SUPREME COURT OF QUEENSLAND

CITATION:	*R v Armitage; R v Armitage; R v Dean* [2021] QCA 185
PARTIES:	**In CA No 62 of 2020:** **R** **v** **ARMITAGE, Stephen John** (applicant) **In CA No 51 of 2020:** **R** **v** **ARMITAGE, Matthew Leslie** (applicant) **In CA No 63 of 2020:** **R** **v** **DEAN, William Francis** (applicant)
FILE NO/S:	CA No 62 of 2020 CA No 51 of 2020 CA No 63 of 2020 SC No 973 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Applications
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 19 February 2020 (Jackson J)
DELIVERED ON:	31 August 2021
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2021 Supplementary written submissions: 11 June 2021
JUDGES:	Sofronoff P and Morrison JA and Flanagan J
ORDERS:	**In CA No 62 of 2020 (Stephen John Armitage):** **1. Application for leave to appeal against sentence granted.** **2. Appeal allowed.** **3. Set aside the sentence imposed below.** **4. The applicant is sentenced to imprisonment for 11 years and six months commencing from 21 February 2018. Pursuant to s 159A of the *Penalties***

and Sentences Act 1992 **(Qld), it is declared that 1237 days spent in pre-sentence custody between 4 October 2014 and 21 February 2018 is time taken to be imprisonment already served under the sentence. It is declared that the conviction for manslaughter is a conviction of a serious violent offence under s 161B(1) of the *Penalties and Sentences Act 1992* (Qld).**

In CA No 51 of 2020 (Matthew Leslie Armitage):

1. **Application for leave to appeal against sentence granted.**
2. **Appeal allowed.**
3. **Set aside the sentence imposed below.**
4. **The applicant is sentenced to imprisonment for nine years and six months commencing from 21 February 2018. Pursuant to s 159A of the *Penalties and Sentences Act 1992* (Qld), it is declared that 1237 days spent in pre-sentence custody between 4 October 2014 and 21 February 2018 is time taken to be imprisonment already served under the sentence. It is d**

In CA No 63 of 2020 (William Francis Dean):

1. **Application for leave to appeal against sentence granted.**
2. **Appeal allowed.**
3. **Set aside the sentence imposed below.**
4. **The applicant is sentenced to imprisonment for 11 years and six months commencing from 21 February 2018. Pursuant to s 159A of the *Penalties and Sentences Act 1992* (Qld), it is declared that 370 days between 4 October 2014 and 9 December 2015 is time taken to be imprisonment already served under the sentence. It is declared that the conviction for manslaughter is a conviction of a serious violent offence under s 161B(1) of the *Penalties and Sentences Act 1992* (Qld). Pursuant to s 160D(2) of the *Penalties and Sentences Act 1992* (Qld), the applicant's parole eligibility date is fixed at 29 April 2026.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicants were tried and convicted of murder, torture and interfering with a corpse – where the applicants were sentenced on each count – where the murder convictions were subsequently downgraded to manslaughter and the torture convictions were quashed on appeal – where

the applicants were re-sentenced by the primary judge for manslaughter – where, at re-sentencing, the applicants had lost the benefit of pre-sentence custody declarations under s 159A of the *Penalties and Sentences Act 1992* (Qld) – where serious violent offence declarations were imposed – whether the primary judge erred by failing to adjust the head sentences to account for non-declarable pre-sentence custody in circumstances where a serious violent offence declaration was imposed

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – POWERS OF COURT ON APPEAL – POWER TO SUBSTITUTE VERDICT OR SENTENCE – OTHER PARTICULAR CASES – where manslaughter convictions were substituted for murder convictions on appeal under s 668F(2) of the *Criminal Code* (Qld) – where the Court of Appeal remitted the matter to the primary judge for re-sentencing – whether a sentence imposed under s 668F(2) is imposed as and from the date of the original sentence or as and from the date the order for the new sentence is made

CRIMINAL LAW – SENTENCE – SENTENCING PROCEDURE – FACTUAL BASIS FOR SENTENCE – PARTICULAR CASES – where an applicant is to be sentenced for manslaughter in circumstances where the count of torture has been discontinued by the Crown – where the applicant was found guilty of manslaughter on the basis of liability pursuant to s 7 or s 8 of the *Criminal Code* (Qld) – where the applicant formed a common purpose with his co-accused to assault the victim to obtain information from him, and the manslaughter was a probable consequence of the prosecution of that common purpose – whether facts pertaining to the discontinued count of torture can be considered as part of the factual basis for the manslaughter sentence

Criminal Code (Qld), s 668E, s 668F
Penalties and Sentences Act 1992 (Qld), s 159A, s 160D, s 161B

Hancock v Prison Commissioners [1960] 1 QB 117, considered
R v Armitage; R v Armitage [2019] QCA 149, considered
R v Beattie; Ex parte Attorney-General (Qld) (2014) 244 A Crim R 177; [2014] QCA 206, cited
R v Boney; Ex parte Attorney-General (Qld) [1986] 1 Qd R 190, considered
R v Carlisle [2017] QCA 258, applied
R v Charles (2001) 123 A Crim R 253; [2001] QCA 320, considered
R v Collins [2018] QCA 277, applied
R v D [1996] 1 Qd R 363; [1995] QCA 329, considered
R v De Simoni (1981) 147 CLR 383; [1981] HCA 31,

considered
R v Dean [2019] QCA 254, considered
R v Havercroft [1940] QWN 16, cited
R v Jennings [1999] 1 VR 352; [1998] VSCA 69, cited
R v NQ [2013] QCA 402, applied
R v Phillips [2009] 2 Qd R 263; [2009] QCA 57, considered
R v Richards [2017] QCA 299, cited
R v Sant [2005] QCA 474, considered

COUNSEL: S C Holt QC, with J J Underwood, for the applicant, Stephen Armitage
T Ryan for the applicant, Matthew Armitage
G M Elmore for the applicant, William Dean
D Nardone for the respondent

SOLICITORS: Owens & Associates for the applicant, Stephen Armitage
Legal Aid Queensland for the applicant, Matthew Armitage
Ashkan Tai Lawyers for the applicant, William Dean
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P**: I agree with the reasons of Flanagan J and with the orders proposed by his Honour.

[2] **MORRISON JA**: I have read the reasons of Flanagan J and agree with those reasons and the orders his Honour proposes.

[3] **FLANAGAN J:** The applicants were sentenced by Jackson J for the offence of manslaughter on 19 February 2020. His Honour imposed the following sentences which were to commence from 19 February 2020:

(a) Stephen Armitage was imprisoned for a period of 10 years. Pursuant to s 159A of the *Penalties and Sentences Act 1992* (Qld) (***Penalties and Sentences Act***), 1237 days of pre-sentence custody between 4 October 2014 and 21 February 2018 was declared as imprisonment taken to be already served under the sentence. The conviction was declared a conviction for a serious violent offence.[1]

(b) Matthew Armitage was sentenced to imprisonment for a period of eight years. Pursuant to s 159A of the *Penalties and Sentences Act*, 1237 days of pre-sentence custody between 4 October 2014 and 21 February 2018 was declared as imprisonment taken to be already served under the sentence. The conviction was declared a conviction for a serious violent offence.[2]

(c) William Dean was sentenced to imprisonment for a period of 10 years. Pursuant to s 159A of the *Penalties and Sentences Act*, 370 days of pre-sentence custody between 4 October 2014 and 9 October 2015 was declared as imprisonment taken to be already served under the sentence. The conviction was declared a conviction for a serious violent offence.[3]

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1 *Penalties and Sentences Act 1992* (Qld) s 161B(1) (***Penalties and Sentences Act***).
2 *Penalties and Sentences Act* s 161B(3).
3 *Penalties and Sentences Act* s 161B(1).

[4] Each applicant seeks leave to appeal against sentence.

[5] The applicants came to be sentenced for manslaughter on 19 February 2020 in the following circumstances. On 24 August 2016, a three-count indictment was presented in the Supreme Court. Count 1 was that the applicants murdered Shaun Matthew Barker on a date unknown between 9 December 2013 and 11 April 2014 at Cooloola Cove or elsewhere in the State of Queensland.[4] Count 2 was that the applicants tortured Mr Barker during the same period.[5] Count 3 was that the applicants improperly interfered with a dead human body during the same period.[6]

[6] On 21 March 2017, after an 11-day trial before Jackson J and a jury, Stephen and Matthew Armitage were found guilty of torture and interfering with a corpse but the jury could not reach a unanimous verdict in relation to murder. Dean was found guilty on all three counts. On 26 September 2017, after a seven-day retrial on the murder count, both Stephen and Matthew Armitage were found guilty of murder.

[7] Jackson J sentenced the applicants on 21 February 2018. Each was sentenced to life imprisonment for murder and two years' imprisonment for interfering with a corpse. Stephen Armitage and Dean were sentenced to six years' imprisonment for torture, and Matthew Armitage was sentenced to five years' imprisonment.

[8] Stephen and Matthew Armitage appealed against their convictions for murder, torture and interfering with a corpse. They were successful in relation to the murder and torture convictions but not in relation to the interfering with a corpse convictions.[7] McMurdo JA (with whom Sofronoff P and Boddice J agreed), after outlining the evidence given at the second trial,[8] considered whether the jury's guilty verdicts for murder were unreasonable. His Honour noted that the Crown had provided written particulars of the murder charges which relied on s 7(1)(a), s 7(1)(c) and s 8 of the *Criminal Code* (Qld) (***Criminal Code***).[9] After quoting s 8, his Honour continued:[10]

> "The particulars referred to a common intention of the two appellants. But in the way in which the case was argued to the jury, without objection from defence counsel, it was said that there was a plan between the two appellants and William Dean, which was a plan to assault Mr Barker for the purpose of getting information about stolen drugs.
>
> The evidence strongly supported a finding that William Dean and Stephen Armitage had a common intention of that kind. There was the evidence of their involvement in bringing Mr Barker from the Gold Coast to the Armitage property, where Mr Barker was then detained in inhumane conditions and subjected to serious violence. The evidence which I have summarised, if accepted, proved that Stephen Armitage was causing Mr Barker to be detained and treated in that way. …"

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4 *Criminal Code* (Qld) ss 300, 302 (***Criminal Code***).
5 *Criminal Code* s 320A.
6 *Criminal Code* s 236(b).
7 *R v Armitage; R v Armitage* [2019] QCA 149.
8 *R v Armitage; R v Armitage* [2019] QCA 149, [9]-[58].
9 *R v Armitage; R v Armitage* [2019] QCA 149, [68].
10 *R v Armitage; R v Armitage* [2019] QCA 149, [70], [71].

[9] His Honour noted that the Crown had to prove that, in the prosecution of that unlawful purpose, Mr Barker was murdered and that the commission of such an offence was a probable consequence of the prosecution of that purpose. His Honour observed:

> "Alternatively, to establish that the appellants were guilty of manslaughter, it had to be proved that, in the prosecution of that purpose, Mr Barker was unlawfully killed, and that the commission of an offence of that nature was a probable consequence of the prosecution of that purpose."[11]

[10] As to why the convictions of murder were unreasonable, his Honour reasoned as follows:[12]

> "The object of the violence was to extract information from Mr Barker, an object that would have been defeated by killing him. It is not unlikely that Mr Barker was assaulted by someone who intended to cause an injury that constituted grievous bodily harm. But, it is also not unlikely that those inflicting the violence were recklessly indifferent to Mr Barker's condition. But those things were not sufficient to prove the prosecution case. The prosecution had to prove that *what killed Mr Barker* was an act done by someone with an intention to, at least, cause grievous bodily harm, and that had to be proved beyond reasonable doubt. As the cause of death was unknown, in my view, it was not open to the jury to be satisfied, beyond reasonable doubt, that Mr Barker was killed by an act done with the requisite intent for the offence of murder. It follows that it was not open to convict the appellants of murder."

[11] His Honour concluded that the jury could have been satisfied, in the terms of s 8, that the offence of manslaughter was committed in the prosecution of the unlawful purpose. It was also open to the jury to conclude that the unlawful killing was a probable consequence of the prosecution of that purpose.[13] Accordingly, it was open to the jury to convict Stephen and Matthew Armitage of manslaughter by operation of s 8.

[12] His Honour then considered the application of s 668F(2) of the *Criminal Code* which provides:

> "Where an appellant has been convicted of an offence, and the jury could on the indictment have found the appellant guilty of some other offence, and on the finding of the jury it appears to the Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

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11 *R v Armitage; R v Armitage* [2019] QCA 149, [74].
12 *R v Armitage; R v Armitage* [2019] QCA 149, [77] (emphasis in original).
13 *R v Armitage; R v Armitage* [2019] QCA 149, [99].

[13] For the following reasons, his Honour concluded that the Court of Appeal could substitute for the jury's verdict a verdict of guilty of manslaughter:[14]

> "The jury was given clear directions as to what might constitute an aiding in the commission of an offence. A juror who did not reason by the path of s 8 must have found that the appellant did something which aided another person to do that which caused death. It was legitimate for a juror to reason that the appellant aided the actual killer, if that appellant was not the killer himself, so that by one way or the other, the appellant was guilty of killing Mr Barker. There was a sufficient evidentiary foundation for that reasoning. As I have discussed, the evidence supported a finding of fact that each of the appellants participated in the intentional mistreatment of Mr Barker. And a person might aid in the commission of an offence, not only by physical acts, but also by encouragement."

[14] The Court of Appeal remitted the matter to the trial division for sentencing on the manslaughter convictions, having heard no sentence submissions.[15] In respect of the appeals against the torture convictions, McMurdo JA identified several acts relied upon by the Crown: "acts of assaulting Mr Barker, keeping him in the esky, depriving him of sustenance and/or depriving him of his liberty".[16] These convictions were set aside on the basis that the learned trial judge had failed to instruct the jury that, before they could convict of torture, they had to unanimously agree on which act was, or series of acts were, intentionally inflicted to cause severe pain and suffering.[17]

[15] Dean also successfully appealed his convictions for murder and torture. In *R v Dean*,[18] in setting aside Dean's murder conviction, Morrison JA (with whom Holmes CJ and Gotterson JA agreed) observed:[19]

> "That evidence, taken in combination, justifies the acceptance on the appeal before this Court that the appellant was directly involved in the kidnapping and imprisonment of Barker, and his subjection to violence and other mistreatment culminating in his death.
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> However, the difficulty which confronts the ability to draw an inference of the requisite intent for the offence of murder, is that the prosecution had to prove that whatever killed Barker was an act done by the perpetrator with an intention to either cause death or cause grievous bodily harm. In other words, it had to prove beyond reasonable doubt that something done in the mistreatment of Barker caused his death, and that thing was done with the requisite intent."

[16] Morrison JA concluded that it was equally open on the evidence that Barker died because of either reckless indifference or neglect to his welfare.[20] The Court of Appeal substituted the murder conviction for one of manslaughter and remitted the matter to

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14 *R v Armitage; R v Armitage* [2019] QCA 149, [105].
15 *R v Armitage; R v Armitage* [2019] QCA 149, [108] and [123].
16 *R v Armitage; R v Armitage* [2019] QCA 149, [109].
17 *R v Armitage; R v Armitage* [2019] QCA 149, [110].
18 [2019] QCA 254.
19 *R v Dean* [2019] QCA 254, [109], [110].
20 *R v Dean* [2019] QCA 254, [112].

the trial division for re-sentencing. For the same reasons given in *R v Armitage; R v Armitage*, Dean's torture conviction was set aside and a retrial was ordered.[21]

[17] At the hearing of sentencing submissions on 18 February 2020 before Jackson J, the Crown entered *nolle prosequis* in relation to the torture counts for each of the applicants.

The sentencing remarks of 19 February 2020

[18] After outlining the history of the proceedings, the learned sentencing judge noted that the orders for remittal made by the Court of Appeal did not identify the basis of the jurisdiction to be exercised by the trial division. The Crown submitted before his Honour that the sentencing power to be exercised was that under s 668F(2) of the *Criminal Code.* Had this submission been accepted, any sentences for the substituted manslaughter convictions would have commenced from 21 February 2018, being the original sentencing date.[22] His Honour noted, however, that the power under s 668F(2) is one to be exercised by the "Court", which is defined in s 668(1) to mean the Court of Appeal. As his Honour considered that he was not exercising the power of the Court of Appeal, the sentences for manslaughter were imposed as and from 19 February 2020.[23]

[19] His Honour identified a notional head sentence for manslaughter for each applicant: 11 years for Stephen Armitage, nine for Matthew Armitage, and 12 for Dean. Had the applicants been sentenced for manslaughter and interfering with a corpse at the same time, his Honour would have increased each of these notional sentences by one year to 12 years, 10 years and 13 years, respectively, to reflect the overall criminality.[24] But, as at re-sentencing on 19 February 2020, the applicants had each served their full two-year period of imprisonment for interfering with a corpse. His Honour took this into account:

> "Having regard to my conclusion that the sentences that I pass today must start from today, and that the full time period of the interfering with the corpse sentences has expired, in effect, long ago – it appears, when they were pronounced – the question whether the notional sentences should be increased to reflect a head sentence for any concurrent operation of the sentences for interfering with a corpse is [a] question that does not arise."[25]

[20] His Honour took the following approach in relation to Stephen and Matthew Armitage:

> "Taking the simpler cases of Stephen Armitage and Matthew Armitage, in my view it's appropriate to consider these questions in the following way: had the offences been passed at the same time and as at today's date, with the interfering with a corpse sentence so as to run concurrently I would have either increased the manslaughter sentences as a head sentence in each case by a year to

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21 *R v Dean* [2019] QCA 254, [118] (Morrison JA).
22 See [7] above.
23 AB143.41.
24 AB157-AB158.
25 AB157.24-29.

> reflect the overall criminality, or accumulated the sentences in part but reduced them to achieve a similar, just, overall result.
>
> If that had been done by the first method I described the defendants would've received the benefit of the time in prison since 21 February 2018 as time served under the sentences to date. Accordingly, in my view, it's appropriate to reduce the sentence I would otherwise have imposed in the cases of Stephen Armitage and Matthew Armitage by a period of two years to reflect the consequence of the accumulation of those offences as they have been served, or will be served, and it would have been potentially appropriate to do the same for any non-parole period, subject to the operation of sections 161A and 161B."[26]

[21] Adopting that approach, his Honour adjusted the notional sentence for Stephen Armitage from 12 years to 10 years and, for Matthew Armitage, from 10 years to eight years. Despite having correctly identified that it would have been appropriate, his Honour did not accompany this adjustment of the notional head sentences with a corresponding adjustment to the non-parole period in circumstances where serious violent offence declarations were made. This is discussed further below.[27]

[22] The learned sentencing judge then addressed Dean's notional sentence:

> "As to William Dean, if similar reasoning were applied in the first place, the sentence he would have received would have been increased to 13 years but reduced by the two years to 11 years to take account of accumulation and the non-declarable time. But there are further complications associated with his remand and imprisonment upon his conviction for the [extortion] offences."[28]

[23] His Honour's reference to "complications" is a reference to the fact that, on 16 September 2016, Dean was sentenced to six years' imprisonment for separate, unrelated extortion and other violent offences (**extortion offences**). His parole eligibility date was set at 12 November 2018. On appeal, his sentence was reduced to five years' imprisonment and the parole eligibility date was varied to 12 November 2017. Having considered this existing sentence, his Honour concluded:

> "The result would be that two years and six months approximately should be reduced from the notional 11 years I'd previously arrived at to a period of nine years and six months. As to any additional period of reduction, in applying the principle of totality and the factors raised in *Mills v R*, I know that the full-time release date in William Dean's case for the extortion offences is 1 June, 2021. It wouldn't, I think, be crushing to impose an additional seven years three months of sentence so as to operate in a cumulative way."[29]

[24] By the same process that his Honour adopted in reducing the Armitages' notional sentences, his Honour reduced Dean's notional sentence of 13 years to 11 years. However, unlike the Armitages, Dean was not entitled to declarable pre-sentence custody for time spent on remand between October 2015 and February 2018 by

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26 AB157.44-AB158.10.
27 See [25] to [29] below.
28 AB158.16-20.
29 AB159.11-17.

reason of his sentence for the extortion offences. It follows that the notional sentence of 11 years ought to have been further reduced to take proper account of non-declarable pre-sentence custody in circumstances where the conviction was declared to be one for a serious violent offence. Despite having alluded to further reducing Dean's notional 11-year sentence by 2½ years, his Honour ultimately imposed a sentence of 10 years' imprisonment.

The Crown concedes error

[25] In relation to Stephen and Matthew Armitage, the Crown concedes that the learned sentencing judge failed to take proper account of non-declarable pre-sentence custody in circumstances where the manslaughter conviction was declared a conviction for a serious violent offence.[30] This concession is not made in relation to Dean.[31] However, as is evident from [22] to [24] above, the learned sentencing judge's reduction of the notional sentence of 13 years to 11 years is affected by the same error.

[26] The nature of the conceded error has been explained by this Court in three decisions: *R v NQ*,[32] *R v Collins*[33] and *R v Carlisle*.[34] In *R v NQ*, McMurdo P (with whom Mullins J, as her Honour then was, agreed) identified the correct approach as follows:

> "The sentencing judge next properly took into account the applicant's 22 months of pre-sentence custody which could not be declared part of the sentence. His Honour rightly treated this as a 27 month period of pre-sentence custody as, had it in fact been part of the notional 12 year sentence, the applicant would have been eligible to apply for parole after serving 80 per cent of it."[35]

[27] When accounting for non-declarable pre-sentence custody where a serious violent offence declaration is made, it is necessary to reduce the head sentence to reflect the fact that, if the non-declarable pre-sentence custody formed part of the sentence, the defendant would be eligible for parole after serving 80 per cent of it. This approach was further explained by Applegarth J, with whom Gotterson and Morrison JJA agreed, in *R v Carlisle*:[36]

> "The exercise of taking account of non-declarable pre-sentence custody may become complicated in a case in which a serious violent offence declaration is made. For example, absent a serious violent offence declaration, a sentence of 12 years' imprisonment would be reduced to 11 years on account of a year of pre-sentence custody which cannot be declared, and what would otherwise be a parole eligibility date after six years (one half of the effective sentence of 12 years) would be reduced by one year to arrive at a non-parole period of five years. However, a serious violent offence declaration for such an 11 year sentence would not result in a parole eligibility date after five

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30 Respondent's Submissions (Stephen Armitage), paragraphs 30 to 35; Respondent's Submissions (Matthew Armitage), paragraphs 22 to 27.
31 Respondent's Submissions (Dean), paragraphs 20 to 21.
32 [2013] QCA 402.
33 [2018] QCA 277.
34 [2017] QCA 258.
35 [2013] QCA 402, [16].
36 [2017] QCA 258, [52]-[53].

years. It would create parole eligibility after serving 80 per cent of an 11 year sentence.

In a case such as the present, a sentence of 10 years' imprisonment with a requirement to serve eight years before being eligible for parole, when adjusted for a one year period of pre-sentence custody which cannot be declared yields an effective non-parole period of nine years. If the head sentence of 10 years is the result of an adjustment of one year, then one would arrive at an effective head sentence of 11 years with an effective non-parole period of nine years, being more than 80 per cent. An alternative effective sentence in such a case, so as to arrive at an 80 per cent non-parole period, would be to conclude that the sentence imposed of 10 years with a non-parole period of eight years was the result of an effective sentence of 11 years and three months, with an effective non-parole period of nine years. On this approach the adjustment to the head sentence would be one year and three months."

[28] Taking Stephen Armitage as an example, the Crown concedes that the sentence that should have been imposed, applying the approach identified in *R v NQ* and *R v Carlisle*, was 9½ years rather than 10 years. It is instructive to set out the underlying calculations which reflect the Crown's concession:[37]

"• The applicant first went into custody on 4 October 2014. On a head sentence of 12 years (as was the intention of the sentencing Judge) the applicant would have been eligible for release after serving 80% of the head sentence – 80% of 12 years is 3506 days which results in an eligibility for release to parole on 10 May 2024.

- The applicant was sentenced on 19 February 2020. The period of time from 19 February 2020 to 10 May 2024 (the intended date of eligibility for release to parole after serving a notional head sentence of 12 years) is 1542 days (4 years 2 months and 21 days).
- A total of 1237 days was declared as time served as part of the sentence. The addition of 1237 days (PSC) plus the 1542 days (yet to serve to reach 10 May 2024, the notional date of having served 80% of the head sentence) equals 2779 days.
- 2779 days would represent 80% of what should be a head sentence that results in eligibility for release to parole on 10 May 2024.
- When 2779 days represents 80% of a head sentence that head sentence would be 3473 days (this is slightly more than 114 months – 114.18 months). A total of 114 months equates to 9 ½ years."

[29] Having identified that the learned sentencing judge fell into error in exercising the sentencing discretion, it follows that each application for leave to appeal should be

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37 Respondent's Submissions (Stephen Armitage), paragraph 33.

granted and each appeal allowed. It falls to this Court to re-sentence the applicants afresh.[38]

[30] In re-exercising the sentencing discretion, there are two preliminary issues. The first concerns the date from which the substituted sentences are to commence. This issue turns upon the proper construction of s 668F(2) of the *Criminal Code* and, in particular, the meaning of the phrase "and pass such sentence in substitution for the sentence passed at the trial". The second issue, which is only raised by the applicant Stephen Armitage, concerns the correct factual basis upon which he should be re-sentenced.

When do substituted sentences under s 668F(2) of the *Criminal Code* commence?

[31] Under s 668E(3) of the *Criminal Code*, this Court's task is to pass sentences in substitution for the sentences passed by the learned primary judge who, in this instance, was exercising the re-sentencing power in s 668F(2).[39] This Court is, in effect, re-exercising the re-sentencing power under s 668F(2). A question arises as to when sentences passed under that section commence.

[32] Unlike the learned sentencing judge, this Court has had the benefit of written submissions on this issue from the Crown and Stephen and Matthew Armitage. The uniform submission of the parties is that the substituted sentences should commence on 21 February 2018. However, as submitted by Mr Holt QC and Mr Underwood for Stephen Armitage, this issue has not previously been squarely considered and the Queensland appellate decisions reveal a disparity of approach.[40]

[33] The phrase used in s 668F(2) is "… and pass such sentence in substitution for the sentence passed at the trial…". The term "in substitution" is the same term used in s 668E(3), which provides:

> "On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal."

[34] The term "in substitution" is not defined. The ordinary meaning of the word "substitute" is to "replace"[41] or "to put … in the place of another".[42] As correctly submitted by Mr Holt and Mr Underwood, the term "in substitution" carries some ambiguity:

> "It most naturally suggests that a sentence passed under section 668F(2) takes effect from the date of the original sentence, as if it were passed in its stead. However, a sentence passed on appeal which commenced upon the date of the order could also, without

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38 *Criminal Code* s 668E(3); *Kentwell v The Queen* (2014) 252 CLR 601, [35] (French CJ, Hayne, Bell and Keane JJ); *AB v The Queen* (1999) 198 CLR 111, [130] (Hayne J).

39 Remitted to the trial division pursuant to s 61(2) of the *Supreme Court of Queensland Act 1991* (Qld).

40 Applicant's Supplementary Written Submissions on s 668F(2) (Stephen Armitage), paragraphs 4 and 5.

41 Macquarie Dictionary, Concise Fifth Edition.

42 Oxford English Dictionary (3rd ed, June 2012), sense 2.

> doing violence to the language, be described as a 'substitute' for the sentence quashed at the same time."[43]

[35] Substituted sentences under s 668E(3) have consistently been imposed as applying from the date of the original sentence. In *Hancock v Prison Commissioners*,[44] Winn J considered the commencement date of a sentence imposed by the Court of Criminal Appeal pursuant to s 4(3) of the *Criminal Appeal Act 1907* (UK). Section 4(3), before it was repealed, was in similar terms to s 668E(3) and provided:

> "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict … in substitution therefor as they think ought to have been passed."

[36] The commencement date for the substituted sentence was the original date of the first sentence. As observed by Winn J:

> "… the true meanings of the words in subsection (3) of section 4 of the Criminal Appeal Act, 1907, which enables such an order to be made, is that the Court of Criminal Appeal quashes for the future the original sentence, and substitutes for the future the new sentence which the Court of Criminal Appeal considers the proper sentence, albeit that that sentence itself takes its extent from the original date of the first sentence; that is to say, it is a term of so many years calculated from a starting date which is the same date as the starting date of the sentence which has been, in the sense which I have indicated, quashed."[45]

[37] The same approach was adopted by the Queensland Court of Criminal Appeal construing s 668E(3) of the *Criminal Code* in *R v Havercroft*[46] and by the Victorian Court of Appeal in *R v Jennings*.[47] The section under consideration by the Victorian Court of Appeal was s 568(4) of the *Crimes Act 1958* (Vic), which was in similar terms to s 668E(3). Brooking JA, with whom Tadgell JA agreed, noted that from previous Victorian appellate decisions there was a uniform view that the substituted sentence should be taken to have been passed on the day on which the sentence set aside was imposed.[48] Brooking JA stated:

> "In my opinion it should be taken to be authoritatively established that substituted sentences passed by the Court of Appeal do not take effect from the date of its order and that the Court of Appeal has no discretionary power to determine the date of operation of its substituted sentences: by force of the Crimes Act, those sentences operate from the date of the original sentence. Section 568(4) requires the passing of such other sentence in substitution for the original one as the appellate court thinks ought to have been passed. It is the combined effect of the words 'in substitution therefor' and

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43 Applicant's Supplementary Written Submissions on s 668F(2) (Stephen Armitage), paragraph 4.
44 [1960] 1 QB 117.
45 *Hancock v Prison Commissioners* [1960] 1 QB 117, 126.
46 [1940] QWN 16.
47 [1999] 1 VR 352.
48 *R v Jennings* [1999] 1 VR 352, [50].

> 'as it thinks ought to have been passed' which suggests to my mind that, as was said by the Full Court in such cases as *Ferrett*, *Eades*, *Dennaoui*, *Stone* and *Singh*, a substituted sentence passed on appeal under Part VI of the Crimes Act must be taken to have been passed on the date of the original sentence unless there can be found, as applicable in a given case, some express or implied statutory provision to the contrary. The passing of the sentence which ought to have been passed below in substitution for the sentence actually passed seems to me to require that the sentence be imposed as at the date on which the sentence below was imposed, although, as I have said, the requirements of s. 568(4) and s. 567A(4) are capable of being modified expressly or by implication by some other statutory provision, including one providing for a particular kind of sentence."[49]

[38] Although the term "in substitution" is not defined, there is no good reason why it should not have the same operation in s 668F(2) as it does in s 668E(3), so that the commencement date of the substituted sentence is either the date of the sentence which is quashed on appeal (s 668E(3)) or the sentence passed at trial (s 668F(2)).

[39] There are, however, three Queensland appellate authorities where the substituted sentence under s 668F(2) has commenced from the date of the judgment of the Court of Appeal rather than from the date of the sentence passed at trial. In *R v Charles*,[50] the Court of Appeal, pursuant to s 668F(2), substituted a verdict of assault occasioning bodily harm for a conviction of grievous bodily harm. In imposing a substituted sentence of nine months' imprisonment, wholly suspended with an operational period of two years, the Court noted:

> "As this court is sentencing with respect to a substituted offence it is preferable that the sentence date from the date of this Court's order."[51]

[40] Similarly in *R v Sant*,[52] the Court, pursuant to s 668F(2), substituted a verdict of indecent assault for one of rape. The Court ordered that, on the substituted verdict of guilty of indecent assault, the appellant be convicted and sentenced to six months' imprisonment. The Court, however, declared that the time spent in custody between 8 September 2005 and the date of the Court's order be time taken to be already served. The effect of these orders is that the substituted sentence commenced from the date of the Court of Appeal's orders. In *R v Phillips*,[53] the Court substituted a verdict of guilty of unlawful carnal knowledge for one of rape. The substituted sentence was one of two years' imprisonment, with a declaration that a period of 378 days from 8 March 2008 to the date of the Court of Appeal's judgment be taken to be imprisonment already served under that sentence. Again, this had the effect that the commencement date of the substituted sentence was the date of the Court of Appeal's judgment. None of these decisions considered the proper construction of the words "and pass such sentence in substitution for the sentence passed at the trial" in s 668F(2).

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49 *R v Jennings* [1999] 1 VR 352, [66].
50 (2001) 123 A Crim R 253.
51 (2001) 123 A Crim R 253, [24] (Davies and Williams JJA and Byrne J).
52 [2005] QCA 474.
53 [2009] 2 Qd R 263.

[41] Mr Holt and Mr Underwood have identified decisions of both this Court and other intermediate appellate courts in relation to equivalent provisions where the substituted sentence took effect from the date the original sentence was imposed.[54] Again, in none of those cases was consideration given to the proper construction of s 668F(2) or its equivalents. The power under s 668F(2) is to pass a sentence "in substitution for the sentence passed at the trial". On its ordinary meaning, the phrase suggests that the substituted sentence should commence from the date of the original sentence because the sentence being substituted is the sentence passed at trial. Further, as noted above at [38], there is no good reason why the term "in substitution" in s 668F(2) should have a different operation to its use in s 668E(3).

[42] The substituted sentences to be imposed by this Court should therefore commence from the date of the sentences passed at trial, 21 February 2018.

The factual basis for re-sentencing

[43] In exercising the sentencing discretion afresh, it is necessary to identify the factual basis upon which Stephen Armitage is to be sentenced.

[44] Mr Holt and Mr Underwood submit that, in identifying the factual basis, the Court should avoid two errors said to have been committed by the learned sentencing judge. The first alleged error is treating the Court of Appeal's discussion of the facts in the context of the unreasonable verdict ground in relation to murder in *R v Armitage; R v Armitage* as constituting findings of fact for the purposes of sentencing for the substituted verdict of manslaughter. The second alleged error is taking into account the acts and omissions constituting the torture count for which the Crown ultimately did not proceed. It is submitted that Stephen Armitage would be punished for an offence of which he has not been convicted if these acts and omissions were taken into account by this Court in sentencing for manslaughter. In support of this submission, reference is made to *R v De Simoni*,[55] *R v Boney; Ex parte Attorney-General (Qld)*[56] and *R v D*.[57]

[45] The first alleged error may be dealt with briefly. Mr Holt and Mr Underwood submit as follows:

> "The error in treating the Court of Appeal's discussion of findings that were open to the jury as if they were a binding statement of the Court of Appeal's finding as to the factual basis for the substituted conviction for manslaughter caused the sentencing process to miscarry."[58]

[46] A distinction must be drawn between the Court of Appeal's discussion of the unreasonable verdict ground in relation to murder and the Court's factual enquiry for substituting a verdict of guilty of manslaughter. In *R v Richards*,[59] the Court of Appeal explained its task under s 668F(2):

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54 *R v Taylor* [2000] QCA 96; *R v Bourke* [2003] QCA 113; *R v Burke* (1918) 18 SR (NSW) 336; *R v Winner* (1989) 39 A Crim R 180 and *R v McKittrick* [2008] VSCA 69.

55 (1981) 147 CLR 383.

56 [1986] 1 Qd R 190.

57 [1996] 1 Qd R 363.

58 Applicant's Submissions (Stephen Armitage), paragraph 34.

59 [2017] QCA 299, [65] (*per curiam*).

> "… the section limits the scope of the Court's factual inquiry under the jurisdiction which the sub-section confers. The Court is obliged to examine 'the finding of the jury' to determine whether that finding makes it apparent to the Court that 'the jury must have been satisfied of facts which proved the appellant guilty of that other offence'. The inquiry is, therefore, into the facts about which, it can be inferred from the actual guilty verdict, the jury must have been satisfied on the evidence at trial. The Court, in performing its task, is required to consider the elements of the count the subject of the successful appeal, the elements of the 'other offence' to which s 668F(2) refers, the jury's verdict, the evidence that must have supported that verdict, and the necessary findings implicit in the verdict. Upon that examination, the Court must consider whether the inferred findings of fact by the jury upon the evidence led at trial support a finding of guilt of the 'other offence'. If those facts that had necessarily been found support a conclusion of guilt of the 'other offence' the Court has a discretion to substitute a verdict of guilty for that offence."

[47] McMurdo JA adopted this approach in *R v Armitage; R v Armitage*.[60] The Crown could not establish the precise circumstances in which Mr Barker died. McMurdo JA acknowledged that it was not open to the jury to find, pursuant to s 7(1)(a) of the *Criminal Code*, in respect of each individual applicant, that it was his act or omission that caused Mr Barker's death.[61] One of the bases for the substituted verdict identified by McMurdo JA[62] was pursuant to s 8 of the *Criminal Code*:

> "But as I have also concluded, it was open to the jury to find that Mr Barker was killed by an injury or injuries caused by the mistreatment and violence inflicted upon him. Therefore, the jury could have been satisfied, in the terms of s 8, that the offence of manslaughter was committed in the prosecution of the unlawful purpose, according to the appellants' common intention, of assaulting the victim. Further, it was open to the jury to conclude that the unlawful killing was a probable consequence of the prosecution of that purpose."[63]

[48] Those observations were informed by his Honour's previous statements at [70]-[71]:

> "The particulars referred to a common intention of the two appellants. But in the way in which the case was argued to the jury, without objection from defence counsel, it was said that there was a plan between the two appellants and William Dean, which was a plan to assault Mr Barker for the purpose of getting information about stolen drugs.
>
> The evidence strongly supported a finding that William Dean and Stephen Armitage had a common intention of that kind. There was the evidence of their involvement in bringing Mr Barker from the Gold Coast to the Armitage property, where Mr Barker was then

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60 [2019] QCA 149, [106].
61 *R v Armitage; R v Armitage* [2019] QCA 149, [103].
62 The other being pursuant to s 7(1)(c).
63 *R v Armitage; R v Armitage* [2019] QCA 149, [99].

> detained in inhumane conditions and subjected to serious violence. The evidence which I have summarised, if accepted, proved that Stephen Armitage was causing Mr Barker to be detained and treated in that way. The reason why that was being done to Mr Barker was explained by Stephen Armitage to Mr Mitchell, namely that Mr Barker had stolen something from the Gold Coast, and other evidence supported a finding to that effect. The evidence supported Mr Dean's participation in this plan, in combination with Stephen Armitage."

[49] The above factual analysis by McMurdo JA constituted the basis upon which the Court substituted a verdict of guilty for manslaughter with the jury's verdict of guilty for murder. This analysis constitutes an appropriate factual basis for this Court to exercise the sentencing discretion afresh.

[50] As to the second alleged error, counsel for Stephen Armitage did not submit to the learned sentencing judge that taking into account the particulars of the torture count constituted error. To the contrary, counsel expressly accepted that Stephen Armitage should be sentenced on the following factual basis which was contained in paragraphs 16 and 17(a)-(i) of the Crown's written submissions on sentence:[64]

> "16. It should be accepted that Barker was imprisoned in an esky for an extended period of time, in the summer, without food or water, except water provided laced with a dangerous drug. He was also subjected to a number of serious assaults.
>
> 17. The evidence against Stephen Armitage at the second trial was as follows:
>
> (a) He told Mitchell *'they had a bloke in the esky'* and *'they were trying to get information out of him'*. He also said *'that he stole from down the Gold Coast. Either some frank or some ephedrine or something'*.
>
> (b) On another occasion he told Mitchell the guy in the esky was thirsty and he was going to give him a drink with the drug fantasy and water. Mitchell took a sample which was later analysed by police and found to be a substance if ingested converts to the drug GHB.
>
> (c) He told Mitchell he had some dead weight out there and he needed a hand. Shortly after a forklift started.
>
> (d) He told Mitchell he had to go down the Gold Coast about 'the fellow in the esky' and *'to explain to them down the Gold Coast about the bloke in the esky.'*
>
> (e) Ballard saw Dean and Stephen Armitage near an esky with *'a man trying to half stand up, or half on his hands and knees'*. Later Stephen Armitage threatened Ballard saying if he said anything that he *'would end up in the esky beside him.'*

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64 AB267, paragraph 7; AB91.23-27.

(f) He told Schutz to *'stay away from the eskies, that there was someone in there.'*

(g) Schutz saw Stephen Armitage was operating a forklift with an esky on the tines which was on its side and raised a metre off the ground. There was a human on their knees in front of the esky underneath. The human's head was covered.

(h) Stephen Armitage told Matthew Dean *'you wouldn't believe how much of a flogging he's taken'* and *'he won't talk.'*

(i) Stephen Armitage told Matthew Dean in the presence of Matthew Armitage *'don't worry about it that blokes still alive.'*

…"[65]

[51] An applicant in Stephen Armitage's position would ordinarily be bound by the conduct of his case at first instance.[66] As this Court is sentencing afresh, however, it should not have regard to the particulars of the torture count if to do so would constitute error. The Crown relied on several acts in relation to the torture count which included assaulting Mr Barker, keeping him in an esky, depriving him of sustenance and/or depriving him of his liberty.[67] Before this Court, counsel for Stephen Armitage identify the allegations comprising the offence of torture as being that Mr Barker:

(a) was confined to an esky in summer for an extended period of time;

(b) was deprived of sustenance;

(c) was provided water laced with a dangerous drug;

(d) had honey put on his genitals to attract ants;

(e) was tied to a tree in a forest; and

(f) was flogged.[68]

[52] It is submitted that, as Stephen Armitage has not been convicted of torture, he is presumed to be innocent, and that this presumption prevents the torture allegations from influencing his sentence for manslaughter. The submission is made on the premise that the torture allegations do not relate to how the unlawful killing occurred.[69] For those reasons, this Court would re-sentence Stephen Armitage on the following limited factual basis:

"(a) The applicant was party to a plan to assault Mr Barker to get information from him about drugs.

(b) Mr Dean brought Mr Barker to the applicant's property.

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65 AB228-229 (original emphasis).

66 *R v Compton* [2017] 2 Qd R 586, [29]-[30] (Flanagan J), citing *R v Flew* [2008] QCA 290, [27] (Keane JA).

67 *R v Armitage; R v Armitage* [2019] QCA 149, [109] (McMurdo JA).

68 Applicant's Reply Submissions (Stephen Armitage), paragraph 6.

69 Applicant's Reply Submissions (Stephen Armitage), paragraphs 8, 9 and 13.

(c) Mr Barker was unlawfully killed in unknown circumstances.

(d) The applicant is responsible for Mr Barker's unlawful killing on the basis that his death was a probable consequence of the prosecution of the plan to assault Mr Barker to get information from him about drugs.

(e) The applicant became aware of Mr Barker's death.

(f) He interfered with Mr Barker's corpse by disposing of it in bushland and setting it on fire."[70]

[53] Counsel for Stephen Armitage submit that, on this factual basis, the only violence for which he is guilty is the violence associated with Mr Barker's unlawful killing. It is said that the degree of that violence is unknown, and it cannot be inferred that it was so serious as to warrant a serious violent offence declaration.[71]

[54] In *R v De Simoni*, the judge, sentencing for robbery, impermissibly took into account an uncharged circumstance of aggravation, being that the defendant had used personal violence and wounded the victim. Gibbs CJ stated:

> "However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. … The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."[72]

[55] In *Nguyen v The Queen*,[73] Bell and Keane JJ stated that "… the *De Simoni* principle is an aspect of the fundamental principle that no one should be punished for an offence of which the person has not been convicted".

[56] In *R v Boney; Ex parte Attorney-General (Qld)*, the Queensland Court of Criminal Appeal considered the *De Simoni* principle. The primary judge, sentencing for manslaughter, heard evidence of the facts surrounding the crime which included not only the killing by asphyxiation of an 85 year old person, but also that the defendant had assaulted and had sexual intercourse with the victim prior to killing her. Both Macrossan J and McPherson J (as their Honours then were) held that, in imposing sentence, it was impermissible to give consideration to the fact that the defendant may have raped the victim. Macrossan J observed:

> "If in the circumstances of this case it is thought that the basis upon which the prisoner had to be sentenced was an artificially restricted one, then this is so simply because rape was not charged and a plea to a lesser charge than murder was accepted."[74]

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70 Applicant's Reply Submissions (Stephen Armitage), paragraph 15.
71 Applicant's Reply Submissions (Stephen Armitage), paragraphs 16 and 17.
72 *R v De Simoni* (1981) 147 CLR 383, 389.
73 (2016) 256 CLR 656, [29].
74 *R v Boney; Ex parte Attorney-General* [1986] 1 Qd R 190, 205.

[57] McPherson J analysed the decision in *R v De Simoni* as follows:

> "That case involved a conviction for robbery – stealing with actual violence under s. 391 of the Criminal Code of Western Australia – which raised for consideration the factors to be taken into account in sentencing the offender. There was a division of opinion on the question whether or not in fixing sentence it was proper for the judge to have regard to the fact that the victim of the robbery had been wounded. Gibbs C. J., Mason and Murphy JJ held that it was not. Gibbs, C. J., with whose reasoning Mason J agreed, reached that conclusion on the ground that wounding was, under s. 393 of the Criminal Code (W.A.), capable of being, but had not in that case been, charged in the indictment as a circumstance of aggravation. On that point Wilson and Brennan JJ held a different view. The members of the Court were, however, unanimous in holding that the sentencing judge was justified in having regard to the circumstance that actual violence had been used by the offender. Although the use of 'personal violence' was also treated by s. 393 of the Code as a circumstance of aggravation, Gibbs C. J. considered it to be indistinguishable from 'actual violence', which was an ingredient of the offence of robbery as defined by s. 391 of the Code. Accordingly, the use of personal violence by the accused was a factor to be considered in sentencing although not specifically alleged in the indictment as a circumstance of aggravation."[75]

[58] McPherson J observed that, as the defendant had been neither charged nor convicted of rape, he could not be punished for it.[76] This, according to McPherson J, was consistent with the principle identified by Gibbs CJ in *De Simoni,* namely that "no one should be punished for an offence of which he has not been convicted".

[59] In applying this principle to the present case, this Court should proceed on the basis that Stephen Armitage cannot be punished for the offence of torture of which he has not been convicted. Section 320A of the *Criminal Code* creates the offence of torture and provides that a person who tortures another person commits a crime. "Torture" means the intentional infliction of severe pain or suffering on a person by an act or series of acts done on one or more than one occasion.[77] The term "pain or suffering" is defined to include physical, mental, psychological or emotional pain or suffering, whether temporary or permanent.[78] The question for the Court in sentencing for manslaughter in this case is as follows. In circumstances where manslaughter was a probable consequence of the prosecution of a common purpose to assault Mr Barker for the purpose of obtaining information about stolen drugs, what is the relevance of those acts done in prosecution of the common purpose that might also be relevant to a charge of torture?

[60] This Court further considered *De Simoni* in its unanimous joint judgment in *R v D*:[79]

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75 *R v Boney; Ex parte Attorney-General* [1986] 1 Qd R 190, 207.
76 *R v Boney; Ex parte Attorney-General* [1986] 1 Qd R 190, 208.
77 *Criminal Code* s 320A(2) def of "torture".
78 *Criminal Code* s 320A(2) def of "pain or suffering".
79 [1996] 1 Qd R 363, 394.

> "In *De Simoni*, a majority of the High Court held that a person convicted of robbery with actual violence, who had wounded a person in the course of the robbery, could be sentenced on the basis of the violence which he had used but that the wounding caused by such violence could not be taken into account."

[61] After quoting from Gibbs CJ's judgment, including the passage reproduced at [54] above, the Court stated:

> "A careful reading of that passage reveals that it deals, without distinction, with a number of potentially different situations; its broad effect is that a matter cannot be taken into account in sentencing if:
>
> (i) it is another offence of which the person to be sentenced has not been convicted;
>
> (ii) it establishes that the offence which the person to be sentenced committed was more serious than the offence of which he or she has been convicted;
>
> (iii) it aggravates the offence of which the person to be sentenced has been convicted, in that it renders that person liable to a greater maximum penalty."[80]

[62] The Court, however, added the following qualification:

> "However, it does not in terms state that a circumstance of the offence of which the person to be sentenced has been convicted which also establishes another offence cannot be taken into account in sentencing if that other offence is not more serious than the offence charged and does not expose the person convicted to a greater maximum penalty."[81]

[63] The Court summarised its conclusions as follows:

> "Sentencing judges ought experience little difficulty in practice if there is unqualified adherence to the fundamental principles which emerge from the decisions of the High Court in *De Simoni* and subsequent cases. We will try to summarise those principles in a manner which should be adequate for most purposes.
>
> 1. Subject to the qualifications which follow:
>
> (a) a sentencing judge should take account of all the circumstances of the offence of which the person to be sentenced has been convicted, either on a plea of guilty or after a trial, whether those circumstances increase or decrease the culpability of the offender;
>
> (b) common sense and fairness determine what acts, omissions and matters constitute the offence and the attendant circumstances for sentencing purposes; and

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80 *R v D* [1996] 1 Qd R 363, 395.
81 *R v D* [1996] 1 Qd R 363, 395.

(c) an act, omission, matter or circumstance within (b) which might itself technically constitute a separate offence is not, for that reason, necessarily excluded from consideration.

2. An act, omission, matter or circumstance which it would be permissible otherwise to take into account may not be taken into account if the circumstances would then establish:

(a) a separate offence which consisted of, or included, conduct which did not form part of the offence of which the person to be sentenced has been convicted;

(b) a more serious offence than the offence of which the person to be sentenced has been convicted; or

(c) a 'circumstance of aggravation' of which the person to be sentenced has not been convicted; i.e., a circumstance which increases the maximum penalty to which that person is exposed."[82]

[64] Having regard to these principles, it may be accepted that the particulars of torture may constitute a relevant circumstance of the manslaughter by reason of the fact that those acts and omissions inform how manslaughter was a probable consequence of the prosecution of the common purpose. However, it is unnecessary for this Court to make specific factual findings about whether any particular act was committed. It is sufficient to proceed on the factual basis identified by McMurdo JA in substituting the verdict of guilty of murder with one of manslaughter. That factual basis is outlined in [47] to [49] above and may be summarised as follows:

(a) there was a plan to assault Mr Barker by the infliction of pain[83] for the purpose of getting information about stolen drugs;

(b) Stephen Armitage was involved in bringing Mr Barker from the Gold Coast to the Armitage property, where Mr Barker was then detained in inhumane conditions and subjected to serious violence;

(c) Mr Barker was unlawfully killed by an injury or injuries caused by the mistreatment and violence inflicted upon him;

(d) the offence of manslaughter was committed in the prosecution of the unlawful purpose, according to the applicants' common intention of assaulting Mr Barker;

(e) the unlawful killing of Mr Barker was a probable consequence of the prosecution of the common purpose.

Re-sentencing

[65] As observed at [42] above, the sentences to be imposed by this Court should commence from 21 February 2018. The result is that, when compared with the sentences imposed by Jackson J on 19 February 2020, these sentences will appear to

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82 *R v D* [1996] 1 Qd R 363, 403 (citations omitted).

83 It was conceded by Mr Holt QC in the course of oral submissions that the common purpose was to assault Mr Barker by the infliction of pain: T 1-12, lines 34-36.

be higher. However, the fresh sentences do not have the practical effect of imposing a higher sentence given their retrospective commencement date.

[66] The Court should re-sentence the applicants on the basis that they do not have the benefit of any guilty pleas and are to be sentenced for manslaughter following a trial. There was no cooperation with police and, as found by Jackson J, "[t]here is no expression of regret or remorse".[84]

[67] It is necessary to take account of the sentences imposed on 21 February 2018 for interfering with a corpse. Pursuant to s 155 of the *Penalties and Sentences Act*, the two-year terms of imprisonment for interfering with a corpse will be deemed to be served concurrently with any sentence imposed for manslaughter. To reflect the separate criminality involved with the count of interfering with a corpse, Jackson J notionally considered increasing each sentence for manslaughter by one year.[85] The interfering with a corpse offending would not, however, attract a declaration for a serious violence offence. As stated by Fryberg J in *R v Derks*:

> "In circumstances where the operative sentence is for an offence the subject of an SVO declaration, it is a mistake to impose a global sentence reflecting non-declarable convictions unless the fact that those convictions are not declarable has been taken into account in reducing what would otherwise have been the global sentence. I agree with what the President has written on this aspect of the application."[86]

[68] Taking this into account, the criminality of the interfering with a corpse offending is appropriately reflected by increasing each sentence for manslaughter by an additional six months.

[69] In determining sentences for each of the applicants, the issue of parity requires the Court to assess differences between them such as "age, background, criminal history, general character and the part each has played" in the unlawful killing of Mr Barker.[87] I accept, as submitted by the Crown before Jackson J,[88] and as his Honour accepted,[89] that the degree of criminal culpability would be, from highest to lowest, Dean, Stephen Armitage and Matthew Armitage.

Stephen Armitage

[70] Stephen Armitage was 45 years of age when the offending occurred and is now 52. He has a minimal criminal history. He has three adult-aged daughters to a previous relationship and is the father of Matthew Armitage. He completed grade 8 at Gympie State High School, has worked as a fisherman and holds a Master Fisherman's Licence, a Marine Engine Driver's Ticket and other licences associated with driving large fishing vessels.

[71] His counsel submit that a head sentence of no more than nine years without a serious violent offence declaration is appropriate. In support of this submission,

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84 AB152-153.
85 AB157.45-48.
86 [2011] QCA 295, [44] (Fryberg J). See also, McMurdo P's reasons at [26]-[29] of that decision.
87 *Green v The Queen* (2011) 244 CLR 462, [31] (French CJ and Crennan and Kiefel JJ).
88 AB231, paragraph 25.
89 AB155.1-8.

reference is made to *R v Miller*[90] and *R v Lincoln; R v Kister; R v Renwick*.[91] The facts in both cases differ from the present case. As correctly submitted by the Crown before Jackson J:

> "There does not appear to be any closely comparable cases to the factual circumstances of this case. No established range can be submitted."[92]

[72] As stated by Holmes JA (as the Chief Justice then was), with whom Jerrard JA and Cullinane J agreed, in *R v Huebner*:[93]

> "… manslaughter offences were so variable that it was difficult to generalise about appropriate sentences or compare sets of facts one against the other."

[73] The factual basis outlined in [64] above constitutes criminal conduct that is very serious. The offence was a probable consequence of protracted mistreatment committed in an attempt to obtain information from Mr Barker about stolen drugs.[94] I accept the Crown's submission that a declaration of the manslaughter conviction as a conviction for a serious violent offence is justified. Community protection and adequate punishment warrant an order requiring the applicant to serve 80 per cent of his sentence as part of a just penalty. A notional head sentence of 11 years for manslaughter is within the appropriate range. An additional six months should be added for the count of interfering with a corpse. A sentence of 11½ years' imprisonment would mean, pursuant to s 161A(a) of the *Penalties and Sentences Act*, that the applicant would be automatically convicted of a serious violent offence. In any event, the Court should make such a declaration.[95]

[74] Further, pursuant to s 159A of the *Penalties and Sentences Ac*t, 1237 days of pre-sentence custody between 4 October 2014 and 21 February 2018 is declarable as imprisonment taken to be already served under the sentence.

Matthew Armitage

[75] Matthew Armitage was 21 years of age when the offending occurred and is now 29. He had no criminal history as at 21 February 2018. After leaving school, he worked with his father in commercial fishing. He has a 10-year-old son from a high school relationship which lasted for approximately four years. After the offending, he moved to New South Wales for work and formed a new relationship which continued until he was remanded in custody on 4 October 2014.

[76] Mr Ryan, who appeared for Matthew Armitage, submits that a sentence of eight years' imprisonment is appropriate, with no serious violent offence declaration. Mr Ryan emphasises the following matters as being relevant to the exercise of the sentencing discretion:

(a) the applicant's liability arose under s 8 of the *Code*;

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90 (2011) 211 A Crim R 214.
91 [2017] QCA 37.
92 AB232, paragraph 35.
93 [2006] QCA 406, [25].
94 Respondent's Submissions (Stephen Armitage), paragraph 38.
95 *Penalties and Sentences Act* s 161B(1).

(b) the evidence did not support a finding that he participated in acts of actual violence;

(c) he was the least culpable of the three offenders;

(d) he was only 21 and without criminal history when the offences were committed;

(e) he acted under the influence of his father; and

(f) his prospects of rehabilitation are good.[96]

[77] By reference to decisions of this Court in *R v Hicks & Taylor*[97] and *R v Dean; R v Selmes; R v Phillips*,[98] which he submits are broadly comparable manslaughters committed by young offenders, Mr Ryan asks this Court not to impose a serious violent offence declaration. While the factors identified by Mr Ryan call for a lesser sentence than that to be imposed on Stephen Armitage and Dean, it remains the case that Matthew Armitage was a party to the plan to assault and detain Mr Barker for the purpose of obtaining information about stolen drugs. Mr Barker's unlawful killing was a probable consequence of the execution of that plan.

[78] Matthew Armitage's role was identified by McMurdo JA in *R v Armitage; R v Armitage* as follows:[99]

> "The case that Matthew Armitage was a party to this plan, if not as strong as that against his father, had a sufficient evidentiary basis. Matthew Armitage worked with his father in his father's fishing business and lived with his father in his father's house. Mr Mitchell testified that Matthew Armitage said that he was wanting to find 'the big black zip ties' in order to tie somebody down, or to a tree, or to handcuff him. If the jury accepted that this was said by Matthew Armitage, then in the context of the evidence of the reasons for and the circumstances of Mr Barker's detention at the property, it was compelling proof of Matthew Armitage's participation in the common plan."

[79] Community protection and adequate punishment warrant an order requiring the applicant to serve 80 per cent of his sentence as part of a just penalty.[100]

[80] Matthew Armitage should therefore be sentenced to imprisonment for 9½ years, which reflects a notional sentence of nine years for manslaughter, together with six months for the interfering with a corpse offending. The manslaughter conviction should be declared a conviction for a serious violent offence pursuant to s 161B(3) of the *Penalties and Sentences Act*. Pursuant to s 159A, 1237 days of pre-sentence custody between 4 October 2014 and 21 February 2018 is declarable as imprisonment taken to be already served under the sentence.

William Dean

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96 Applicant's Submissions (Matthew Armitage), paragraph 50.
97 [2011] QCA 207.
98 [2018] QCA 124.
99 *R v Armitage; R v Armitage* [2019] QCA 149, [72].
100 Respondent's Submissions (Matthew Armitage), paragraph 32, citing *R v Free; Ex parte Attorney-General (Qld)* (2020) 4 QR 80, [54].

[81] The Court of Appeal summarised the evidence against Dean in *R v Dean* at [94]. Morrison JA, with whom Holmes CJ and Gotterson JA agreed, summarised the effect of the evidence as follows:[101]

> "The summary of evidence above shows that the appellant participated in the imprisonment of Mr Barker on 10 December 2013, and the assaults upon him, for the ostensible reason of extracting information from him about the location of drugs or money. Further, the inference available on that evidence is that he was doing so in order to assist Murphy, to whom Barker owed the debt, or from whom Barker had stolen drugs.
>
> Further, the evidence shows that the appellant participated in the kidnapping of Barker on the morning of 11 December, when he drove Barker north and (inferentially) to the property owned by Stephen Armitage."

[82] Dean was 36 years of age when the offending occurred and is now 44. He was educated to year 12 and had a career in professional fishing. He has both master's and marine engineering qualifications. Jackson J accepted that Dean's involvement in the offending grew from his involvement in the operations of drug dealers that traced back to Dean's personal drug habit.[102]

[83] Dean did have a criminal history as at 21 February 2018, including for possessing dangerous drugs. On 16 September 2016, Dean was sentenced in the District Court at Southport for his role in the extortion offences in March 2014. The offending was serious. He pleaded guilty to extortion, robbery in company, deprivation of liberty and two counts of assault occasioning bodily harm. Dean, with Scott Murphy and Stephen Jaffe, kidnapped the victim who owed Murphy $2,000. They tied him up and took him to the bush where he was held and assaulted before police intervened. The details of this sentence and Dean's subsequent successful appeal are outlined in [22] above.

[84] Dean was remanded in custody for the manslaughter offending on 4 October 2014 and was also in custody for the extortion offending from 9 October 2015. Dean's pre-sentence custody between 9 October 2015 and 16 September 2016 was taken into account by the Court of Appeal in reducing Dean's sentence for the extortion offences by 12 months. He was serving his custodial sentence for the extortion offences during his period of pre-sentence custody from 16 September 2016 to 21 February 2018. His declarable pre-sentence custody is therefore a period of 370 days from 4 October 2014 to 9 October 2015.

[85] Dean's parole eligibility date for the extortion offences was 12 November 2017, with a full-time release date of 1 June 2021. The period of pre-sentence custody from 12 November 2017 to 21 February 2018, which is a little over three months, cannot be declared under s 159A,[103] but must be taken into consideration if a serious violent offence declaration is made.

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101 *R v Dean* [2019] QCA 254, [98]-[99].
102 AB153.39-40.
103 *R v McCusker* [2015] QCA 179.

[86] As Dean's manslaughter sentence will overlap with the sentence for the extortion offences, totality issues arise. As stated by McMurdo J (as his Honour then was) in *R v Beattie*:[104]

> "The principle has also been extended in the sentencing of an offender who is then serving an existing sentence. In such a case, 'the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable'."[105]

[87] The period of overlap is from 16 September 2016 to 21 February 2018, which is 523 days or one year, five months and five days, during which time Dean was remanded in custody for the present offences, as well as serving the sentence for the extortion offences. This period incorporates the non-declarable period of approximately three months between Dean's parole eligibility date under the extortion sentence and 21 February 2018. As none of the 523 days is declarable, the question arises what reduction should be made to the manslaughter sentence to reflect the totality principle in circumstances where the sentence that will be imposed will carry with it a serious violent offence declaration. The sentence for the extortion offences, which were a completely unrelated series of offences committed shortly after the present offences, should be reflected by the sentence for manslaughter having some cumulative effect.

[88] Before Jackson J, Dean's counsel submitted that the appropriate range was between nine and 12 years. Jackson J identified a notional head sentence for manslaughter of 12 years, increased to 13 years by reference to the interfering with a corpse offending. The notional starting point for Dean is 12½ years, which reflects his greater culpability in Mr Barker's unlawful killing and takes account of the interfering with a corpse offending. For the reasons outlined in the preceding paragraphs, this should be reduced by one year, to 11½ years.

[89] A sentence of 11½ years carries with it a mandatory serious violent offence declaration pursuant to s 161B(1) of the *Penalties and Sentences Act*, enlivening the operation of s 160D. As Dean has a parole eligibility date under the extortion sentence, s 160D(2) obliges this Court to fix a new parole eligibility date which should be 80 per cent of his sentence of 11½ years, commencing from 21 February 2018.[106] Taking into account the 370 days of declarable pre-sentence custody, the parole eligibility date should therefore be 29 April 2026.

Disposition

[90] I would make orders as follows.

[91] In CA No 62 of 2020 (Stephen John Armitage):

1. Application for leave to appeal against sentence granted.

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104 *R v Beattie; Ex parte Attorney-General (Qld)* (2014) 244 A Crim R 177, [19] (citations omitted).

105 See also *Mill v The Queen* (1988) 166 CLR 59 and s 9(2)(1) of the *Penalties and Sentences Act* which provides that in sentencing an offender a court must have regard to "sentences already imposed on the offender that have not been served".

106 Dean's full-time release date for the extortion offences was 21 June 2021, meaning that, as at 21 February 2018, he had a current parole eligibility date for the purposes of s 160D(2) of the *Penalties and Sentences Act*.

2. Appeal allowed.

3. Set aside the sentence imposed below.

4. The applicant is sentenced to imprisonment for 11 years and six months commencing from 21 February 2018. Pursuant to s 159A of the *Penalties and Sentences Act 1992* (Qld), it is declared that 1237 days spent in pre-sentence custody between 4 October 2014 and 21 February 2018 is time taken to be imprisonment already served under the sentence. It is declared that the conviction for manslaughter is a conviction of a serious violent offence under s 161B(1) of the *Penalties and Sentences Act 1992* (Qld).

[92] In CA No 51 of 2020 (Matthew Leslie Armitage):

1. Application for leave to appeal against sentence granted.

2. Appeal allowed.

3. Set aside the sentence imposed below.

4. The applicant is sentenced to imprisonment for nine years and six months commencing from 21 February 2018. Pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld), it is declared that 1237 days spent in pre-sentence custody between 4 October 2014 and 21 February 2018 is time taken to be imprisonment already served under the sentence. It is declared that the conviction for manslaughter is a conviction of a serious violent offence under s 161B(3) of the *Penalties and Sentences Act 1992* (Qld).

[93] In CA No 63 of 2020 (William Francis Dean):

1. Application for leave to appeal against sentence granted.

2. Appeal allowed.

3. Set aside the sentence imposed below.

4. The applicant is sentenced to imprisonment for 11 years and six months commencing from 21 February 2018. Pursuant to s 159A of the *Penalties and Sentences Act 1992* (Qld), it is declared that 370 days between 4 October 2014 and 9 December 2015 is time taken to be imprisonment already served under the sentence. It is declared that the conviction for manslaughter is a conviction of a serious violent offence under s 161B(1) of the *Penalties and Sentences Act 1992* (Qld). Pursuant to s 160D(2) of the *Penalties and Sentences Act 1992* (Qld), the applicant's parole eligibility date is fixed at 29 April 2026.