SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cane* [2023] QCA 199
PARTIES:	**R** **v** **CANE, Mark** (applicant)
FILE NO/S:	CA No 199 of 2022 DC No 555 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 30 May 2022 (Fantin DCJ)
DELIVERED ON:	4 October 2023
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2023
JUDGES:	Mullins P and Boddice JA and Cooper J
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal against sentence be allowed.** **3. The sentence below for the offence of kidnapping for ransom imposed on 30 May 2022 be varied by substituting "five years" for "six years".** **4. All other orders made by the sentencing judge are confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant pleaded guilty to one count of kidnapping for ransom and one count of making a false declaration – where the sentence application only concerns the sentence imposed for the kidnapping for ransom count – where the applicant was sentenced in respect of that count to six years imprisonment with an immediate parole eligibility date, to be served cumulatively on any other term of imprisonment he was liable to serve – where the kidnapping for ransom count was contained on a three count indictment which included a count of common assault and a count of assault occasioning bodily harm, in company, alleged to have been inflicted upon the complainant during the commission of the kidnapping for ransom – where the Crown entered a *nolle prosequi* in respect of the two latter

counts on the basis the agreed statement of facts on sentence would refer to acts of violence inflicted upon the complainant – where the applicant was sentenced on the kidnapping for ransom count on the basis he had committed those acts of violence – whether the sentencing judge erred in sentencing the applicant on the basis of uncharged acts

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – where the sentence hearing was complicated by the proper construction of the words "any other term of imprisonment the offender is liable to serve" in s 156A(2) of the *Penalties and Sentences Act 1992* (Qld) – where the applicant committed the kidnapping for ransom whilst on parole for possessing dangerous drugs and related offending – where the applicant also committed an offence of dangerous operation of a motor vehicle after the kidnapping for ransom – where that offence was dealt with in the Magistrates Court prior to the sentence the subject of appeal – where the applicant submits the triggering event to activate the mandatory cumulative term of imprisonment under s 156A was the commission of a schedule 1 offence whilst on parole and that the words "liable to serve" relate to the liability to serve the sentence that is the triggering event – whether, on a re-exercise of the sentencing discretion, s 156A ought be construed to require the applicant to serve the kidnapping for ransom sentence cumulatively with the sentences imposed for both the dangerous operation of a motor vehicle and possessing dangerous drugs

Corrective Services Act 2006 (Qld), s 209, s 211
Penalties and Sentences Act 1992 (Qld), s 4A, s 9(2)(m), s 156, s 156A, s 159A

Nguyen v The Queen (2016) 256 CLR 656; [2016] HCA 17, applied
R v Bartorillo [2006] QCA 283, considered
R v Braeckmans (2022) 10 QR 144; [2022] QCA 25, cited
R v De Simoni (1981) 147 CLR 383; [1981] HCA 31, applied
R v Hawks [2019] QCA 181, considered
R v Pepper & Cornwell [1999] QCA 47, considered
R v Ramsay [2010] QCA 276, considered

COUNSEL: A M Hoare and L M Dollar for the applicant
S L Dennis for the respondent

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

[1] **THE COURT:** On 11 April 2022, the applicant pleaded guilty to one count of kidnapping for ransom committed on 9 August 2019, against a male complainant.

[2] On 30 May 2022, the applicant was sentenced to six years imprisonment. It was declared the applicant had been held in pre-sentence custody for a period of 1,024 days, but only 68 of those days was to be taken to be imprisonment already served under the sentence. The sentence was ordered to be served cumulatively on any other term of imprisonment the applicant was liable to serve. A parole eligibility date was fixed at 31 May 2022.

[3] On the same date, the applicant was sentenced to three months imprisonment for one count of making a false declaration, to which the applicant had pleaded guilty on 10 May 2022. The three months imprisonment was ordered to be served concurrently with any other term of imprisonment he was liable to serve. In respect of this count, it was declared the applicant had been held in pre-sentence custody for a period of 642 days, but only 92 days of that pre-sentence custody was to be taken to be imprisonment already served under the sentence.[1]

[4] The applicant seeks leave to appeal against his sentence for the offence of kidnapping for ransom. Should leave be granted, the applicant relies on two grounds. First, the sentencing judge erred in sentencing the applicant on the basis of uncharged acts, being acts of violence against the complainant. Second, the sentencing judge erred in only declaring 68 days pre-sentence custody as time taken to be served under the sentence.

Background

[5] The applicant was aged 56 at sentence and 53 at the time of the commission of the offence. He had an extensive past criminal history. Relevantly, that history included recent convictions for serious drug offending for which the applicant had been sentenced to imprisonment.[2] The applicant was on parole in respect of that sentence at the time of the commission of this offence.

[6] The count of kidnapping for ransom was contained on a three count indictment. The remaining counts were common assault and assault occasioning bodily harm, in company. All three counts were alleged to have been committed on the same day, against the same male complainant, by the applicant and two co-offenders.

[7] After the applicant pleaded guilty to the count of kidnapping for ransom, the Crown entered a *nolle prosequi* in respect of the remaining two counts, insofar as they related to the applicant.[3] That course of action was taken in circumstances where it was accepted by the applicant that the agreed statement of facts on sentence for the kidnapping for ransom count would refer to acts of violence inflicted upon the male complainant during the commission of the kidnapping for ransom count.

Sentence hearing

[8] Relevantly, the agreed statement of facts stated:

(a) The complainant owed the applicant $3,500 and the applicant wanted that money returned to him. At the same time, the complainant was owed various sums of money from people in the surrounding area. The applicant told the

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1 By the time this application was heard, the applicant had been released on parole as a result of the orders made by the sentencing judge.

2 Although initially sentenced to six years, six months imprisonment, on 25 November 2015 that sentence was reopened and the applicant's sentence was reduced to five years, 11 months imprisonment.

3 The applicant had been charged with those counts on the basis of his liability as a party.

complainant to obtain the money from these people. The applicant had made unsuccessful attempts to obtain those outstanding sums.

(b) On 9 August 2019, the applicant called and messaged the complainant numerous times. The voicemails captured conversations between the applicant and his co-offenders in relation to those debts.

(c) Shortly before 2.00 pm on 9 August 2019, the applicant and his co-offenders ordered the complainant into a vehicle before one of the co-offenders punched the complainant in the face and demanded he empty his pockets. The complainant offered to go and see other people who owed him money. The applicant threatened that if he did not obtain the money, he would go to the complainant's mother's house and get the money from her. He also threatened the complainant.

(d) Thereafter, the applicant, his co-offenders and the complainant attended other residences and work areas, seeking to recover outstanding debts owed to the complainant. During this period, the complainant was punched by one of the co-offenders at various times throughout the afternoon.

(e) The attempts to obtain the outstanding monies were unsuccessful and the applicant, his co-offenders and the complainant returned to a unit where the complainant unsuccessfully sought to contact a number of people via text and Facebook messages seeking money. Whilst at the unit, the applicant told the complainant to sit in a chair. The applicant and his co-offenders punched the complainant to the head multiple times causing him extreme pain and leaving him fearful for his life.

(f) Throughout that afternoon, the applicant and his co-offenders continued to assault the complainant. One of the co-offenders hit the complainant in the head with a chair with metal legs. There was a discussion between the applicant and one of his co-offenders about "knocking" the complainant, putting him into a car and setting it alight. One of the co-offenders turned the kettle on and threatened to pour boiling water over the complainant.

(g) During the afternoon, the complainant contacted his mother, requesting money. He told her "I'm pretty banged up". One of the offenders was heard to state, "What you think you're banged up, mate? Cop this". The mother heard the complainant being hit. Later, the complainant contacted his brother who could hear the complainant crying and grunting as he was hit by one of the offenders.

(h) It was arranged between the complainant and his brother that they would meet at a shopping centre where the brother would give the applicant and his co-offenders $1,500. The applicant told the brother to bring that money where they would arrange a "payment plan" for the remainder of the money. The applicant threatened to break the complainant's legs if payment was not made.

(i) Unbeknown to the applicant and his co-offenders, the complainant's brother and mother had contacted police who arranged to covertly attend the meeting place. This resulted in delay. During this period, the applicant struck the complainant in the face.

(j) At one point, a female associate of the applicant arrived at the unit. She observed the complainant with a swollen black eye. It looked like his eye was popping out of his head. The applicant threatened her as she also owed the applicant money. He told her police did not know her car and she had to drive them to meet the complainant's brother to collect the money, or "she would end up like [the complainant]".

(k) The female associate drove the applicant, one of the co-offenders and the complainant to the meeting place. The applicant told the complainant to get the money from his brother and to meet him at a fast food outlet. The complainant was found by police and taken to hospital for treatment.

(l) When police sought to arrest the applicant and his co-offenders on 10 August 2019, the applicant drove at speed, drifting across three lanes of traffic.[4]

[9] The statement of facts recorded that the complainant had suffered a number of injuries including right eye socket fractures, a right cheek fracture, a nose fracture, a right jaw fracture, significant swelling and bruising to the right eye.

[10] Victim impact statements tendered from the complainant, his mother and his brother spoke of the emotional distress occasioned to them. The complainant also spoke of the significant impact of the physical injuries upon him.

Sentencing remarks

[11] The sentencing judge recorded that the applicant had pleaded guilty; that the offence of kidnapping for ransom was a particularly serious offence; and that whilst there was an early plea to an amended indictment, a submission in relation to the indictment was not sent until 17 months after the indictment was ultimately presented and after the complainant had been subjected to cross-examination at committal. The sentencing judge observed that whilst there was utility in the plea by saving the Court and the community the cost of a trial, the plea of guilty was entered in the face of a strong Crown case and did not spare the complainant from being cross-examined. Nevertheless, the sentence would be reduced accordingly because of that plea of guilty.

[12] The sentencing judge also recorded that the circumstances of the offence were set out in an agreed statement of facts; that the sentencing judge "had regard to all of the facts set out in that document"; and that the applicant was a mature man with a lengthy and serious criminal history, whereas the complainant was a young man who had become concerned for his safety due to the applicant's repeated demands for repayment of the debt. The sentencing judge then recorded the circumstances of the offence, noting repeated acts of violence in the commission of the offence.

[13] The sentencing judge recorded that when police attempted to intercept the applicant and his co-offenders, the applicant had reversed at speed, drove around an officer and drove across three lanes of traffic. That offending had formed a separate charge of dangerous operation of a vehicle for which the applicant had been sentenced to nine months imprisonment on 17 November 2020.

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4 This conduct was the subject of a charge of dangerous operation of a motor vehicle to which the applicant pleaded guilty in the Magistrates Court.

[14] After recording the complainant's extensive physical injuries, and the contents of the victim impact statements, the sentencing judge said:

> "There are a number of aggravating features to that offending. They include that you were the instigator of it and the ring leader. The debt was owed to you and [the offending] occurred as an attempt to recover a debt owed to you. The offending was protracted, occurring over a period of 10 to 11 hours. You threatened the complainant numerous times including by death threats. *You inflicted actual violence on him*. You were in company and the other co-offenders also inflicted violence on him. He suffered significant injuries. Fortunately, they were not sufficient to constitute grievous bodily harm. You involved others, the victim's mother and brother, in the offending. You attempted to flee from police. The offending had a significant impact on the victim, his brother, and mother, and you were on parole at the time that you committed the offence." (emphasis added)

[15] The sentencing judge referred to the sentences imposed on the two co-offenders. One received a head sentence of five years imprisonment, suspended after serving 781 days declared as time served. That offender had been sentenced on the basis he was not the instigator and "got swept up in" the offending. His criminal history also contained offences of violence which were very dated. The other was sentenced to six years imprisonment with an immediate parole eligibility date, with 963 days of pre-sentence custody being declared as time served. He was sentenced on the basis he had a significant role in the offending, had inflicted actual violence on a number of occasions and had a poor and relevant criminal history, including a conviction for deprivation of liberty, as well as convictions for violent offending. His offending was also aggravated by the fact it occurred in breach of a suspended sentence which was activated to be served in full, concurrently with the head sentence.

[16] The sentencing judge accepted that parity was a relevant consideration and noted that although the latter co-offender's criminal history contained more relevant convictions for offences of violence and for deprivation of liberty, the applicant had a poor and lengthy criminal history and was on parole at the time of the commission of the offence. He also was being sentenced on the basis he was the instigator of the offence.

[17] After referring to the separate offence of making a false declaration and the sentence imposed on a co-offender in that offence, the sentencing judge recorded that the applicant was not an Australian citizen with the likelihood that his permanent residence visa would be cancelled with the prospect of deportation, which the sentencing judge took into account as a relevant factor in mitigation on sentence.

[18] The sentencing judge recorded the details of the applicant's significant and poor criminal history, noting that most relevantly he had been sentenced on 17 November 2015 for the possession of a substantial amount of dangerous drugs, as well as a quantity of cash and being the holder of a bank account containing hundreds of thousands of dollars suspected of being used in connection with trafficking. The applicant was released on board-ordered parole in respect of that sentence on 28 November 2018 and committed this offence after having been on parole for about eight months.

[19] The sentencing judge recorded that the applicant had now served a very lengthy period in pre-sentence custody, some 1,024 days, and that because he had committed this offence whilst on parole and the offence was a Schedule 1 offence under the *Penalties and Sentences Act 1992* (Qld) ("the Act"), the sentence must be served cumulatively with any other term of imprisonment he was liable to serve, as required by s 156A. The sentencing judge also had regard to the effect of the decision in *R v Braeckmans* [2022] QCA 26 that the cumulative nature of the penalty must be reflected by not declaring the time served in pre-sentence custody before the expiration of the applicant's previous sentence.

[20] After setting out the details of what would be the applicant's full time expiry date for that previous sentence and noting that the applicant had been sentenced to nine months imprisonment for the dangerous operation of a motor vehicle, which was itself part of this offending, the sentencing judge found that only 68 days of the 1,024 days in pre-sentence custody could be declared as time served in relation to the term of imprisonment for the kidnapping for ransom offence.

[21] The sentencing judge then recorded the applicant's personal circumstances accepting he had suffered a disadvantaged childhood; had been subjected to abuse as a young person which had a significant adverse impact upon him; had intellectual difficulties; had psychological problems, including paranoia, anxiety and depression; and had a long history of substance abuse for illicit drugs. The sentencing judge noted that despite those issues, the applicant had obtained a number of vocational certificates whilst in custody and had had periods of gainful employment which were to his credit. The applicant also had relationships, an adult daughter who continued to support him, and a very young daughter born in 2019.

[22] The sentencing judge recorded that the applicant had in the past participated in residential drug rehabilitation and had shown a willingness to do so again upon his release. The sentencing judge also referred to a psychologist's report, noting that some of the versions of events given to the psychologist differed from the agreed statement of facts, and were suggestive of a lack of acceptance of aspects of the offending and an attempt to diminish his role. The sentencing judge accepted a letter of expressed remorse, but was guarded as to the extent to which it was genuine and full remorse in the sense of a full and genuine acceptance of responsibility. The sentencing judge accepted the applicant had demonstrated progress towards rehabilitation and accepted the psychologist's expressed opinion that the applicant was a moderate risk of reoffending for future violence, although he was a real risk of re-offending if he was to return to substance abuse.

[23] The sentencing judge recorded that general and personal deterrence were significant factors in the applicant's case, as was denunciation and community protection given that he was a recidivist offender.

[24] The sentencing judge concluded:

> "The Crown submitted for a head sentence of six years and six months on the kidnapping offence, after moderation down to reflect the significant period you've spent in custody that is not declarable and to take into account considerations of totality, having regard to what you may have received if you had been sentenced at the same time as the dangerous operation of a motor vehicle offence. The

> Crown also submitted you should receive an immediate parole eligibility date and the Court should declare 68 days of presentence custody as time served under the sentence.
>
> Your barrister's submissions were not, in the end, a significant distance apart. However it was submitted that the Court could moderate your sentence down to one of five to five years and six months imprisonment with an immediate parole eligibility date. He accepted that the Court could only declare 68 days of pre-sentence custody as time served under the sentence.
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> The Crown also submitted that the sentence for the second offence of making a false declaration should be one of three months imprisonment to be served concurrently with all of that time declared as time served. So, in effect, the sentence for the making of the false declaration will be subsumed in the head sentence on the kidnapping.
>
> The sentencing exercise is not one of mathematical precision. In my view, your sentence would ordinarily be higher than your co-offenders for the reasons identified. On the other hand, it must be moderated down to take into account the long period you've served in custody that is not declarable and for considerations of totality. There would ordinarily be some elevation in it, however, to reflect the false declaration offence. I'm doing the best I can to balance those considerations which pull in different directions. I intend to fix a sentence of six years imprisonment on the kidnapping and set your parole eligibility date at tomorrow, which is 31 May 2022. You will be able to apply for parole immediately. When you will ultimately be released on parole will be up to the parole board."

Consideration

[25] As to the first ground of appeal, the applicant submits the sentencing judge erred in sentencing him on the basis of uncharged acts, being acts of violence against the complainant.

[26] In *R v De Simoni* (1981) 147 CLR 383, Gibbs CJ observed at [8]:

> "At first sight it might seem unlikely that the framers of the Code intended that an offender should be sentenced on the fictitious basis that no circumstances of aggravation existed when it is found by the trial judge that such a circumstance did exist, particularly when such a finding is based upon an unchallenged statement of facts made by the prosecutor after the offender has pleaded guilty. However, the general principle that the sentence imposed on an offender should take account of all of 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. Section 582 reflects this principle. 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."

[27] This principle was described in *Nguyen v The Queen* (2016) 256 CLR 656 at [60] as prohibiting "a judge taking into account, as an aggravating circumstance of an offence, a circumstance or factor which would render the offence a different or more serious offence".

[28] This prohibition renders it impermissible for a sentencing judge to take into account an act, omission, matter or circumstance which it would be otherwise permissible to take into account on sentence, if the circumstances would then establish a separate offence which did not form part of the offence for which the person is to be sentenced; a more serious offence; or a circumstance of aggravation of which the person to be sentenced has not been convicted.

[29] In the present case, whilst it had been agreed between the parties, when accepting a submission to not proceed further in respect of the counts of common assault and assault occasioning bodily harm in company, that the circumstances of the infliction of violence in the course of the kidnapping offence would be the subject of express reference in the agreed statement of facts, that agreement did not permit the applicant to be sentenced in respect of the kidnapping offence on the basis he had committed those offences of violence. To do so would breach the prohibition as those acts of violence constituted separate offences. There was no element in the offence of kidnapping for ransom which included the infliction of actual violence, nor did those acts fall within the scope of a circumstance of aggravation for an offence of kidnapping for ransom.

[30] That being so, it was impermissible for the sentencing judge to treat the fact that the applicant had inflicted actual violence on the complainant in the course of the kidnapping for ransom offence as a feature of the applicant's criminality which rendered it a more serious example of the offence.

[31] A perusal of the sentencing remarks establishes the sentencing judge did, in fact, sentence the applicant on that basis. Accordingly, the sentencing discretion was infected by error.

[32] This conclusion renders it strictly unnecessary to consider the applicant's second ground of appeal. However, in re-exercising the sentencing discretion, this Court must have regard to the days the applicant had served in pre-sentence custody that may be properly declared as time served in respect of any re-sentence.

[33] The necessity to consider that matter requires consideration of one aspect of the applicant's argument in respect of that second ground. It relates to the proper construction of the words "any other term of imprisonment the offender is liable to serve" in s 156A(2) of the Act.

[34] Section 156A of the Act provides:

> "(1) This section applies if an offender—
>
> (a) is convicted of an offence—
>
> (i) against a provision mentioned in schedule 1; or

(ii) of counselling or procuring the commission of, or attempting or conspiring to commit, an offence against a provision mentioned in schedule 1; and

(b) committed the offence while—

(i) a prisoner serving a term of imprisonment; or

(ii) released on post-prison community based release under the *Corrective Services Act 2000* or released on parole under the *Corrective Services Act 2006*; or

(iii) on leave of absence, from a term of imprisonment, granted under the *Corrective Services Act 2000* or the *Corrective Services Act 2006*; or

(iv) at large after escaping from lawful custody under a sentence of imprisonment.

(2) A sentence of imprisonment imposed for the offence must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve."

[35] A mandatory cumulative order of imprisonment must therefore be imposed for an offence that is within s 156A(1)(a) (which for the purpose of this matter is a schedule 1 offence) where the offender committed that offence in one or more of the circumstances that are set out in sub-paragraphs (i)-(iv) of s 156A(1)(b) and where there is "any other term of imprisonment the offender is liable to serve" as contemplated by s 156A(2). A schedule 1 offence is one that is listed in schedule 1 to the Act. It is implicit in each of the circumstances in paragraphs (i)-(iv) that there is an existing term of imprisonment that was being served either in custody, or on parole or on leave of absence at the time the schedule 1 offence was committed.

[36] The applicant committed the kidnapping for ransom (which is a schedule 1 offence) on 9 August 2019 whilst he was on parole in respect of the sentence for possessing dangerous drugs and related offending imposed originally on 17 November 2015 (to which we will refer as the sentence for possessing dangerous drugs) that was not due to expire until 20 June 2021. After committing the kidnapping for ransom, he committed the offence of dangerous operation of a motor vehicle on 10 August 2019 when the police attended to arrest him for the kidnapping for ransom. He returned to custody on 10 August 2019. His parole was suspended on 12 August 2019, so that he continued serving the sentence for possessing dangerous drugs from 10 August 2019 for which he had been on parole at the time he committed the offences respectively on 9 and 10 August 2019.

[37] The applicant pleaded guilty to and was sentenced for the dangerous operation of a motor vehicle in the Magistrates Court on 17 November 2020. The dangerous operation of a motor vehicle was also a schedule 1 offence. He was sentenced to nine months imprisonment that was ordered to be cumulative and given a parole eligibility date of 17 November 2020. That sentence was, in effect, cumulative on his sentence for possessing dangerous drugs that he was then serving. That made his full time discharge date 20 March 2022.

[38] The effect of s 209(1) of the *Corrective Services Act 2006* (Qld) (CSA) was that upon the applicant being sentenced for the kidnapping for ransom by the learned sentencing judge, the parole order which he was under at the time of committing that offence was taken to have been automatically cancelled on 9 August 2019 which had the effect, as he returned to custody on 10 August 2019, that he had one further day of the sentence for possessing dangerous drugs to be served from the date that he was sentenced for the kidnapping for ransom. (The prosecutor before the sentencing judge incorrectly interpreted s 209 and s 211 of the CSA as having the effect of extending the full time expiry of the sentence for dangerous operation of a motor vehicle to 21 March 2022.)

[39] The presentence custody certificate showed that for the kidnapping for ransom the applicant had been in presentence custody for 1,024 days between 10 August 2019 and 29 May 2022. Before the sentencing judge, the prosecutor submitted that, as the applicant's previous sentence had expired, the cumulative nature of the penalty for the kidnapping for ransom would be reflected by not declaring the time spent in presentence custody prior to the expiration on 21 March 2022 of the balance remaining of the sentence for possessing dangerous drugs and the cumulative sentence for the dangerous operation of a motor vehicle as time served for the kidnapping for ransom offence with the result that only 68 days out of the 1,024 days spent in presentence custody from 22 March 2022 to 29 May 2022 was declarable as time served in relation to the kidnapping for ransom offence. The applicant's counsel at the sentencing hearing did not demur from the proposition that only 68 days of the applicant's presentence custody was declarable, as the focus of the applicant's counsel was the moderation of the sentence for the kidnapping for ransom for totality issues.

[40] The effect of the orders made by the sentencing judge was that the sentence for the kidnapping for ransom offence was made cumulative upon the sentence of nine months imprisonment for the dangerous operation of a motor vehicle offence.

[41] On the hearing of this application, the applicant submits that the error made by the sentencing judge was sentencing him on the basis that the kidnapping for ransom sentence had to be cumulative upon both the sentence for dangerous operation of a motor vehicle in addition to the sentence for possessing dangerous drugs. The applicant submits that the triggering event to activate the mandatory cumulative term of imprisonment was the commission of a schedule 1 offence by him whilst on parole for possessing dangerous drugs and that the words "liable to serve" relate to the liability to serve the sentence that is the triggering event in s 156A(1)(b). It is therefore argued that the sentencing judge should have declared a total of 342 days between 21 June 2021 and 29 May 2022 as presentence custody for the kidnapping for ransom offence.

[42] The respondent submits that s 156A(2) of the Act does not restrict the requirement for the sentence that must be imposed cumulatively to the term of imprisonment that was being served in one of the circumstances set out in s 156A(1)(b) but it applies to "any other term of imprisonment the offender is liable to serve" at the date of sentencing for the offence that attracts the mandatory cumulative sentence.

[43] The alternative constructions of s 156A(2) of the Act that were advanced on this application are therefore that s 156A(2) refers to the term of imprisonment the offender was serving when the offence was committed for which the conditions in

s 156A(1) were satisfied or that it refers to the term of imprisonment the offender is serving when sentenced for the offence for which the conditions in s 156A(1) were satisfied.

[44] The nature of a cumulative order of imprisonment is dealt with by s 156 of the Act which provides:

> "(1) If—
>
> (a) an offender is serving, or has been sentenced to serve, imprisonment for an offence; and
>
> (b) is sentenced to serve imprisonment for another offence;
>
> the imprisonment for the other offence may be directed to start from the end of the period of imprisonment the offender is serving, or has been sentenced to serve.
>
> (2) Subsection (1) applies whether the imprisonment for the first offence is being served concurrently or cumulatively with imprisonment for another offence."

[45] The expression "period of imprisonment" is defined in s 4A of the Act:

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

[46] The expression "term of imprisonment" is defined in s 4A of the Act which relevantly provides:

> "**term of imprisonment** means the duration if imprisonment imposed for a single offence and includes–
>
> (a) the imprisonment an offender is serving, or is liable to serve–
>
> (i) for default in payment of a single fine; or
>
> (ii) for failing to comply with a single order of a court; and …"

[47] The expression "liable to serve" is used in the definition of "term of imprisonment" but in a sense that does not assist in the interpretation of "liable to serve" in s 156A(2).

[48] Section 156A was introduced into the Act in the suite of amendments that introduced the concept of serious violent offences into the Act: see s 8 of the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld). The Explanatory Notes for the Bill that was enacted as the 1997 Amendment Act do not assist in the construction of "liable to serve" in s 156A(2).

[49] Careful reading is required of older authorities on the meaning of s 156A of the Act as related provisions in the CSA have not always been in the same terms as are now found in s 205, s 209 and s 211 of the CSA. That is apparent from the analysis of the then relevant provisions of the CSA considered in conjunction with s 9(2)(m), s 156 and s 156A of the Act in observations made by way of *obiter dicta* by Jerrard JA in *R v Bartorillo* [2006] QCA 283 at [28]-[37] in respect of the sentence imposed on the appellant where the Court allowed the appeal against conviction and ordered a new trial (making consideration of the sentence unnecessary). Jerrard JA noted at [36] that "liable to serve" is used in s 9(2)(m) of the Act in requiring a court when sentencing an offender to have regard to "sentences that the offender is liable to serve" because of the revocation of orders for contravention of conditions by the offender which suggested that "liable" in s 9(2)(m) and s 156A(2) described imprisonment that may not happen. The observation then made at [37] remains apposite to the wording of s 156 and s 156A of the Act which are substantially in the same terms as they were for *Bartorillo*:

> "The wording of 156A differs from s 156. The latter section refers to imprisonment an offender is 'serving' or has been 'sentenced to serve', not imprisonment an offender is 'liable' to serve, and there is no authority given by s 156 to make cumulative terms on imprisonment to which an offender is only 'liable'."

[50] The meaning of s 156A was considered in *R v Pepper & Cornwell* [1999] QCA 47 where two offenders had committed schedule 1 offences in attempting to escape from prison. The Court favoured the construction of s 156A(2) which treated the use of the present tense "is" as referring to the situation at the beginning of the sentencing process, so that s 156A would apply only in respect of sentences imposed on a previous occasion. That decision must be considered in the context of the competing constructions that were considered by the Court in the circumstances of that case.

[51] The offenders attempted to escape the prison in July 1997. The offences committed at the time of the attempted escape by each offender were two counts of assault occasioning bodily harm, two counts of deprivation of liberty and one count of attempted escape. The offender Pepper was not serving a sentence at the time of the attempted escape, as the inference from the judgment is that she was on remand for the offences that it was alleged she had committed earlier in 1997. The offender Cornwell was serving a sentence of three years imprisonment for armed robbery that was imposed in 1996 when she attempted to escape. At the date of sentencing the offender Pepper was sentenced to 10 months imprisonment in respect of the earlier offences committed in 1997 before the attempted escape. The Court interpreted the sentencing remarks as indicating that the judge intended that the sentences for the July 1997 offences as a group would be cumulative upon the offences committed by Pepper at the earlier dates. The offence of attempted escape and the assaults occasioning bodily harm offences were schedule 1 offences but the two offences of deprivation of liberty were not. The competing construction considered by the Court at [6] was:

> "A possible interpretation of s. 156A of the *Penalties and Sentences Act* 1992 is that it requires every sentence imposed for a schedule offence to be served cumulatively with every sentence which is imposed on the same offender, either earlier or on the same occasion.

> If that were so, then the proper order would have been to make each of the three relevant offences, namely the two assaults and the attempt to escape, carry a sentence cumulative upon the other two relevant offences, as well as being cumulative upon the two deprivations of liberty; that, the judge plainly did not do."

[52] The alternative construction was set out by the Court at [8]:

> "Another reading, somewhat broader and producing a more rational result, is one which treats the use of the present tense 'is' as referring to the situation at the beginning of the sentencing process. That would mean that s. 156A would apply only in respect of sentences imposed on a previous occasion."

[53] On the basis that the choice was between those two alternatives, the Court concluded at [9]:

> "The choice, to our minds, is one between these alternatives. We favour the latter, on the ground that it is open on the language used and avoids making the operation of the section depend upon fortuitous circumstances relating to the way in which the orders are pronounced. The result is that the judge was only obliged to make the schedule offences cumulative upon offences already being served at the inception of the sentencing process; that obligation was fulfilled, in that Cornwell's sentences imposed on 16 September 1998 were made cumulative upon those imposed, as mentioned below, in 1996."

[54] The issue on the appeal in relation to the offender Pepper was whether the date fixed for her eligibility for parole should be brought forward or her sentences should be suspended which did not, in fact, raise any issue for the offender Pepper in respect of s 156A of the Act. Although s 156A did apply to the sentencing of the offender Cornwell, the issue on the appeal for the offender Cornwell was the fixing of the date for her eligibility for parole. This authority provides only limited assistance on the construction issue raised on the current application as the Court in *Pepper & Cornwell* did not consider as a possible construction that which is advanced on behalf of the applicant in this application and, in any case, the focus of the appeal was primarily about dates for eligibility for parole.

[55] Counsel for the applicant also referred to *R v Ramsay* [2010] QCA 276 where it is implicit at [9] that the Court would have acted on the basis that "liable to serve" in s 156A(2) of the Act referred to the period of imprisonment that he was serving at the date of sentencing which in the case of the offender included the sentence for which he was on parole at the time that he committed the subject offences in addition to default periods of imprisonment for a series of fines that had remain unpaid. It is apparent from the reasons that there was no detailed consideration of the alternative construction of "liable to serve" in s 156A(2) of the Act being limited to the term of imprisonment that was being served on parole when the offender committed the offence in circumstances that satisfied the conditions in s 156A(1).

[56] The construction that is advanced on behalf of the applicant was conceded as the appropriate construction of s 156A by the respondent in *R v Hawks* [2019] QCA 181 at [20]:

> "Section 156A relevantly provides that those who offend in the prescribed way while subject to a parole order serve the 'new' sentence cumulatively on the sentence that they were subject to at the time of their offending, including the consequences brought about by breach of the Court ordered parole. The respondent accepts that the sentence imposed for the offence was required by s 156A to be served cumulatively 'with any other term of imprisonment imposed the offender is liable to serve' (by reason of the commission of the offence while released on parole). Section 156A therefore required that the sentence be imposed cumulatively on the 2016 sentence (including any period the applicant was liable to serve pursuant to s 205 and s 209 of the *Corrective Services Act* 2006 (Qld) as a result of his failing to comply with a single order of the Court) as it was that sentence in respect of which he was subject to a parole at the time of the commission of the index offence."

[57] It has been 26 years since the introduction of s 156A into the Act and there has been no substantial consideration by this Court of the construction of s 156A(2) of the Act advanced on this application on the applicant's behalf. One can surmise that is due to the fact that, in many instances when s 156A(1) conditions are satisfied, the offender has been sentenced to a mandatory cumulative sentence for that further offending while still serving the sentence that was the triggering event for s 156A(1)(b). In those circumstances, the two constructions of s 156A(2) advanced in argument in this matter result in the same outcome from the imposition of the cumulative sentence.

[58] Section 156A of the Act provides a disincentive for persons to reoffend in the circumstances set out in s 156(1)(b) by the imposition of a mandatory cumulative sentence. There is inevitably a gap between the commission of the further offending and the sentencing for that further offending, as the offender must be arrested, charged and convicted before being able to be sentenced for the further offending that satisfies the s 156A(1) conditions. It is feasible, as shown by the applicant's position, that the gap can be so long that the sentence that was being served that was the triggering event under s 156A(1)(b) is fully served, subject to s 209 and s 211 of the CSA, which is the same outcome as a mandatory cumulative sentence being imposed on the existing sentence. It is logical that the expression "liable to serve" in s 156A(2) is referable to the sentence for the term of imprisonment that was the subject of the triggering event. If the other construction of "liable to serve" were adopted and it is any term of imprisonment that is being served at the date of sentencing for the offending which satisfied the s 156A(1) conditions, the application of s 156A is not linked to the sentence that was the triggering event for its application.

[59] Because of the factual circumstances in *Bartorillo*, Jerrard JA considered only circumstances that the existing sentence may not have been completed because of an intervening event such as the Community Corrections Board may have exercised its discretion not to require the unexpired part of the sentence being served at the time of the offending to be served in full. Equally on the construction that "liable to serve" is related to the sentence that was the subject of the triggering event, if the sentence that was the triggering event has been served by the time the offender is sentenced for the further offending that satisfied the s 156A(1) conditions, there is

no term of imprisonment the offender is liable to serve on which a cumulative sentence could be imposed.

[60] If s 156A of the Act is not invoked because the offender has fully served the sentence that was the triggering event for the application of s 156A, the sentencing judge who is sentencing for the further offending has available the possibility of imposing a cumulative sentence under s 156 on any other terms of imprisonment being served at the date of sentencing.

Re-sentencing

[61] As to a re-exercise of the sentencing discretion, regard is properly to be had to the fact that the applicant's offending involved serious criminality, committed but months after the applicant's release on parole for serious drug offending, by an offender with a lengthy criminal history, including for previous offences of violence.

[62] Further, the applicant was the instigator of the kidnapping of the complainant and was to be the beneficiary of the monies to be received by way of the ransom demand. The offending occurred over a protracted period of many hours and involved contact by the complainant with both his mother and brother, in circumstances where the complainant was plainly fearful in the event that monies could not be provided to satisfy the applicant's demands.

[63] As against those factors, the applicant is properly to receive the benefit of the cooperation shown by his plea of guilty. Other mitigating factors, including his dysfunctional upbringing, his expressed remorse, and his attempts at rehabilitation, are also properly to be taken into account.

[64] Finally, regard must be had to the 1,024 days the applicant has served in custody, even though many of those days were served as a consequence of previous offending.

[65] There are two further factors that must be considered in any re-sentence.

[66] First, the sentence of nine months imprisonment, imposed for the offence of dangerous operation of a motor vehicle. That offence was committed in an effort to avoid police at the conclusion of the kidnapping for ransom offence. It is conduct forming part of that episode. Regard must be had to this nine month sentence to ensure the sentence imposed for the offence of kidnapping for ransom properly reflects the totality of the applicant's criminal conduct.

[67] Second, the applicant's separate offending in respect of the false declaration offence. The sentence imposed at first instance was taken into account when ordering it be served concurrently.

[68] Allowing for all of those factors, we would re-sentence the applicant to a head sentence of five years imprisonment for the offence of kidnapping for ransom. That sentence has been moderated to allow for the fact that the applicant was sentenced to nine months imprisonment for the offence of dangerous operation of a motor vehicle, which he served in actual custody.

~~[69]~~ As there is one day of the sentence (namely 9 August 2019) imposed on 17 November 2015 which the applicant remained liable to serve on being sentenced

for the kidnapping for ransom, the sentence imposed for the kidnapping for ransom had to be cumulative on that sentence for possessing dangerous drugs, due to the operation of s 209 and s 211 of the CSA.

[70] Even though the applicant is being re-sentenced, as he has been released on parole as a result of the sentence imposed by the sentencing judge, it is expedient to re-sentence the applicant by varying the orders made by the sentencing judge.

Orders

[71] We would order:

1. Leave to appeal be granted.

2. The appeal against sentence be allowed.

3. The sentence below for the offence of kidnapping for ransom imposed on 30 May 2022 be varied by substituting “five years” for “six years”.

4. All other orders made by the sentencing judge are confirmed.