SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wallace* [2023] QCA 22
PARTIES:	**R** **v** **WALLACE, Tyrese Leonard George** (applicant)
FILE NO/S:	CA No 139 of 2022 DC No 139 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 10 June 2022 (Morzone KC DCJ)
DELIVERED ON:	24 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2023
JUDGES:	Bowskill CJ and Bond and Dalton JJA
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The sentences imposed at first instance on all counts are set aside.** **4. The applicant is sentenced to 10 years' imprisonment on each of counts 3 and 5, and five years' imprisonment on each of counts 2 and 4. Those terms of imprisonment are concurrent with one another. The applicant is sentenced to 12 months' imprisonment on count 1, to be served cumulatively on the term imposed on count 3.** **5. Pursuant to s 161B(1) of the *Penalties and Sentences Act 1992* (Qld), the convictions on all counts are declared to be convictions of a serious violent offence.** **6. The declaration of pre-sentence custody made at first instance is affirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pled guilty to one count of assault occasioning bodily harm against complainant 1 and one count of grievous bodily harm, two counts of rape and one count of attempted rape against

complainant 2 – where the applicant suffered a significantly disrupted childhood – where the applicant was 19 years-old at the time of the offending, with no prior criminal history – where the primary judge sentenced the applicant to 18 months imprisonment in respect of the offending against complainant 1, cumulatively with a period of 12 years imprisonment for the offending against complainant 2 – whether the sentence imposed is manifestly excessive

Corrective Services Act 2006 (Qld), s 182(2)(a)
Penalties and Sentences Act 1992 (Qld), s 161B(1)

R v Adcock; Ex parte Attorney-General (Qld) [1994] QCA 525, cited
R v Benjamin (2012) 224 A Crim R 40; [2012] QCA 188, considered
R v Flew [2008] QCA 290, cited
R v Newman (2007) 172 A Crim R 171; [2007] QCA 198, considered
R v O'Brien [1998] QCA 80, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v RBG [2022] QCA 143, cited
R v Smith [2020] QCA 23, cited
R v Soper [1994] QCA 254, cited
R v Wark [2008] QCA 172, considered

COUNSEL: C R Smith for the applicant
E L Kelso for the respondent

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

[1] **BOWSKILL CJ:** In the early hours of the morning on 30 September 2020, the applicant, intoxicated and angry, committed two separate violent offences against women. The first victim was a 51 year old sex worker, whose services the applicant had engaged for 30 minutes from about 3.00 am, after he had been out drinking since the night before. After the 30 minutes was up, the woman told him his time was over. The applicant, angry and frustrated, assaulted her by punching her in the face, pushing her to the floor and holding his hand over her mouth so that she could not scream. He continued punching her in the face multiple times. She suffered significant facial injuries. The applicant was angry because he had not "finished" (ejaculated), when the woman told him his time was up. He was charged with assault occasioning bodily harm (count 1).

[2] Less than two hours later, at about 5.15 am, the second victim, a 66 year old woman, was taking her morning walk along the bank of Ross River. The applicant came at her from behind, with a forceful thud and pushed her to the ground. Her face and shoulder hit the ground. He threatened her, "don't move, move and I'll kill you". The woman feared for her life. The applicant dragged the woman from the footpath and across the grass towards the river, where they slid down an embankment into scrubland. The applicant removed her shorts and put his shirt over her face to obscure her view. He spread her legs apart and restrained her

ankles as she tried to kick out at him, leaned into her and told her to "put it in, put it in". He raped her first with his fingers (count 3). He then attempted to rape her with his penis, but was unable to because it was flaccid (count 4). He threatened her again "move and I'll kill you". He told her to "open your mouth or I'll punch you. Don't bite or I'll kill you", as he forced his penis into her mouth and raped her again (count 5). This woman suffered significant physical injuries as a result of the applicant's attack on her: a dislocated shoulder, broken jaw, fractured eye socket, broken nose and significant facial swelling, as well as lacerations to her back and legs. She required surgery to fix the fractured facial bones, without which she would have suffered permanent injury to her health, resulting in a further charge of causing grievous bodily harm (count 2). Beyond the physical injuries, this woman was severely traumatised by the applicant's attack on her: as she says, "I honestly thought that I was going to die a violent death that day, at your hands". She has to deal with the ongoing consequences of both her physical and psychological injuries.

[3] The applicant is a young Indigenous man, who was 19 years old at the time of the offences. He had no criminal history prior to this. A psychologist, whose report was tendered at the sentence, described him as having "chronic anger issues which he repressed". He suffered a prejudicial and disadvantaged adolescence. The psychologist described his "relatively uneventful upbringing" being "severely compromised after his mother's suicide" when he was 12 or 13. After that, he was shipped from pillar to post to live with various family members, couch surfing at times. His emotional needs were neglected and he developed and harboured "deep-seated anger". He was exposed to excessive drinking and violence in the families around him as he grew up, and started drinking alcohol from age 15. He described himself as a "violent drunk". Despite those many disadvantages, he managed to complete school to year 12; and had completed a hospitality course just two weeks before the offending. He had also been a talented football player at high school.

[4] The learned sentencing judge accepted that the applicant was remorseful for the offending, with his feeling of deep shame leading to suicidal thoughts. His remorse was apparent from the day of the offending when he was interviewed by police at about 3 pm. He made some admissions to police, particularly about the first incident; although was less candid about the second incident. He told police of his feelings of guilt and said "if I could, I would put a bullet through my head". When interviewed by the psychologist in December 2021, the applicant described feeling a great deal of shame and guilt about the offending, and was frank about describing his anger issues, particularly when affected by alcohol. He said he could not recall the details of the second incident. The psychologist described him as being at moderate to high risk for suicide. The psychologist also observed that the applicant's "risk for committing future acts of explosive violence was moderate to high, and he needed assistance in learning to understand and express his anger appropriately." In the latter regard, the psychologist recommended appropriate treatment programs.

[5] At first instance, the prosecution submission was that an overall sentence of 14 years was appropriate. For count 1 (the assault occasioning bodily harm to the first victim), the prosecutor submitted that, looked at alone, a sentence approaching three years would be appropriate. For counts 2 to 5 (the rapes and other offences against the second victim) the prosecutor submitted, by reference to the authorities, that the range was 10 to 14 years. It was accepted that, if cumulative terms were to be imposed, there would need to be some amelioration. The defendant's counsel

accepted that the relevant range for the second set of offences was 10 to 14 years, and asked the sentencing judge to impose a sentence "towards the lower end of that range" (inferentially, for the totality of the offending, including count 1).

[6] The learned sentencing judge imposed a sentence of 12 years' imprisonment on each of counts 3, 4 and 5 (the two counts of rape and one of attempted rape), a concurrent term of six years for count 2 (grievous bodily harm) and a cumulative term of 18 months' imprisonment for count 1 (assault occasioning bodily harm) – resulting in an overall term of 13 and a half years' imprisonment. Because all the offences are "serious violent offences" and the overall term imposed on the day was more than 10 years, the applicant was automatically declared a serious violent offender and will have to serve 80 per cent of the sentence before he is eligible for release on parole.

[7] The applicant seeks to appeal his sentence on the ground that it was manifestly excessive in all of the circumstances. The applicant contends a sentence of 10 to 11 years ought to have been imposed on counts 3 and 5 (the rapes), cumulative upon 12 to 18 months for count 1 (the assault occasioning bodily harm), with lesser concurrent terms on the remaining counts.

[8] As is well-established, where, as in this case, no specific error of principle is relied upon, appellate intervention on the ground of manifest excess "is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle".[1]

[9] Analysis of the comparable authorities relied upon below and on the application for leave to appeal leads me to conclude that the penalty imposed was manifestly excessive.

[10] One of the cases particularly relied upon is *R v Benjamin* [2012] QCA 188, in which nine years' imprisonment was imposed. I regard *Benjamin* as a less serious case than the present, in terms of the offending itself. It involved one count of rape; and the complainant did not suffer permanent physical injury. The circumstances of the offender were different though, as he was a little older, being 25, and did have a criminal history, although that was not regarded as a matter of great significance. His conduct was described at first instance as callous and premeditated, having "singled out and set upon a vulnerable woman" in a public area. It was also described as "random sexual violence". The victim in that case was a 19 year old woman who was out jogging at 7 pm.

[11] The offending in the present case occurred in circumstances where the applicant was "tired, heavily intoxicated, explosively angry and aggressive"; and was described by the sentencing judge as "cruel, sadistic and callous"; showing "utter contempt and disrespect for women". It may not have been premediated to any particular extent; but appears to have been no more random than in *Benjamin*. The victim was subjected to digital rape, attempted penile rape and oral rape; and suffered injuries amounting to grievous bodily harm, whilst fearing for her life because of the threats to kill. There was no threat to kill in *Benjamin*.

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1 *R v Pham* (2015) 256 CLR 550 at [28].

[12] *R v Newman* [2007] QCA 198 is a comparable decision, in terms of the circumstances of the offender and the offending, although fairly described as more serious. *Newman* was sentenced to 13 years' imprisonment for the charge of rape, not disturbed (by majority) on appeal. He was just 17 at the time of the offending and had no criminal history (although a history of drug use and "delinquent behaviour"). The victim was a 60 year old woman who lived next door to his grandmother. He had consumed a quantity of ecstasy the night before and the next day was tired and aggressive as he was "coming down off" the drug. He went to his grandmother's house, and saw her neighbour go into her house, before deciding to rob her. He went into her house while she was in the bathroom; grabbed her and put his hand over her mouth telling her not to scream; dragged her down a hallway and into a bedroom and punched her multiple times to her face. The victim asked to get up because her back was sore, and begged him not to punch her eye as she had recently had surgery, and the offender said he did not care. He dragged her clothes off, pushed her onto the bed, put a pillow over her face, put a condom on his penis and then raped her. He got up, and left, stealing $40 from the victim's purse as he went. She suffered a broken jaw, a fractured rib and extensive bruising. In addition to her physical injuries, the victim suffered severe psychological injury, resulting in treatment and hospitalisation for post-traumatic stress disorder and depression. There was said to be no real evidence of remorse and the degree of callousness was described as "significant".

[13] *Newman* involved the aggravating element of burglary; and there was greater personal violence inflicted (punching the victim) as well as an absence of remorse. However, objectively, the sexual violation and degradation in the present case was worse. In this respect, I would endorse the observations made in *R v Wark* [2008] QCA 172 by each of McMurdo P (at [2]), Mackenzie AJA (at [13]-[14]) and Cullinane J (at [36]) as to the need to consider the particular circumstances of each case, rather than proceed on the basis of formulaic compartmentalisation of offending, or generalisations as to what kind of rape is worse or more serious.[2]

[14] The injuries suffered in *Newman* and this case were similar, although the victim in *Newman* may be said to have suffered more severe psychological injury. There was no threat to kill in *Newman*. The circumstances of the offenders in *Newman* and this case were also similar – young, with no criminal history. However, having regard to the distinguishing features, I would regard the 13 year sentence upheld by the majority in *Newman* as too high in the present case. Jerrard JA, in the minority in *Newman*, would have resentenced the offender to 11 years' imprisonment.

[15] Similarly, the case of *R v Wark* [2008] QCA 172, in which the offender was resentenced, on appeal, to 12 years' imprisonment, supports the view that 12 years was too high in this case. The offender in *Wark* was 51 years old, with a limited criminal history of minor drug offending. He too had a problem with alcohol and had been drinking in the lead up to the offending, which started at about 1 am one Saturday morning. The complainant, a woman in her 30s, was walking along a highway. She accepted a lift from the applicant, who persuaded her to come to his house with him for some tea. When she tried to leave, he struck her in the head with a piece of wood (leading to a charge of assault occasioning bodily harm while armed). He grabbed her by the hair and dragged her back inside, forced her onto a

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2 See also *R v RBG* [2022] QCA 143 at [4] per Dalton JA, referring to *R v Smith* [2020] QCA 23 at [34]-[37] per Morrison JA.

bed and removed her clothes (leading to a charge of assault with intent to rape and deprivation of liberty). He tied her hands to the bed head with rope and lay on her, rubbing his penis on her vaginal area. He then used the rope to pull her onto the floor where he forced his penis into her mouth (the first rape), continuing to repeatedly slap her across the face. He continued to sexually assault her in various ways, before forcing her to perform oral sex a second time (the second rape); and then a third time after dragging her to the shower (the third rape) after which he urinated on her. He then dragged her by the rope back to the bed where he tried unsuccessfully to penetrate her vagina with his penis (charged as sexual assault). The applicant fell asleep briefly, and when awoken was again forced to perform oral sex (the fourth rape). The assaults continued, including with the offender whipping her and later inserting something into her anus (the fifth rape). He told her he was going to "keep her" and that as long as she did as he said she would be fine. She was repeatedly assaulted and abused throughout this ordeal, and feared throughout that she would be killed. She suffered bruising, lacerations and swelling, bite marks and a tear to her perianal region. She was eventually able to escape, although not without being pursued by the offender.

[16] Both by reference to the circumstances of the offending (which involved a far more prolonged series of violent and degrading sexual assaults) and the offender, *Wark* is a more serious case.

[17] *Newman* is authority for the proposition that in cases where rape and grievous bodily harm are involved, on a plea of guilty, the sentencing range is 10 to 14 years' imprisonment.[3] Youth and lack of prior criminal history support sentencing at the lower end of this range.[4]

[18] In my view, the present case appropriately falls at the lower end of that range. The offending did involve a significant level of sexual violation and physical violence, coupled with threats to kill, resulting in grievous bodily harm. But in contrast to some other cases, the physical violence did not extend to punching the victim, nor was there a weapon involved. Having said that, the impact of the defendant's initial attack upon the victim must have been substantial, and the defendant's overall actions resulted in serious physical injury to the victim, as well as severe psychological harm, both with ongoing consequences – matters which place this case within that range of 10 to 14 years; rather than in the lower range referred to by Henry J in *Benjamin* at [75]-[77].

[19] Personal factors which favour a lower sentence are the applicant's very young age, lack of any criminal history, disadvantaged background and genuine remorse. Also positive is the fact that the applicant had been released on bail for some 16 months prior to the sentencing hearing, without reoffending. Despite the many challenges he faced during adolescence, he had managed to finish school and complete a vocational course. Given his young age, and lack of prior criminal history, these things provide some optimism for his prospects of rehabilitation (including by requiring his attendance at appropriate treatment programs); and certainly favour a sentence which factors this into account, to the extent that is possible. That of

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3 *R v Newman* [2007] QCA 198 at [20] and [43] per Williams JA.

4 *R v Newman* [2007] QCA 198 at [54] per Jerrard JA. See also *R v Flew* [2008] QCA 290 at [23] per Keane JA.

course is limited where, as here, by operation of law the offender is required to serve 80 per cent of the sentence imposed.

[20] In my respectful view, a sentence of 12 years for each of the rape offences, and the attempted rape, of the second victim was manifestly excessive, when viewed in light of the authorities referred to. That sentence failed to give sufficient weight to the favourable mitigating factors just discussed. When 18 months was added to that, for count 1, resulting in an overall sentence of 13 and a half years, of which the applicant must serve 80 per cent before becoming eligible for parole, the result is unreasonable or unjust.

[21] I would resentence the applicant to 10 years imprisonment for counts 3 and 5; with concurrent terms of 5 years on each of counts 2 (the attempted rape) and 4 (the grievous bodily harm). Although I did consider whether the appropriate term was 11 years' imprisonment, given the circumstances of the offending, a review of some of the comparable authorities included within Henry J's comprehensive survey in *Benjamin*[5] supports the conclusion that a sentence less than 11 years is appropriate. In those cases referred to, where 11 years' imprisonment was imposed for relatively similar violent sexual offending, the offenders were older and had relevant criminal histories. They also had the benefit of being able to apply for parole at an earlier stage than 80 per cent.

[22] It is appropriate that a cumulative term of imprisonment be imposed for count 1, because it was separate offending, against another complainant. However, because of that, and the inevitability of the applicant having to serve 80 per cent of the (combined) sentence imposed, significant amelioration of the otherwise appropriate penalty for count 1 is called for. I would resentence the applicant to a cumulative term of 12 months imprisonment for count 1.

[23] For those reasons, I would order:

(1) The application for leave to appeal is granted.

(2) The appeal is allowed.

(3) The sentences imposed at first instance on all counts are set aside.

(4) The applicant is sentenced to 10 years' imprisonment on each of counts 3 and 5, and five years' imprisonment on each of counts 2 and 4. Those terms of imprisonment are concurrent with one another. The applicant is sentenced to 12 months' imprisonment on count 1, to be served cumulatively on the term imposed on count 3.

(5) Pursuant to s 161B(1) of the *Penalties and Sentences Act 1992*, the convictions on all counts are declared to be convictions of a serious violent offence.

(6) The declaration of pre-sentence custody made at first instance is affirmed.

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[5] Commencing from [42]. See, for example, *R v Soper* [1994] QCA 254 (11 years' imprisonment imposed on a 22 year old offender with a relevant prior conviction); *R v Adcock; Ex parte Attorney-General (Qld)* [1994] QCA 525 (11 years' imprisonment imposed on an older – but age not specified – offender with a substantial criminal history); *R v O'Brien* [1998] QCA 80 (11 years' imprisonment imposed on a 28 year old offender, with prior convictions for burglary and indecent assault).

[24] **BOND JA:** I agree with the reasons for judgment of Bowskill CJ and with the orders proposed by her Honour.

[25] **DALTON JA:** The appellant pled guilty in the District Court at Townsville to one count of assault occasioning bodily harm to a lady I will call complainant 1, and to one count of grievous bodily harm; two counts of rape, and one count of attempted rape against a lady I will call complainant 2. He was sentenced to 18 months imprisonment in respect of the offending against complainant 1, cumulatively with a period of 12 years imprisonment for the offending against complainant 2. He applies for leave to appeal on the ground that the sentence is manifestly excessive. My view is that the sentence is manifestly excessive. Therefore, the application and the appeal ought to be allowed and the appellant resentenced.

The appellant's background

[26] The appellant is an indigenous man who suffered a significantly disrupted childhood. His mother committed suicide when he was 12 or 13. His father could not care for him and he was passed between relatives through his remaining teenage years. He had the view that none of the relatives loved or cared for him. He seems to have spent most time, after his mother died, living with his grandmother; that was not a happy relationship. The material before the primary judge was to the effect that throughout his childhood the appellant saw dysfunctional drunken and violent behaviour. Despite these obstacles, he completed his schooling and gained a qualification in hospitality not long before the subject offending.

[27] The offending took place in the early hours of 30 September 2020. The offending against complainant 1 occurred at about 3.30 am and the offending against complainant 2 occurred some time between 5.15 and 5.40 am. The appellant was very drunk at the time. He was arrested at 11.35 am on 30 September 2020 and released on bail on 21 January 2021. He spent another period of nine days in custody in June 2022. In total he spent 122 days in custody before he was sentenced on 10 June 2022. This meant he spent more than 16 months in the community between the offending and sentence. During that time he committed no further offences. He had committed no offences before the offending on 30 September 2020; that is, he had no criminal history.

The offending

[28] The offending was serious violent and sexual offending. Having spent the night and early morning drinking in Townsville hotels or clubs, the appellant engaged the services of a sex worker, complainant 1, at about 2.40 am on 30 September 2020. She was 51 years of age. He attended her work address at a motel, arriving just after 3.00 am. He had paid for 30 minutes with her. During that time he did not ejaculate. When she told him that his time was up he stood up and began dressing. He then assaulted complainant 1 by punching her in the face, pushing her to the floor, and holding his hand over her mouth so that she could not scream for help. He continued punching her in the face. She estimated she was punched five times. She suffered facial injuries. Her right eye was swollen shut. Her left cheek was grazed and swollen and her lip was split and bleeding. The appellant ran outside and fled. He was wearing his pants and carrying the rest of his clothes in a bundle.

[29] At about 5.15 am, complainant 2, a 66 year old woman, left home to go for her morning walk. She was walking on a footpath along the bank of the Ross River when she felt a forceful thud to her back. She fell to the ground. Her face and shoulder struck the ground. This impact dislocated her shoulder and broke her jaw. The appellant told her that if she moved he would kill her. He dragged her from the footpath, down a steep embankment, into scrubland beside the river. He did this with no regard to her, so that her face scraped on the ground resulting in injuries. At the bottom of the embankment he removed her shorts, spread her legs apart and restrained her attempts to kick out. He inserted his fingers into her vagina. He attempted to penetrate her vagina with his penis but was unable to. He directed her to open her mouth and orally raped her. He threatened her that if she moved or bit him he would kill her. During this time he wrapped his shirt around her head. Eventually he took his shirt away from her head and ran off. Complainant 2 had considerable difficulties getting from the bottom of the embankment back up to the footpath. She required surgery to fix her jaw. She has ongoing physical and psychological problems because of the attack.

[30] When police arrested the appellant had admitted that he had been drinking. He admitted that he engaged complainant 1 to provide him with sexual services and admitted that he struck one blow to her face. He said that he frightened complainant 2 and that as a result of the fright she fell to the ground. He said he then jumped on top of her and said that they rolled around on the ground. He refused to specify what occurred after that. He expressed to police that he felt guilty during his first interaction with them, and again when he took part in a record of interview. In my view he is to be given credit for genuine remorse from an early point. He is to be given credit for having made partial admissions to police. Nonetheless, he certainly understated, or refused to state all, the facts which he admitted on the sentencing hearing.

The primary judge's sentence

[31] It could not be said that the primary judge overlooked any material fact or misdirected himself as to the task upon which he embarked. He referred to the cases of *R v Benjamin*;[6] *R v Wark*,[7] and *R v Newman*.[8] All those cases were relevant to the sentence to be imposed. The primary judge imposed a sentence of 18 months on count 1 against complainant 1. He imposed a sentence of six years imprisonment for the count of grievous bodily harm against complainant 2. He imposed a sentence of 12 years on each of the rapes and on the attempted rape.

[32] He said:

> "… It is critical, as is required, that a sentence be just and appropriate, and not too crushing and disproportionate.
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> What I have sought to do is ameliorate the sentences so that the overall sentence is just and appropriate. The likely overall sentence would have been, I think, about 16 years, that is, the sentence for count 1, in my view, is likely to have been over two years, and was

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6 (2012) 224 A Crim R 40; [2012] QCA 188.
7 [2008] QCA 172.
8 (2007) 172 A Crim R 171; [2007] QCA 198.

> likely to be over 13 years for your sexual offending, coupled with the violence …"

[33] The primary judge made the sentences in respect of complainant 2 concurrent with each other, but cumulative with the sentence on count 1, the offending against complainant 1. In that way he imposed a total sentence of 13 and a half years. He declared (as he was bound to do) that the assault occasioning bodily harm and the offending on the counts of rape were serious violent offences – s 161B(1) *Penalties and Sentences Act 1992* (Qld). By dint of s 182(2)(a) of the *Corrective Services Act 2006* (Qld) parole eligibility was fixed by the Legislature at 80 per cent of the period of imprisonment. The 122 days already served was declared.

The case law

[34] The parties were agreed as to the relevant cases, and I think that the three referred to by the primary judge were probably the most helpful of them. I think the case of *R v Benjamin* is the appropriate starting point. In that case the Court of Appeal resentenced Mr Benjamin. The judgment with which the other members of the Court of Appeal agreed was written by Henry J. In it he includes a very thorough review of cases of rape which include a significant element of violence.

[35] Before coming to the details of the offending in *Benjamin*, it seems to me that observations which Henry J chose to make about the use of comparative cases on sentencing can usefully be repeated. Henry J said:

> "In *Wong v The Queen* Gleeson CJ observed in respect of the exercise of the sentencing discretion that the administration of justice 'should be systematically fair, and that involves, amongst other things, reasonable consistency'. However, in *Hili v The Queen* the plurality explained the consistency that is sought is not numerical equivalence but consistency in the application of the relevant legal principles. …" [74] (footnotes omitted).

[36] Benjamin was a 25 year old man who waited near a river in Townsville for an appropriate victim. He watched a 19 year old university student jog one way along the river and when she jogged back he began jogging behind her on a secluded section of pathway. He hit her from behind, knocking her unconscious, or into a semi-conscious state, which meant she had only a patchy memory thereafter. He removed her shorts and underwear and raped her by inserting his penis into her vagina. He ejaculated inside her. The violence he used immediately before and during the rape caused the complainant bodily harm. There was no evidence that any blow was struck after the first blow which caused the complainant to fall to the ground, but there were cuts and bruises on her face, including severe swelling to her cheekbones, a nosebleed, and her lip was badly split and swollen with a chunk missing from it. As well she had cuts and bruises to her elbows and abrasions to her hips. Her face, jaw, neck, shoulder, hips and buttocks were sore. Some of her injuries required suturing. She had a chronic headache.

[37] It can be immediately observed that the injuries to complainant 2 in this case were more serious than those received by the complainant in *Benjamin's* case, and that must be a factor which makes the criminality in this case more serious. On the other hand, Benjamin was 25 at the time of the commission of the offence and had a criminal history including offences of common assault and of breaching a

domestic violence order. In those respects the comparison between this case and *Benjamin's* favours Mr Wallace. Another factor which favours Mr Wallace on comparison with the case of *Benjamin* is that the Court regarded Mr Benjamin's offending as callous and premeditated. I do not think either of those terms is apt to describe Mr Wallace's offending.

[38] The primary judge in *Benjamin* had sentenced him to 11 years. The Court of Appeal resentenced Benjamin to nine years. After a comprehensive review of rape cases involving significant violence, Henry J commented:

> "… the parties particularly emphasised statements of principle about a sentence range of seven to 10 years in cases such as *Basic* and *Kahu* and a sentence range of 10 to 14 years in cases such as *Mallie*, *Newman* and *Flew*.
>
> As the earlier emphasised observations of Keane JA in *Kahu* and *Flew* illustrate, the material difference in the two ranges is the presence and extent of any physical violence inflicted upon the victim additional to the act of physical violation constituting the rape. That difference will be obvious in some cases, particularly where there are other aggravating features.
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> However, there will inevitably be some overlap between the two ranges. There are two reasons for this of particular relevance in the present case. Firstly, there may be cases where there is a significant degree of additional violence but it is not as extreme as in the cases tending to attract sentences in the upper half of the 10 to 14 year range. Secondly, those cases may involve a plea of guilty, resulting in a lowering of the sentence that would otherwise be imposed after a trial. Head sentences in cases of that kind might well commence marginally above the intersection point of 10 years common to both ranges but after discounting to allow for a guilty plea might finish marginally below that point." – [75]-[77].

[39] In *Benjamin* Henry J considered that nine years imprisonment was an appropriate sentence accompanied by a serious violent offender declaration, which meant that Benjamin served 80 per cent of his sentence before becoming eligible for parole. North J agreed with Henry J. McMurdo P agreed as to the sentence of nine years but was of the view that there should not have been a declaration. She made no remark as to what part of the sentence she thought ought to have been served before Benjamin became eligible for parole; the implication was that he became eligible for parole, in her view, at the halfway point of his sentence.

[40] The case of *R v Wark* concerned offending which was considerably more serious than the offending here. Wark picked up a woman in her 30s who was walking along a highway in North Queensland at 1.00 am. He promised to drive her to her destination, but persuaded her to come with him to his house so he could have some tea first. At his house she attempted to leave; Wark struck her twice about the head with a piece of wood (charged as assault occasioning bodily harm). He then dragged her by her hair onto his bed and removed her clothes (charged as assault with intent to rape and deprivation of liberty). Wark then tied the woman's hands to the bedhead with a rope. This was the beginning of a series of sexual and violent assaults upon her which included four separate episodes of oral sex (each charged as

rape); an episode of anal penetration (charged as rape), and some particularly humiliating and sadistic assaults. At the end of this series of attacks Wark told the complainant that he was going to "keep her", and that as long as she did as he said, she would be fine. Some time later, as dawn was breaking, the complainant managed to escape and run to a neighbouring house. Wark pursued her, but the neighbour took her in and called the police.

[41] Wark was 51 at the time of sentence. He had a minor criminal history for drug offences. He pleaded to an *ex officio* indictment at the first possible opportunity and expressed shame at his conduct.

[42] The primary judge in *Wark* expressed the view that, before mitigation for a plea, the range for that type of offending was 14 to 16 years imprisonment. In this Court, Mackenzie AJA expressed the view that he thought that 14 to 16 years was "towards the upper end of that range as a starting point before allowing for matters of mitigation". Cullinane J was not prepared to say that the primary judge erred in making that statement, and McMurdo P thought that, without a plea, a sentence of 15 or even 16 years was appropriate. However, all the judges thought that the primary judge's reduction to 13 years imprisonment to reflect Wark's plea was inadequate. They resentenced him to 12 years imprisonment. Mackenzie AJA particularly noted that where a sentence was 10 years or more it attracted the legislative requirement to serve 80 per cent before being eligible for parole. He said, "To allow the applicant proper allowance for his plea of guilty in a case in this category, a reduction in the notional head sentence is the only way in which [proper mitigation for a plea of guilty] can be achieved".

[43] It seems to me that a comparison with the offending in *Wark* and the offending in the present case shows that the primary judge's starting point of perhaps 16 years for the total of the appellant's offending was significantly too high. Serious though it was, the appellant's offending was objectively much less than Wark's offending. Not only was the starting point too high but, again in comparison with Wark, a reduction from 16 years to 13 and a half years in the present case was an insufficient reduction to reflect a guilty plea. Significantly the primary judge in this case needed to mitigate the sentence he imposed to reflect a guilty plea, and also to reflect the fact that the appellant was a young man with no criminal history (Wark was a mature man). The appellant's youth and lack of criminal history bore upon his prospects of rehabilitation. His youth also bore upon the primary judge's consideration of totality. That is, in considering what might be a crushing sentence, the primary judge was obliged to consider the appellant's youth.

[44] Before leaving the case of *Wark*, I would acknowledge the statements in that case which were made by Cullinane J, and agreed in by McMurdo P and Mackenzie AJA, as to the proper comparisons to be made between penile rapes and other types of rapes. Cullinane J said:

> "I do not think that a reading of the cases supports the proposition that there is a rigid compartmentalisation of rape offences into these two categories. In all cases it is the particular circumstances which will determine the level of criminality and together with other factors the sentence to be imposed.
>
> I think it can be accepted that as a general proposition that rape constituted by penile-vaginal or anal penetration will attract a higher

> sentence than rape cases involving digital or oral penetration. However there may be cases not involving penile penetration which because of their associated circumstances call for punishment which may be as great as or exceed cases involving penile penetration." – [36]-[37].

[45] I endorse those remarks. When sentencing, all the facts of the offending must be considered. I think there is an unwarranted tendency in submissions in this Court, when comparing not just rape cases but sexual offending cases in general,[9] to compartmentalise cases according to the specific "category" of sexual offending involved. In this case I do not think that the attack on complainant 2 was any less serious than the attack by Mr Benjamin, even though there was no penile/vaginal rape of complainant 2 as there had been in the case of *Benjamin*.

[46] Lastly, I examine the comparative case of *R v Newman*. Newman was 17 years old. He had taken ecstasy the night before the offending and was tired and aggressive the next morning. Having become annoyed with his immediate family he walked away to his grandmother's house. She gave him a soft drink and he went outside to have a cigarette. He then saw his grandmother's neighbour, a 60 year old woman, go into her house. He decided to rob her as he had no money. He entered the house, located the complainant and threw her to the floor so that she immediately felt immense pain in her lower back. He punched her at least four times to the side of her face. She protested that she was hurt and begged to be allowed to get up. Newman said he did not care and punched her again. He dragged off her clothes and dragged her to the main bedroom. He put a pillow over her face and then raped her (penile/vaginal rape). He then instructed the complainant to stay where she was, went to the dining room, stole $40 and left the house.

[47] The violence which accompanied the rape was grievous bodily harm. The complainant had extensive bruising around her face. She had a broken jaw and a broken rib. She had bruising on one of her knees. She required an operation to repair her fractured jaw and the hospital notes record that she had extreme pain because of soft tissue injuries to her back. She became quite ill, suffering from post-traumatic stress disorder and depression.

[48] Newman showed no remorse and the psychiatrist who examined him described his actions as callous. Although he had no previous criminal convictions, the material before the Court showed that he was a drug user and behaved in a delinquent way, fighting in the streets and throwing rocks onto rooves, stealing garden gnomes and the like. The psychiatrist who examined Newman said that he was a low to moderate risk of re-offending. Williams JA, with whom White J agreed, thought that the appropriate range for this offending was a sentence of imprisonment between 10 and 14 years and regarded the 13 year sentence imposed by the primary judge to be at the top of that range but not manifestly excessive. Jerrard JA dissented. He would have reduced the sentence from 13 years to 11 because the offender was aged 17 at the time of the offending. This dissenting opinion is more easily reconcilable with *Benjamin*. Ultimately though, I think it must be acknowledged that the Court of Appeal's refusal to interfere in *Newman* shows a somewhat harsher approach than the Court of Appeal's approach in *Benjamin*.

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9 *R v RBG* [2022] QCA 143, [4]-[6].

Resentencing

[49] As noted at the outset, in my opinion this Court must resentence the appellant. His offending against complainant 2 is similar to the offending in *Benjamin* and similar to the offending in *Newman*. The appellant also committed the offending against complainant 1 shortly before his offending against complainant 2. I think that the primary judge's approach in imposing a separate cumulative sentence for the offending against complainant 1 was correct in the circumstances here: the offending against complainant 1 was separate offending and was so serious that I think it was appropriate to recognise it with a separate cumulative sentence. Structuring the sentence this way means that considerations of totality are very important.

[50] I would impose a sentence of nine years on count 5, the oral rape. I think that was the most serious of the offences against complainant 2. As discussed, while there is some difference in the approaches in *Benjamin* and *Newman*, I prefer a period of imprisonment in line with *Benjamin* because of the appellant's youth; lack of criminal record; lack of subsequent offending, and almost immediate remorse.

[51] The period of nine years is inflated to allow for the criminality of all the offending against complainant 2, so that I would simply record convictions with no further punishment on the other counts which relate to complainant 2.

[52] I think the primary judge's sentence on count 1 was an appropriate sentence to be imposed cumulatively with the sentences for the offending against complainant 2. The primary judge recognised that if he were sentencing for count 1 alone, the sentence would be higher, but there had to be some reduction to reflect totality concerns. I would therefore not interfere with the sentence of 18 months imprisonment on count 1 which should be served cumulatively with the sentence on count 5.

[53] The total sentence I would impose is (just) over 10 years. Thus, pursuant to the *Corrective Services Act*, the appellant must serve 80 per cent of the sentence before he is eligible for parole. Notwithstanding the appellant's youth, lack of criminal history and the fact that he had obtained a qualification which might have seen him embark upon a useful career, the Court has no option to moderate this.