fell into error in that her Honour:

(a) Failed to exercise the discretion to impose a Serious Violent Offence declaration under s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld);
(b) Found that she "must recommend a time for your release on parole because you have pleaded guilty and confessed to police…"; and
(c) Failed to give sufficient weight to the fact that the respondent's self induced methylamphetamine intoxication aggravated his culpability.

The Offence

[23] The complainant was a 20 year old marathon runner and tri-athlete out for her evening training run. While running along the shoulder of Gooding Drive at the Gold Coast the complainant was tackled by the respondent, a stranger to her, down an embankment into a grassy area described as bushland, and raped. The rape consisted of vaginal penetration by the respondent's penis. The incident occurred at 6.45 pm in a public area, a few hundred meters from a service station.

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15 (1936) 55 CLR 499 at 504-505.
16 See *Lacey v The Attorney-General of Queensland* (2011) 242 CLR 573 at [62].

[24] The incident involved the use of force over and above the rape itself. After the tackle the complainant was held tightly around the chest area and, as she screamed, a hand was placed across her mouth, and, after she bit her attacker's finger, her mouth and nose, affecting her ability to breathe. She feared she would pass out.

[25] There were then threats of physical harm: "Now if you don't be quiet I am going to start punching you in the face and if I punch you in the face things will get very bad for you and you will stay here."

[26] The complainant suffered injury. The list of injuries is extensive - there are some 28 discrete areas of injury - but the injuries consist principally of minor abrasions and "marks" to many areas of her body. That the physical injuries were relatively minor is so because, after initialling struggling, biting and screaming the complainant did as the respondent directed. She was in fear for her life.

[27] The sexual act was unprotected and the respondent ejaculated into the complainant's vagina. At the very least this makes plain that the attacker had not the slightest concern that from the victim's perspective there was the risk of exposure to both disease and pregnancy.

[28] During the ordeal the respondent called the complainant "darling" and "sweetheart". After the rape the respondent said to the complainant "tell me you love me" or perhaps "tell me you loved it." The complainant was unsure. The appellant rightly characterised this conduct as an added indignity.

[29] The most notable injury was one to the complainant's genital area described as an "8 mm diameter abrasion in the fossa navicularis which extended on to the posterior fourchette."

[30] As the victim impact statements show the effect on the complainant was not restricted to the physical injuries, painful though they undoubtedly were. She has lost confidence, employment, a relationship with her then partner who rejected her, and trust in others. Her life was profoundly affected. I will deal with that in greater detail below.

The Respondent

[31] The respondent was a 31 year old at the time of the offence and 35 years at sentence. His criminal history was not relevant - he had been convicted of two offences involving the unlawful use of a motor vehicle in one appearance before the Court in 2008 but no convictions were recorded. He had a good work record.

[32] Three years passed between the subject offending and arrest. In that time there had been no further offending, the respondent reported that he had ceased to use amphetamines, he had found religion, had married and a son had been born to that union.

The Explanation

[33] The explanation proffered by the respondent for his conduct was that he had been in a relationship for some three years which had ended the week before the offence was committed, that he was then a user of methylamphetamine and had been for some six months, that on the day of the offence he had consumed about three quarters of a 700 ml bottle of bourbon and smoked .2 of a gram of methylamphetamine causing him to feel a heightened sense of sexual awareness. The attack was not pre-mediated – he had seen the complainant jogging by as he drove along and decided to attack her.

The Apprehension of the Respondent

[34] The respondent was not apprehended for some years. His apprehension came about this way: the complainant made a prompt complaint to police officers in a passing vehicle once she had been released. A DNA sample was obtained. Some time later the respondent confessed to his wife he had raped a girl on the Gold Coast. The confession was made, according to the wife's version to the psychiatrist, when the respondent was "pretty drunk." When this occurred is not clear. The account given by the respondent to a psychiatrist was that this occurred six to twelve months before his arrest.

[35] Some time after that confession the wife rang the police. By then the respondent was living in Victoria. The police had their colleagues in Victoria execute a search warrant on the respondent's home and DNA was obtained which was matched to the sample taken after the attack. This occurred on the 6th September 2013. No confession was then made.

[36] After the DNA was matched the respondent was arrested and on the following day, 26th September, and with knowledge of the DNA match, participated in a record of interview. The respondent declined to have a solicitor present. Full admissions were made. Those admissions included a statement that he was remorseful and accepted 100 per cent responsibility for his actions.

The Psychiatric Report & References

[37] Various references and a psychiatric report were tendered by the respondent at sentence.

[38] The psychiatrist was of the opinion that the respondent had no major mental illness; that at the time of the offence he was "likely suffering from an alcohol and substance abuse disorder", dependent on both substances, and that "his judgement was significantly impaired by alcohol and amphetamine intoxication"; that he did not have a personality disorder; and presented a "low risk of sexual violence in the future."

[39] That opinion was premised on the history given which included a claim of complete absence from stimulant drugs since the day he committed the subject offence. It was also qualified as follows:

> "…if Mr Williams maintained stable relationships and sought help and support from those around him when he is suffering from relationship difficulties, and also abstains from alcohol and illicit substance abuse, then he would be at a significantly reduced risk of reoffending in the future."[17]

[40] The report included a reference to two statements by the respondent's wife. She had married the respondent in October 2010 and the son I have mentioned was born in May 2011. She reported that she had sought and obtained a domestic violence order against the respondent in May 2013 and at a time when he was consuming cannabis. She later retracted the significant allegations she had made that provided the basis for the order. Presumably the psychiatrist discounted the wife's statements that the respondent after confessing the rape to her said that he "feels he wants to do it again sometime", that he was "like obsessed…with raping and stuff like that".[18] So far as I can see those statements were not retracted by the wife, not denied by the respondent and not dealt with by the psychiatrist.

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17 AR 119/40

18 AR 113/50 – 114/3.

[41] The report recorded that in addition to telling his wife of this offending the respondent had also so informed his father (on the day of the attack), his mother, an uncle, and a priest. The latter urged him to hand himself in but he did not, he said, because of his family responsibilities.

[42] The references tendered were from the respondent's sister, wife, priest, friend and employer. They attest to the respondent's good character, his loving relationships with family members, good work ethic and sincere remorse. His wife wrote of the impact on their young family.

The Sentencing Remarks

[43] The matters that were expressly referred to by the learned sentencing judge were:

(a) the effect on the complainant and her family had been extreme;
(b) it was relevant that there had been no use of a weapon, no threat to kill or maim, and no aggravating feature of gratuitous cruelty or violence;
(c) the respondent had demonstrated remorse;
(d) that the respondent had done what he could to improve the complainant's position by not having a trial, albeit in the face of the DNA evidence;
(e) there were no prior convictions for any relevant offence;
(f) in the four years since the rape there had been no convictions for any offence;
(g) the psychiatric evidence to the effect that, provided the respondent avoided substance abuse, the risk to the community from him sexually re-offending was low;
(h) the respondent appeared to be a "suitable candidate for rehabilitation" given:
    (i) his various expressions of remorse;
    (ii) his confession to a number of people including his wife and priest of his offending conduct;
    (iii) his avoidance of drugs since the offence;
    (iv) his forming the relationship with his wife;
    (v) his going back to religion;
    (vi) his good behaviour in prison on remand over some seven months; and
    (vii) his then present intentions of resuming his relationship with his wife and son and re-establishing his career upon his release.

[44] The learned sentencing judge concluded that the case was properly characterised as one involving an attack on a vulnerable young woman in a public place but without any brutal bashing, a feature which distinguished the case from several discussed by counsel. Her Honour remarked that this case like "almost all rape cases" involved a "degree of actual violence and …the infliction of physical bodily harm with psychological after effects".

Was There an Error?

[45] Counsel for the respondent submitted that the sentencing judge's approach was "unremarkable." The head sentence imposed was within the range suggested by the cases cited to the judge, and the non parole period, set at four months over the one-third mark, reflected, as it had to, the plea of guilty and other mitigating features and appropriately so. So the submission went.

[46] I would agree that the approach was entirely conventional but I disagree with the notion implicit in the submission that the end result was "unremarkable". It was in fact quite exceptional.

[47] Counsel for the appellant referred the Court to *R v Basic*,[19] *R v Kahu*,[20] *R v Dowden*,[21] *R v Purcell*[22] and *R v Benjamin*.[23] Each case involved the rape of a stranger in a public place. The sentences were in the range of eight to ten years imprisonment. The head sentence of eight years selected by the sentencing judge was plainly within that range and cannot be criticised. But what was exceptional about the end result was the non parole period.

[48] In no case cited to us – and experienced counsel for the respondent said he had not found any such case – was there so short a period of actual imprisonment before the prisoner became eligible for parole where the offence involved a rape of a stranger in a public place. In *Basic*, *Dowden* and *Benjamin* the Court undertook extensive reviews of earlier cases going back over 20 years – 21 previous decisions in all – and in none of those was a period as short as three years adopted as the non parole period. Indeed the non parole period here was very substantially below any sentence for like offending in the cases drawn to our attention. That feature alone requires a close examination of the relevant circumstances to discern if it can be justified.

[49] The learned sentencing judge commenced her consideration from the view point that the appropriate range for offending conduct of this type was seven to ten years imprisonment. That is not controversial. There is certainly support for that approach in decisions of this Court. In *R v Kahu*[24] Keane JA observed:

> "In *R v Basic*,[25] McMurdo P, with whom McPherson JA and Mackenzie J agreed, reviewed the decisions of this Court relating to the range of sentences for the rape of a young woman alone in a public place where there has not been a brutal bashing of the victim, and where the offender had no like prior convictions. This review of the authorities demonstrated that the range is between seven and 10 years where the offender has pleaded guilty."

[50] That observation was cited with approval by Henry J in *R v Benjamin*.[26] McMurdo P and North J agreed. As Holmes JA pointed out in *R v Dowden*[27] that does not mean that a sentence under ten years is only justified where there has been no additional violence, over and above the rape itself, perpetrated on the victim. Several of the decisions reviewed in *Basic* and which resulted in the observation by Keane JA which I have quoted involved terms of imprisonment under ten years where there was considerable violence involved.

[51] I would add to the cases cited to us a reference to *R v GAR*[28] decided earlier this year where Muir JA also undertook an extensive review of sentencing decisions of this Court in cases involving the offence of rape. His Honour concluded, with the concurrence of Fraser and Morrison JJA:

> "The above analysis shows that sentences for rape do not tend to exceed 10 or 11 years unless accompanied by substantial violence. Where the violence is not substantial and there is a timely guilty plea,

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19 (2000) 115 A Crim R 456; [2000] QCA 155.
20 [2006] QCA 413.
21 [2010] QCA 125.
22 [2010] QCA 285.
23 (2012) 224 A Crim R 40; [2012] QCA 188.
24 [2006] QCA 413.
25 (2000) 115 A Crim R 456; [2000] QCA 155.
26 (2012) 224 A Crim R 40; [2012] QCA 188.
27 [2010] QCA 125 – Fryberg and Applegarth JJ agreeing.
28 [2014] QCA 30.

> a sentence of less than 10 years is the norm. No rule of thumb, of course, can be applied. The circumstances of each case must be addressed ...".[29]

[52] No complaint then can be made about the head sentence imposed of eight years. But what, I think, the respondent's submission glosses over is that the adoption of that head sentence can be justified only by accepting that it takes into account, to a degree, and whether recognised by the sentencing judge or not, the mitigating features personal to the respondent. I will endeavour to demonstrate that point in a moment. But I first observe that nothing said by the learned sentencing judge indicated any appreciation that the end result of the sentence imposed was to break new ground in terms of time actually served before becoming eligible for parole and what was said suggests that the judge did not appreciate the point I seek to make, namely that the head sentence itself brought into account mitigating features.

[53] After reviewing various relevant matters her Honour said: "I have come to [the] conclusion that the appropriate head sentence here is eight years and I must recommend a time for your release on parole because you have pleaded guilty and confessed to the police and it will be up to the parole board whether you have done the appropriate programs, etcetera, that you be eligible for release on parole after three years."

[54] The appellant argued that the remark made by the learned sentencing judge that she "must recommend a time for your release on parole because you have pleaded guilty and confessed to police…" connoted error because neither the plea nor the confession to the police had the effect that her Honour was obliged by law to fix a date when the respondent became eligible to apply for parole. Obviously if the learned sentencing judge thought that she was so obliged by those factors then there was a fundamental error.[30] But I do not think that her Honour intended that meaning.

[55] First, it would be surprising, to say the least, that so experienced a criminal lawyer could be under such a misapprehension. Nothing said by counsel in their submissions, or by her Honour to counsel, or by her Honour earlier in the sentencing remarks suggested any such misapprehension.

[56] Secondly, given that this was said in ex tempore remarks, some leeway must be allowed for slips of the tongue.

[57] However I think it is fair to say that the impression that the remarks give is that her Honour moved from a selection of eight years as a suitable head sentence automatically to a conclusion that something around the conventional one-third mark as the minimum non parole period was appropriate without pausing to consider the overall effect of her conclusion.

[58] The concern I have is that by adopting what might be thought to be the conventional approach the sentencing judge has in the end result given too much weight to mitigating factors and insufficient weight to the need to punish and deter, important factors in cases of this type.

[59] First I note that the head sentence selected was at the lower end of the range mentioned of seven to ten years and at the bottom of the range of cases cited in [47] above, cases which involved attacks on strangers in a public place.

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29 *Ibid* at [33].

30 See s 13(1) of the *Penalties and Sentences Act* 1992: the Court "**may** reduce the sentence that it would have imposed had the offender not pleaded guilty."

[60] Secondly, an examination of two of the cases referred to by counsel makes very clear that the overall effect of the sentence here was well out of the usual range. I select those two because one involves the most lenient sentence referred to us and the other a very similar set of facts.

[61] Of the cases mentioned the most lenient sentence imposed was in *Dowden* where this Court reduced the sentence imposed at first instance from nine years to eight and made no declaration as to parole eligibility. Thus Dowden must serve one year longer in actual custody than the respondent here before becoming eligible for parole – a thirty per cent difference.

[62] That there should be so large a discrepancy for roughly similar sorts of offending is surprising but particularly so when it is appreciated that the offending conduct in *Dowden* had features that were less serious than those here. The relevant features included there being no significant violence and no injuries to the victim save two scratches. Dowden told the victim that he had a knife although it was unclear whether that was so. It was assumed that the "weapon", whatever it may have been, was a "relatively harmless one". Hence there was an implicit threat of violence but no actual violence used, save of course for the act of rape itself. Like here the rape involved unprotected vaginal penetration by the offender's penis.

[63] There are three points of significance. First, here, the violence was much more marked and carried with it the potential for serious physical injury. That there was none was not due to any restraint on the part of the respondent. Crash tackling an unsuspecting person down an embankment into bushland might have resulted in significant injuries – it did in *Benjamin* where the facts were very similar. There was then the use of substantial restraining force by the respondent and a smothering of the face and nose, to the extent that the complaint could not breathe and became concerned that she might pass out – facts which would add to the terror of the attack. None of those features were present in *Dowden*.

[64] Secondly, here there was a threat of serious violence: "Now if you don't be quiet I am going to start punching you in the face and if I punch you in the face things will get very bad for you and you will stay here." That is a serious and aggravating feature. The only comment that the sentencing judge made in relation to that threat was that it did not amount to a threat "to kill or maim." The accuracy of that comment is, with respect, debateable. But to treat the threat as in some way not so serious is to indulge in semantics. It was an agreed fact that the complainant was terrified for her life. That was not some odd idiosyncratic reaction – in the context of the violence proffered the threat was a chilling one made by a person with the ability and apparent intent to cause significant injury.

[65] It was submitted, accurately enough, that the violence used fell towards the lower end of the scale for cases of this type but this was not because of the respondent's restraint, but rather it would seem because of the victim's terrified acquiescence. The threat made had its desired effect. There is no reason to assume in the respondent's favour that he did not mean what he said. Violence that was intended to be used but not used remains a relevant factor in the sentencing process: s 9(3)(e) of the *Penalties and Sentences Act* 1992 (Qld).

[66] Thirdly, the impact on the victim has been profound. I have only touched on those impacts above. Her statement summarises those impacts: "The loss of safety I experienced affected my sporting career, my university grades, my ability to perform all

necessary requirements in my part-time jobs, performing normal and essential acts of living such as park my car and walk into a supermarket, and places where I felt safe to socialize." Her partner rejected her and her employer dismissed her, the latter because of the victim's concerns for her own safety. She could no longer compete in her sport at national level as she had aspired to do.

[67] The Act specifically requires that the "physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under the *Victims of Crime Assistance Act 2009*, section 15" be brought into account: s 9(2)(b)(i) of the *Penalties and Sentences Act* 1992.

[68] In *Dowden* the short description of the impact on the victim[31] suggests a lesser impact there than here.

[69] Of course the sentencing process is an integrated one and personal circumstances of the prisoner are relevant. But some of those favoured Dowden. Dowden was young – aged only 19 years at the time of the offence – and, like the respondent here, had not previously committed any sexual offence. His youth was expressly mentioned as of significance in deciding on the appropriate sentence. In other words the sentence originally imposed of nine years might well have stood had he been older. The respondent here does not have that advantage – he was a mature man of 31 years. The impulsivity and immaturity of youth had nothing to do with his offending. Many of the personal circumstances were similar – Dowden was married with a young family, a user of methylamphetamine at the time of the offence but not, it seemed, at the time of sentence, but he remained a heavy drinker. He was a worker in the building industry.

[70] The only points that favour the respondent in any comparison with *Dowden* are the question of remorse and the finding by the sentencing judge here that there existed grounds for optimism with regard to his prospects of rehabilitation. In *Dowden*, the sentence followed a trial and an appeal against conviction and the offender had committed property offences both before and after the rape which had resulted in terms of imprisonment. In those circumstances there was no basis for thinking that the offender was a good candidate for rehabilitation and it was expressly noted that there was a complete absence of remorse or co-operation.

[71] Nonetheless if eight years imprisonment was appropriate in *Dowden* then a longer sentence here was not only open but mandated by the objectively more serious features. It is quite apparent that but for his youth Dowden would have received a longer sentence. Contrary to the implicit assumption underlying the respondent's submission the only basis on which a sentence limited to eight years could be justified, at least by comparison with *Dowden*, was by taking into account the personal mitigating matters. There is nothing in her Honour's reasons which indicates any acknowledgment of that. That raises the prospect that there was significant double counting of those mitigating features.

[72] The second decision of note is *R v Benjamin*.[32]

[73] *Benjamin* is of interest because many of the sentencing considerations were the same as the present case but the result vastly different. As mentioned, the attack was very similar to that here. Benjamin tackled a 19 year old female as she jogged along a public road in the evening. The rape involved penile penetration of the vagina. Considerations

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31 [2010] QCA 125 at [25] per Holmes JA.

32 (2012) 224 A Crim R 40 ; [2012] QCA 188.

such as the protection of vulnerable females enjoying their right to go in public places and enjoy exercise, the condemnation of those who would inflict random sexual violence on others without regard for their welfare, the need to punish those who act in such wilful disregard of the rights of others, the need for general deterrence, all were precisely the same.

[74] The sentence imposed by this Court was one of nine years imprisonment with a serious violent offence declaration. That sentence of nine years was plainly arrived at bearing in mind the intention to impose a serious violent offence declaration. So Benjamin must serve a little over seven years and two months imprisonment before becoming eligible to apply for parole – more than double the period imposed on the respondent. The President dissented on the issue of the declaration but even had her view prevailed the offender would have been required to serve 50 per cent more than the respondent here.

[75] To my mind the discrepancy between the sentence in *Benjamin* and the result here cannot be explained by reference to the differences in the cases. That *Benjamin* was a worse case can be accepted, but not markedly so.

[76] The complainant there suffered significantly worse physical injuries than here. To an extent that reflected the "overwhelming force" found to have been used by the assailant in the initial tackle, force which involved a blow to the back of the head which it was found rendered the complainant dazed or unconscious. But it seems clear too that to an extent the physical injuries reflected the way the complainant fell after being tackled – face first onto hard ground – and that the rape occurred on hard ground. The injuries were described as follows:

> "As a result of the attack upon her she had cuts and bruises to her face, neck and elbows. She had severe swelling to her cheekbones, her nose bled and her lip was badly split and swollen with a chunk missing from it. She had abrasions to her hips and soreness to her face, jaw, neck, shoulder, hips and backside. Some of her injuries required suturing. She had a chronic headache."[33]

[77] Like here the impact of the attack on the complainant in *Benjamin* was profound. The fact that the physical injuries were significantly worse, and the use of apparently greater force, justify placing *Benjamin* in a more serious category than this case. But not greatly. The facial injuries appear to have occurred because of the way the victim fell when tackled. There is no suggestion here that the lack of similar injury came about through any regard by the respondent for the complainant's welfare. The difference is largely fortuitous.

[78] The personal circumstances of the offender in *Benjamin* also justified a longer period of incarceration and non parole. Benjamin had prior convictions for various offences importantly including offences of violence – a breach of a domestic violence order and common assault – and had been sentenced to imprisonment. But like the respondent here he had a good work history, a partner and young child, the partner standing by him despite the domestic violence. He too was a mature man, 25 at the time of the offence, and like the respondent here pleaded guilty at the very first opportunity but after receiving legal advice on the incriminating nature of DNA evidence. While the respondent did not receive legal advice before confessing he did so only after learning of the DNA evidence implicating him and the significance of that evidence could hardly not have been apparent.

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33 *Ibid* at [15].

[79] But these differences, while not insignificant, do not justify such a dramatically different outcome. That one should serve over four years imprisonment longer than the other before any prospect of parole is anomalous. In my view this anomaly, and the comparison not only with *Dowden* but with cases going back over 20 years, suggests that the systemic fairness and reasonable consistency between decisions which Gleeson CJ spoke of in *Wong v The Queen*[34] in the following passage is not achieved if the sentence imposed below is left undisturbed:

> "The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency."

[80] That anomaly is even more marked when the personal mitigating features said to justify the approach the sentencing judge took are examined a little more closely.

[81] While I do not cavil with the general observation that the respondent's conduct gave grounds for thinking that he was, to some degree, remorseful it is worth observing that his remorse did not extend to acceptance of criminal responsibility until the police had accumulated the evidence to convict him. His prospects of avoiding a conviction once the DNA evidence matched were non existent. It is not irrelevant that despite a claim to have found religion he had not accepted the advice of his priest that he ought to turn himself in to the police.

[82] I do not overlook that the disclosure made by the respondent to various people seems to have been prompted by a realisation of the appalling nature of his own conduct. As well, the disclosure to his wife resulted directly in his apprehension. Without that it is doubtful that he would ever have been brought to justice. But the respondent cannot claim much credit for that result. His disclosure was made when he was intoxicated and he never intended it to be passed on to the authorities – and indeed it wasn't for a considerable period.

[83] Nor is it shown that the sentencing judge was wrong in her assessment that the respondent was a suitable candidate for rehabilitation, taken as meaning that there were some promising signs. But that assessment of course, as her Honour recognised, is not the same as a finding that the chance of re-offending was nil. The sentencing judge was of course alive to the important issue of the need to protect the community from the respondent.[35] On that issue her Honour said: "I am confronted with the report from Dr Mann which says that if you are not abusing substances then that is low", meaning that the risk of re-offending was low. I have quoted the opinion above.[36] Dr Mann in fact predicated his opinion on the respondent maintaining stable relationships, seeking "help and support from those around him when he is suffering from relationship difficulties" and abstaining from alcohol and illicit substance abuse.

[84] The learned sentencing judge did not examine the probabilities of those conditions being fulfilled at all. Any such consideration is of course speculative to a degree but what evidence there was did not inspire great confidence.

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34 [2001] HCA 64; (2001) 207 CLR 584 at 591.

35 See *Penalties and Sentences Act* 1992 (Qld) s 9(1)(e).

36 At [22].

[85] The prospect of the respondent maintaining a stable relationship with his wife could not be described as encouraging. The information placed before the psychiatrist included the fact that the respondent's wife had complained to the police of anal rape, had sought and obtained a domestic violence order, described the respondent as "very violent", asserted that he had made threats to "beat up a colleague" and had complained that he had threatened her harm if she "declared" him to the police. The wife had retracted the claims of anal rape and the respondent denied the claims. So there was no evidence that he had behaved in that way. But even if all these claims are assumed to be false, and some were not retracted or denied, the fact remains that they were made. The making of false complaints resulting in hurtful orders being obtained from the courts hardly provides a strong basis for a continuing relationship, whatever optimistic statements are made by the parties involved.

[86] As well the wife reported and the respondent confirmed that he had contacted another woman via Facebook at a time when he and his wife were "considering separating." The wife presumably saw his interest in another woman as a betrayal as this prompted the wife to bring to the attention of the police the respondent's confession to her of the subject offence which eventually led to his arrest and incarceration. While a husband might understand and accept a wife's betrayal of a confidence that ultimately leads to his just incarceration for many years, there are at least the seeds here for future discontent.

[87] I appreciate that the respondent maintains that he and his wife are now "closer than we've ever been"[37], that couples do manage to overcome rocky patches in a marriage, and that the wife supported the respondent by provision of a reference to the sentencing judge. But the history of the relationship does not inspire great confidence that the respondent will not again find himself in much the same position as he did in the week before the subject offence occurred, with a broken relationship, said by him to be a relevant factor in leading to the commission of the subject offence.

[88] If there is a break down in the relationship the respondent's risk of re-offending then depends on which way he turns – to reliable third parties for counselling and support or to drink and illicit drugs? The information put before the sentencing judge suggested that until his incarceration the respondent had continued to drink alcohol, at least at times to excess, and continued to take illicit substances, namely cannabis. Given that background the risk of him again turning to amphetamine use was not negligible.

[89] Finally on this question of the risk of re-offending there is the difficult issue of the wife's claims, reported to the police, recorded by the psychiatrist and put before the Court by the respondent, that I have mentioned above – that the respondent had said of the rape that he "feels he wants to do it again sometime", that he was "like obsessed…with raping and stuff like that".

[90] It needs hardly to be said that if accurate the attitude displayed is deeply disturbing.

[91] The argument on appeal – there was no reference to the statements below – was whether the statements were available to be used against the respondent who advanced them. Apart from assertion from each side there was no real examination of the evidential point.

[92] Of significance, it seems to me, is that the statements were strongly against the respondent's interests, emanated from a disaffected wife, at least at the time they

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[37] Reported by the psychiatrist at AR 117/1.

were made, and were made along with other damning statements since retracted. So at the very least the accuracy and reliability of the statements are in doubt. That the respondent should be punished on the basis of facts of such tenuous provenance seems inherently unjust.[38]

[93] That they were introduced into the case by the respondent is a peculiar feature. If the respondent's counsel had expressly disclaimed the statements as either not forming part of the tender or as untrue then the sentencing judge could hardly have adopted them as established given the standard and onus of proof: s 132C *Evidence Act* 1977 (Qld). That the respondent's counsel did not take that course is a complication as the receipt of hearsay statements and information not proved is commonplace on sentences. And it is incumbent on defence counsel to alert the sentencing judge to facts alleged that are disputed, the issue normally arising of course in respect of facts alleged by the prosecutor. But it is plain that the whole thrust of the respondent's case, and the purpose of the tender of the report in which the statements appear, was to persuade the Court that the respondent was a low level risk of re-offending. What was not express was implicit. In the absence of better evidence the statements should not be taken as proving the facts contained in them and I put these statements to one side.

[94] An important point was the issue of intoxication. The appellant argued that the sentencing judge failed to give sufficient weight to the fact that the respondent's self induced methylamphetamine intoxication aggravated his culpability. While that intoxication is not a mitigating factor in the sense that the respondent would be less culpable than if he had committed the offence when unaffected[39] there is no reason to think that it is, in the circumstances here, an aggravating one either. There is no suggestion that the respondent was aware beforehand that the drug would affect him in this way and then deliberately sought out the effect.

[95] Where, as here, the evidence, such as it was, suggested that the respondent had used amphetamines for a limited period leading up to the offence and never thereafter then two related things follow. One is that it can be said that the impact of the drug explained the inexplicable – why a man with no previous conviction for violence of any sort over twenty-three years of adult life should behave so appallingly. Secondly, the prospect of the respondent re-offending is considerably less than if he suffered from an uncontrollable psychological disturbance of some kind.

[96] The point of this analysis is to highlight that while there were encouraging signs that justified some optimism that the respondent may not again commit a like offence the facts were hardly unique to the point of justifying the shortest non parole period for such offending that has been so far imposed for similar conduct.

[97] I appreciate of course that what is in issue is an eligibility date – the sentencing judge was not determining one way or another whether the respondent would be ready for parole at the three year mark. But the declaring of the eligibility date carries with it the statement by the court that after three years of imprisonment the relevant purposes identified in s 9(1) of the Act and for which the sentence was imposed have been achieved.

[98] In setting the non-parole period the authorities make clear that the task of the sentencing judge is to set the "minimum time that … justice requires that [the defendant]

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38 Cf. *R v Morrison* [1998] QCA 162 at p7 per Fitzgerald P.

39 Section 9(9A) *Penalties and Sentences Act* 1992 (Qld).

must serve having regard to all the circumstances of his offence": *Power v The Queen* (1974) 131 CLR 623 at 628 per Barwick CJ, Menzies, Stephen and Mason JJ; *Deakin v The Queen* (1984) 58 ALJR 367, at 367; 54 ALR 765, at 766; *Bugmy v The Queen* (1990) 169 CLR 525 at 530-531 per Mason CJ and McHugh J; *R v Shrestha* (1991) 173 CLR 48 at 63 per Brennan and McHugh JJ.

[99] In that latter case Brennan and McHugh JJ concluded, after canvassing a number of authorities:

> "It is clear that, although a minimum term is a benefit for the offender, it is a benefit which the offender may be allowed only for the purpose of his rehabilitation **and it must not be shortened beyond the lower limit of what might be reasonably regarded as a condign punishment**. Moreover, the release of an offender for the purposes of rehabilitation through conditional freedom is not to be seen solely as a mercy to the offender but also, and essentially, as a benefit to the public." (emphasis added).

Absent quite exceptional circumstances, in my opinion, offending conduct of the type here demands a sentence which requires the offender to serve longer than only three years imprisonment. The sentence imposed fails to suitably punish him, deter him and others, and denounce the conduct. Those exceptional circumstances are not present here.

[100] In my view the appellant has shown error justifying this Court in setting aside the sentence imposed and setting its own sentence. I turn then to that issue.

The Appropriate Sentence

[101] As I have said the head sentence of eight years imprisonment was plainly within range, bearing in mind the mitigating features to which I have referred.

[102] As to the non parole period the appellant argued that a declaration of a serious violent offence ought to be made pursuant to s 161B *Penalties and Sentences Act* 1992 (Qld) requiring that the respondent serve 80 per cent of his sentence before becoming eligible for parole.

[103] In my view that declaration ought not to be made. The offence is of course, by any definition, a serious one involving significant violence. But there are several factors here which militate against the need for such a declaration.

[104] Primarily, the circumstances of the offence and the personal mitigating features do not suggest that the protection of the public requires such a long period of actual custody before eligibility for parole.

[105] As to the offence itself, there was no use of a weapon, no permanent physical injury, and no sadistic cruelty.

[106] As to the personal features – the respondent's criminal history was very limited and without convictions for violence; he had a good work record. For the reasons the sentencing judge mentioned and that I have summarised above[40] the respondent is a suitable candidate for rehabilitation. Those features distinguish this case from *Benjamin* as does the greater degree of violence there in the initial attack.

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40 At [26].

[107] In *R v McDougall and Collas*[41] this Court noted that:

> "the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question, and, so outside "the norm" for that type of offence."

[108] While there are difficulties in grasping what level of violence is outside "the norm" for a violent rape it seems to me, as I have said, that the violence here was at the lower end of that seen in many of the cases. The appellant submitted that the approach in *McDougall* – the "outside the norm" approach – formed no part of the statute and that is so. However, absent the need for some additional or qualifying feature to justify the declaration, the effect of the submission would be that a declaration should be made in every case of rape, the two pre-conditions in the statute having been met ie the offence appearing in the schedule and a sentence of between five and ten years having been imposed. But the statute does not say that either.

[109] The submission made that a "stranger rape" case is itself an exceptional and aggravating feature is not without force but it is difficult to see why that feature alone and without more must result in a declaration. Its principal relevance goes to how frightening was the trauma inflicted on the victim. Sometimes the fact that the parties are known to each other can itself be an aggravating one. Thus in *R v Harris*[42] Tadgell JA said:

> "In particular it might be said that his Honour purported to apply any principle to the effect that rape by a man of his wife or former wife or of a person with whom he is or has been in a close relationship is to be treated more leniently than rape by a stranger. The authorities do not appear to support any such principle. The most that can be said, in my opinion, is that the penalty to be imposed for the crime of rape cannot be regarded as necessarily conditioned by the relationship of the parties to it. Any relationship or lack of it between them will no doubt usually fall to be considered as one of the circumstances to be taken into account in a determination of the appropriate penalty. In some circumstances a prior relationship may serve as a factor of mitigation, but it need not, and it may indeed serve to aggravate the offence."

Conclusion

[110] In my view there should be no declaration as to the eligibility date with the result that the usual statutory period should apply.[43] That approach in my view gives sufficient recognition to the plea of guilty and the other mitigating features. It reflects, if only just, the need to punish, deter and denounce.

[111] I would make the following orders:

(a) The sentence imposed below be set aside.

(b) The respondent be sentenced to imprisonment for eight years.

[112] **HENRY J:** I have read the reasons of Holmes JA and McMeekin J. I agree with the reasons of McMeekin J subject to one clarification.

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41 [2007] 2 Qd R 87; [2006] QCA 365.

42 [1998] 4 VR 21 at 28 quoted with approval by Winneke P in *R v Mason* [2001] VSCA 62 at [8].

43 Section 184(2) *Corrective Services Act* 2006 (Qld).

[113] I do not apprehend McMeekin J's view the appellant should not by this court be declared to be convicted of a serious violent offence[44] to have involved a conclusion that such a declaration was necessarily beyond the province of the sound exercise of the sentence discretion at first instance. However to remove doubt, I would not agree with such a conclusion.

[114] I agree the violence here was not in a comparative sense as bad as has unfortunately occurred in other rape cases of a kind where men have forced women from public places to more secluded locations to rape them. However this court's observations in *R v McDougall and Collas*[45] do not confine the comparative consideration of whether this offence is more than usually serious or violent solely to rape cases of that kind. The very act of a man forcing a woman from our public paths or streets into a secluded location to rape her of itself may make such a case a sufficiently serious or violent example of the offence of rape to cause, albeit not compel, the exercise of the discretion to make a declaration.

[115] I agree with the orders proposed by McMeekin J.

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44 Per *Penalties and Sentences Act* 1992 (Qld) s 161B(3).

45 [2007] 2 Qd R 87, 96-97.