SUPREME COURT OF QUEENSLAND

CITATION:	*R v NT* [2018] QCA 106
PARTIES:	**R** **v** **NT** (applicant)
FILE NO/S:	CA No 264 of 2017 DC No 2268 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 12 October 2017 (Koppenol DCJ)
DELIVERED ON:	5 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2018
JUDGES:	Gotterson and Morrison JJA and Atkinson J
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – TIME SPENT IN CUSTODY – where the applicant was found guilty of two counts of torture, one count of common assault, one count of rape, one count of assault occasioning bodily harm whilst armed and two counts of deprivation of liberty – where 502 days of pre-sentence custody could be declared for the purposes of s 159A of the *Penalties and Sentences Act* 1992 (Qld) – where the sentencing judge had a discretion as to whether to account for that time in a reduction of the head sentence and the parole eligibility date – where the sentencing judge made an allowance for the pre-sentence custody in imposing an earlier parole eligibility date – where the sentencing judge failed to explain how the allowance in respect of the head sentence was dealt with or to give reasons as to why such an allowance should not be made – whether the sentencing judge was in error CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was found guilty of two counts of torture, one count of common assault, one count of rape, one count of assault occasioning bodily harm whilst armed and two counts of deprivation of liberty – where 502 days of pre-sentence custody could be

declared for the purposes of s 159A of the *Penalties and Sentences Act* 1992 (Qld) – where the sentencing judge had a discretion as to whether to account for that time in a reduction of the head sentence and the parole eligibility date – where the sentencing judge made an allowance for the pre-sentence custody in imposing an earlier parole eligibility date – where the sentencing judge failed to explain how the allowance in respect of the head sentence was dealt with or to give reasons as to why such an allowance should not be made – where the applicant engaged in heinous acts of domestic violence against the complainant – whether, if an error was found to have been committed, the sentence was rendered manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 159A

Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37, cited
R v Carlisle [2017] QCA 258, cited
R v Chinfat [1995] QCA 508, cited
R v Edwards [1997] QCA 472, cited
R v Hunt [1994] QCA 440, cited
R v Lonesborough [1999] QCA 120, cited
R v McCauley [2000] QCA 265, cited
R v Rankmore; ex parte A-G (Qld) [2002] QCA 492, cited
R v Robinson [1997] QCA 66, cited
R v S [1997] QCA 287, cited
R v Sambo [2000] QCA 191, cited
R v Skedgwell [1999] 2 Qd R 97; [1998] QCA 93, cited
R v Taiters [2001] QCA 324, cited
R v Wishart and Jenkins [1994] 2 Qd R 421; [1993] QCA 563, cited

COUNSEL: E Whitton for the applicant
T A Fuller QC for the respondent

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

[1] **GOTTERSON JA:** I agree with the order proposed by Atkinson J and with the reasons given by her Honour.

[2] **MORRISON JA:** I agree with the reasons of Atkinson J and the order her Honour proposes.

[3] **ATKINSON J:** After a five day trial in the District Court, the applicant was convicted of seven offences. The total period of imprisonment to which he was sentenced was nine years with a parole eligibility date fixed as at 11 November 2020, some three years and one month from the date of sentence. The counts of which he was convicted and the concurrent sentences imposed were for the following offences all of which were declared to be domestic violence offences:

count 1: torture (six years' imprisonment); count 2: common assault (two years' imprisonment); count 3: rape (nine years' imprisonment); count 9: assault occasioning bodily harm whilst armed (four years' imprisonment); count 10: torture (five years' imprisonment); count 11: deprivation of liberty (two years' imprisonment) and count 14: deprivation of liberty (two years' imprisonment). The applicant was acquitted on another seven counts.

[4] An appeal against conviction was abandoned. The application for leave to appeal the sentence was on the ground that the sentence was manifestly excessive. The application was argued on the sole contention that the sentencing judge erred by failing to account properly for the time the applicant had spent in custody prior to the sentence which time could not be declared pursuant to s 159A of the *Penalties and Sentences Act* 1992 (Qld) as imprisonment spent under the sentence. As a consequence, it was submitted the sentence was manifestly excessive.

Circumstances of the offending

[5] The applicant and the complainant commenced a relationship in February 2016 after they had known each other for many years. Shortly afterwards, while the complainant was on holiday in New Zealand, she was taken advantage of sexually while she was intoxicated. Immediately upon her return to Australia, the complainant went to the applicant's residence and told him what had happened.

[6] The applicant became enraged, verbally abused the complainant, calling her a whore and a slut and said that he could not trust her. He directed the complainant to undress and stand in a bathtub. The applicant told the complainant that he wanted to clean her because she was a "dirty slut" and scrubbed her body and face roughly with a kitchen scourer, causing her pain and leaving visible scratch marks on her body. She was very frightened by his threats and his behaviour. The applicant then forced the scourer into the complainant's vagina and aggressively twisted it around. His actions were physically painful and psychologically humiliating and degrading. The scouring of the complainant's body was the basis of count 2 and the insertion of the scourer into the complainant's vagina was the basis of count 3. Each were also particulars of count 1 in addition to the appellant's actions over the evening including verbal abuse, spitting, slapping and threatening to burn the applicant.

[7] The applicant and the complainant commenced living together in April 2016. Although there was no more physical violence after the night where he became enraged and the time they commenced living together, the applicant took control of the complainant's phone and other electronic devices, wiping her photos, deactivating her Facebook and cutting her off from contact with her family and friends. This type of controlling behaviour is typical of abusive domestic relationships.[1]

[8] During this period of cohabitation, the applicant's abusive and controlling behaviour continued and worsened, interspersed with periods of loving affection. He again became verbally abusive to the complainant about the incident in New Zealand while they were socialising together at a friend's house and slapped her hard. Police attended and took him to the police station but the applicant was

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1 Controlling behaviour is often recorded in the literature on this subject: see Hunter, R, 'Narratives of Domestic Violence' (2006) 28 Sydney Law Review 733 at 740-741; Follingstad DR et al 'The Role of Emotional Abuse in Physically Abusive Relationships' (1990) 5 Journal of Family Violence 107 at 108.

released. He returned to the friend's house and took the complainant home. When they returned home, the applicant armed himself with a meat cleaver and threatened to cut the complainant with it. The applicant then proceeded to strike the complainant a number of times on the upper back with the flat part of the knife, causing the complainant considerable pain and leaving her with bruising across the upper back and shoulders and a fracture of the little finger in her left hand. This offending was the basis of count 9. The complainant was frightened of the applicant and of his threats that if she complained he would visit worse violence upon her.

[9] The next series of offences occurred in early May 2016. The applicant came into the bathroom while the complainant was showering, turned off the water and attempted to show the complainant's naked body to a friend, asking the friend if he wanted to have sex with the complainant. The friend declined. The applicant then told the complainant that as she was a "dog", he would treat her as one. His behaviour again appeared to be precipitated by his anger over the incident in New Zealand. He forced the complainant to climb into their car on all fours wearing only a hoodie jumper and to put her head out of the window of the car with her tongue out like a dog while he drove. The applicant then drove to a nearby motel. He forced the complainant to climb out of the car on all fours. She was extremely embarrassed and humiliated as she was only wearing the hoodie jumper and not wearing any underwear, which left her genitals exposed in public. The applicant then offered the complainant in very crude terms to another friend (who was staying at the motel) for sex. This friend also declined.

[10] The applicant then made the complainant climb back into the car and they drove to the complainant's father's home. Her fear engendered by his threatening and controlling behaviour caused her to comply with his demands. Even though it was still daylight, he made her take off the hoodie and walk from the car to the house naked. When she asked to go to the toilet, he insisted that she urinate naked in the backyard like a dog whilst he continued to insult her in degrading language. He then let her put on a singlet dress that was at the house when she returned. The couple remained at the house for some time with the applicant being verbally abusive towards her. At some stage the applicant told her to have sex with her father's dog and made threats against her about what he would do to her father if he intervened. Her father was upstairs at the time and came down to take his dog upstairs. He saw his daughter in the foetal position being abused by the applicant but did not intervene.

[11] Later, that night, the couple left the house, with the complainant initially naked again but later permitted to put on the singlet dress. The applicant put a dildo in the complainant's mouth and instructed her to bite down on it. He then walked her up and down the street dragging her by the dildo in her mouth calling out her telephone number and saying he had a cheap whore for sale before returning to the car and driving home. This offending which involved more degrading and humiliating treatment of the complainant formed the basis of counts 10 and 11.

[12] The final offence occurred when the complainant was forced to sit naked on a tiled floor for many hours during the night. She was cold and in pain. During that period, she was also required for some of the time to stand on her toes and maintain her balance whilst a serrated knife was placed under her heels. This incident only ended when the applicant injected himself with methylamphetamine and passed out.

This offending formed the basis of count 14. He had instructed her to inject him but she refused.

Applicant's submissions

[13] The sole ground of appeal is that the sentencing judge failed to properly account in the head sentence for the time that the applicant had spent in custody prior to sentence which could not be declared, rendering the sentence manifestly excessive. At the time of sentence, the applicant had been in presentence custody for 502 days, a period of approximately one year and five months. This presentence custody could not be declared as time spent under the sentence for these offences as it also related to summary charges for drug offences, which were not before the Court.

[14] At sentence, the prosecution contended for a sentence of "not less than 10 years". The defence contended that a "notional" head sentence of nine years was appropriate. The applicant submitted that his Honour appeared to have accepted the submission by the defence counsel that a notional sentence of nine years was appropriate and should be imposed for count 3.

[15] The applicant submitted that his Honour appropriately reflected the 17 months of pre-sentence custody which could not be declared in his calculation of the parole eligibility date. That was calculated as 50 per cent of a nine year head sentence (four and a half years) which was then effectively reduced by 17 months. This is not objected to on appeal. However, the appeal was brought on the basis that the reduction of 17 months should have also occurred in respect of the head sentence.

[16] The effect of the sentence imposed is that if the applicant were not to achieve release on parole, he would serve nine years' imprisonment plus 17 months in actual custody, which is higher than the sentence contended for by both the Crown and the defence at sentence.

[17] The applicant submitted that it appeared that either his Honour intended to reduce the head sentence but simply failed to do so (which would be an error of law) or that his Honour in fact intended to impose a sentence without a reduction but failed to give reasons for this decision (which would also be an error of law).

[18] The applicant submitted that the penalty for count 3 should be changed from nine years' to seven and a half years' imprisonment but that the sentences should otherwise be undisturbed on appeal.

Respondent's submissions

[19] The respondent submitted that the overall sentence was appropriate as it had to reflect the totality of four episodes of violence within a domestic relationship over a three month period which were all marked by "fear, humiliation and degradation of the complainant". The respondent submitted that the actions of the applicant disclosed a malicious streak in a man who repeatedly sought retribution for what he perceived as an act of betrayal.

[20] The respondent submitted that the level of compliance by the complainant during the period of abuse showed the level of control and fear the applicant instilled in the complainant, who remained in the relationship for a further two months after the initial assault occurred and sold personal items at his direction to pay their bills. The respondent further noted that the sentence was appropriate as the applicant was

on probation at the time of the offending and had just completed a period of parole. He had a poor criminal and traffic history (largely for drug offences and related street offences) although he had only a limited history of offences of violence. The applicant had been placed on probation on four occasions and had breached each of these orders by further offending, including the offences the subject of the appeal.

[21] The respondent also relied on the victim impact statement of the complainant, which evidenced the long-term effect of this abuse upon the complainant.

The sentencing remarks

[22] The sentencing judge referred to the circumstances of each of the seven offences for which the applicant was found guilty by the jury. He referred to the occasions of offending occurring when the applicant had a "brain snap". He described the offences as "appalling, humiliating, degrading and disgraceful". His Honour referred to the effect on the complainant, her mother and her father as revealed by their victim impact statements. His Honour referred to the fact that during the relationship which was interspersed with the violent incidents referred to, they "had some good times together". He opined that his offending may well have been caused by the applicant's use of dangerous drugs.

[23] His Honour then said he had considered the Court of Appeal decisions which had been cited and said that there was a clear pattern of routinely imposing up to about 10 years' imprisonment for serious cases of rape. He observed that this rape was 'a nasty act' and the way in which it was carried out made it even worse.

[24] He then proceeded to impose the sentences set out at the beginning of these reasons. With regard to the pre-sentence custody which could not be declared, his Honour said:

> "Taking into account the time you have already served in pre-sentence custody (a total of 502 days from May 28, 2016 to yesterday, October 11, 2017), a period albeit which is not declarable, I fix your parole eligibility date as 37 months from today, namely, November 11, 2020."

He also declined in the exercise of his discretion to make a "serious violent offender declaration".

[25] His Honour did not explain whether or not he took into account the time served in pre-sentence custody in arriving at the appropriate head sentence. If he did take it into account, he did not explain how he had taken it into account. If he did not take it into account, he did not explain why he had not.

Discussion

[26] Section 159A of the *Penalties and Sentences Act* provides that, subject to certain limited exceptions, if an offender is sentenced to a term of imprisonment for an offence, any time that the offender was held in custody in relation to proceedings for the offence and for no other reason *must* be taken to be imprisonment already served under the sentence. As this court held in *R v Skedgwell*[2] that mandatory requirement to give credit in defined circumstances to an offender who is being sentenced for time already held in custody, the section did not, at least directly or

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2 [1999] 2 Qd R 97 at 99.

expressly, abrogate the discretion or practice which had previously existed of reducing the sentence imposed to take account of the time already spent in custody where the particular circumstances referred to in s 159A did not exist.

[27] If the offender has been held in custody in relation to proceedings for the offence in question "and for no other reason" then in imposing sentence, a judge must declare that the time spent in custody has been time served under the sentence. If the offender has been in custody in relation to the offences and for another reason, such as being on remand for other offences, the sentencing judge may nevertheless have that period taken into account by reducing the sentence that would otherwise be imposed. It is usual, although not mandatory, to take into account in the exercise of the sentencing discretion periods of pre-sentence custody which are not declarable. As Applegarth J[3] observed in *R v Carlisle*:[4]

> "Although it is not mandatory, it is generally desirable to take into account periods of pre-sentence custody which are not declarable under s 159A of the *Penalties and Sentences Act* 1992 (Qld) at the first opportunity."

[28] Time spent in custody should be taken into account by "a proportionate reduction of the sentence otherwise imposed."[5] It is not mandatory to reduce both the head sentence and the non-parole period,[6] but the usual practice is to perform both reductions.[7]

[29] In *Carlisle*, Applegarth J also cited with approval[8] the decision of Thomas J in *R v Wishart and Jenkins*[9] as the usual way in which this should be done:

> "The head sentence is the sentence properly imposable less the time actually served up to the time of sentence; and the non-parole period is half the sentence properly imposable less the time actually served up to the time of sentence."

[30] In *Skedgwell*, it was noted that the sentencing judge should "make it plain" in the sentencing remarks "whether and to what extent and in what manner, such an allowance is being made on account of a period of that custody"[10] Similarly, if an allowance is not being made, the sentencing judge should explain why it is not being done.

[31] Where an explanation is not given, an analysis of the decision and the sentence or sentences imposed may nevertheless reveal whether and how the judge has taken account of the pre-sentence custody. In this case the sentencing judge only said that he took the time served in pre-sentence custody into account in fixing the parole eligibility date. He did so by halving the nine year head sentence imposed and then deducting the pre-sentence custody to arrive at an actual date. He did not say that he had reduced the head sentence imposed.

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3 Gotterson and Morrison JJA concurring.
4 [2017] QCA 258 at [46].
5 *R v Carlisle* [2017] QCA 258 [46] citing *R v Skedgwell* [1999] 2 Qd R 97; *R v Fabre* [2008] QCA 386.
6 *R v Skedgwell* [1999] 2 Qd R 97 at 100.
7 *R v Carlisle* [2017] QCA 258 [50].
8 At [49].
9 [1994] 2 Qd R 421 at 428-429.
10 *R v Skedgwell* [1999] 2 Qd R 97 at 100.

[32] This strongly suggests that he did not take the pre-sentence custody into account in imposing the head sentence. Had he done so, the notional sentence which he would have imposed would have been 10 years and five months reduced to nine years to take account of the one year and five months already served. To take one year and five months off first and then to halve it to arrive at the usual parole eligibility date and then again to take one year and five months off the parole eligibility date would have been to give the applicant a double benefit from his time spent in pre-sentence custody. It is therefore apparent from the sentence imposed that the sentencing judge did not take account of the pre-sentence custody in imposing the nine year sentence. He did not give any reason for not doing so, and it is not possible to deduce from his sentencing remarks what his reason might have been. Both the prosecution and the defence submitted that he should do so and it appears from the exchanges with the bench during submissions that this was the course that he intended to adopt. The failure to take the pre-sentence custody into account or, if there was a reason for not doing so, to explain why the pre-sentence custody was not taken into account in fixing the head sentence was an error.

[33] The question remains whether that makes the sentence imposed manifestly excessive. If the usual course had been followed the notional sentence imposed on count 3 would have been 10 years and five months' imprisonment before the reduction to take account of the time spent in pre-sentence custody. Was that sentence manifestly excessive? This question is relevant because even if an error is detected in the original sentence, as is the case here, the court will not allow the appeal if it would not itself, in the independent exercise of its discretion, impose any lesser sentence. This principle of appellate interference was expressed by the High Court in *Kentwell v The Queen*[11] as follows:

> "In the case of specific error, the appellate court's power to intervene is enlivened and it becomes its duty to re-sentence, unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed. By contrast, absent specific error, the appellate court may only intervene if it concludes that the sentence falls outside the permissible range of sentences for the offender and the offence."[12]

[34] Essentially since an error has been identified, this court does not assess to what extent the error affected the outcome in determining what the correct sentence should be but rather in the exercise of its independent discretion, this court must determine what is the appropriate sentence for the offender and the offence. An example of the former approach, which would be flawed, would be to reason that the sentencing judge failed to take account of the time spent in pre-sentence custody which he should have done (given that he did not explain why he did not), therefore the head sentence of nine years should be reduced by 17 months to take account of the pre-sentence custody.

[35] As the High Court explained in *Kentwell*, when a sentencing judge acts on a wrong principle or does not take into account a material or relevant matter, the discretion has miscarried and a court of criminal appeal must exercise its independent discretion. However if, in the exercise of its independent discretion, the court

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11 (2014) 252 CLR 601; [2014] HCA 37.

12 At [35] per French CJ, Hayne, Bell and Keane JJ.

would not impose any different sentence then the application for leave to appeal would be refused, notwithstanding the error. The correct approach to the disposition of an application for leave to appeal against the sentence in such circumstances was explained by the High Court in *Kentwell*:

> "After having identified specific error of the kind described in *House*, the Court of Criminal Appeal may conclude, taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing, that a lesser sentence is the appropriate sentence for the offender and the offence. This is a conclusion that that lesser sentence is warranted in law. The result of the Court of Criminal Appeal's independent exercise of discretion may be the conclusion that the same sentence or a greater sentence is the appropriate sentence. In neither case is the Court required to re-sentence. Nor is the Court required to re-sentence in a case in which it concludes that a lesser sentence is appropriate for one or more offences, but that a greater sentence is appropriate for another or other offences, with the result that the aggregate sentence that it considers warranted in law exceeds the aggregate sentence that is the subject of appeal. The occasions calling for the Court of Criminal Appeal to grant leave, allow an offender's appeal and substitute a more severe sentence are likely to be rare. Were the Court to grant leave in such a case, convention would require that it inform the appellant of its intended course so that he or she might abandon the appeal." (citations omitted).[13]

[36] The applicant was not informed in this case that the court might impose a more severe sentence whether by increase in the head sentence, increase in the parole eligibility date or a declaration that the rape was a serious violent offence if it were to allow the appeal so that need not be further considered.

[37] There appears to be no reason in the case not to take into account the entirety of the pre-sentence custody in fashioning the head sentence to be imposed. If this were done, the notional sentence imposed on the rape count before taking into account the pre-sentence custody was to be 10 years and five months.

[38] Exercising my own independent discretion, I would have imposed a notional sentence on count 3 of at least that length. I would then have taken into account the time spent in pre-sentence custody and reduced the head sentence imposed to no less than nine years.

[39] The reasons why a sentence of at least that length is warranted are as follows. The act of rape in this case was particularly brutal physically and psychologically. The use of a rough item of kitchen cleaning equipment inserted into and then aggressively twisted in the complainant's vagina was intended not only to harm and humiliate, but also to subjugate her.

[40] The sentences imposed for the other offences were not made cumulative so the sentence for the rape was intended to reflect the seriousness of the whole of the offending which included various acts of torture involving degradation and gross public humiliation of the complainant committed in the context of a domestic relationship

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13 At [43] per French CJ, Hayne, Bell and Keane JJ.

from which she felt unable to escape for fear that he would further hurt her or others close to her or that she would be responsible for his self-harming. This might be considered an almost textbook case of the fear and helplessness experienced by a victim of vile domestic violence when the offender inflicts violence upon the victim interspersed with protestations of love and affection. This case falls into a particularly serious category given the number of occasions on which the offending took place and the public humiliation and degradation visited upon the complainant by the applicant.

[41] A sentence which would be in the order of 10 years and five months prior to taking account of the pre-sentence custody is well supported by comparison to other Court of Appeal decisions dealing with offences committed in the context of extreme, repeated domestic violence. The most apposite case is *R v Rankmore; ex parte A-G (Qld)*[14] where a sentence of 12 years' imprisonment on a rape count was imposed on an Attorney-General's appeal.

[42] The facts of *Rankmore* were that the respondent and the complainant had been in a de facto relationship. After that relationship broke up, there were five incidents of violence spanning a period of three months perpetrated upon the complainant. In connection with those events, the respondent was convicted by a jury of two counts of torture, two counts of rape, one count of deprivation of liberty, one count of assault occasioning bodily harm and one count of common assault and pleas of guilty were entered on one count of torture and one count of deprivation of liberty. The respondent was aged 30 to 31 years old at the time of offending.

[43] The first incidents occurred on 14 December 2000, after the respondent demanded to be allowed into the complainant's home and the two got into an argument. The respondent plugged in an iron, tore the complainant's dress off and placed the complainant on a bed, positioning himself on top of her between her legs. The respondent held the iron close to her body and then, in response to her protests, burned her arm and leg. The respondent made comments to the effect that if he could not have a life, neither would she. He prevented the complainant from leaving and threw her onto the lounge room divan, then positioning the iron around her vagina, continued to make comments and threats. The complainant became ill and fell into a state of shock. The respondent then took her to the bedroom and engaged in unspecified sexual acts culminating in his ejaculating on her stomach. Afterwards, the respondent apologised but then later tried to put her fingers into a power socket, desisting in response to a neighbour's call for him to stop. The respondent then drove the complainant to the school where she was picking up her daughter. These circumstances were the basis of count 2 (torture) to which a plea of guilty was entered and count 3 (rape) on which the appellant was acquitted.

[44] On the following day, the respondent telephoned the complainant. He apologised and asked the complainant to go fishing with him. She initially refused, but agreed in response to threats made by him against her children. Once they were together, the respondent requested that their relationship recommence and the complainant asked to be taken home. Once they neared the complainant's home, the respondent insisted on entering her home again. When the complainant refused, he threatened to kidnap her. A scuffle ensued and the respondent began to strangle her and then held a knife to her. The complainant was able to get free of the knife and threw it

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14 [2002] QCA 492.

away. The respondent then threw her into the car and drove off quickly and erratically. He made various threats including threats of suicide and threats against the complainant (for example, one threat to "f… [her] up the butt till [she] split apart"). This offending was the basis of count 4 (assault) for which the appellant was found guilty and count 5 (deprivation of liberty) to which a plea of guilty was entered.

[45] The third incident occurred about a month later when the respondent was staying at a campsite. He contacted the complainant and requested that she come to join him. When she refused, he threatened to kill her children first and then to kill her last, so that she would suffer the grief of losing them. She agreed to join him. When the complainant arrived at the campsite, the respondent considered that she was "too quiet" and became enraged. The respondent tore off the complainant's clothes and then forced her, naked, into the car and drove off, purportedly to avoid the attention of police. At a service station, the respondent went to pay for petrol using the complainant's key card and the complainant wrapped a blanket around herself and ran off screaming that the respondent was trying to kill her. He chased her and the police came to the scene. This offending was the basis of count 6 (assault) for which the respondent was found not guilty and count 7 (deprivation of liberty) for which he was found guilty.

[46] Some two months after that incident, the complainant had agreed to allow the respondent to live in a shed in her backyard. An argument developed between the respondent and the complainant and he threw the complainant on to a bed, again holding a hot iron close to her face and then her groin. The respondent then held a knife to the complainant's throat and later in the close vicinity of her vagina and cut off her underwear. He then attempted to penetrate the complainant's anus and ejaculated on her stomach. During a subsequent shower, the respondent again held a knife to the complainant's throat and then proceeded to continue to follow her and harass her armed with the knife on her way to the local shops. These circumstances were the basis of count 8 (torture) for which the respondent was found guilty and count 9 (rape) for which the respondent was found not guilty.

[47] The final incident happened shortly after the fourth incident. Again, the respondent insisted on visiting the complainant against her objection. He entered her house and threw her on to a mattress. The respondent threatened the complainant with a knife in the vicinity of her vagina, breasts, ear and stomach while making threats and removed her clothing. The respondent stabbed the knife finally into the mattress, near to her head. He then performed oral sex upon the complainant, raped her vaginally and attempted to rape her anally. The complainant was in a state of shock, evidenced by her urinating on herself, and the respondent punished her for non-responsiveness by biting her on the leg. This offending was the basis of counts 10 (torture), 11 (rape), 12 (assault occasioning bodily harm) and 13 (rape) for which the respondent was found guilty.

[48] Of the sentences imposed at first instance, the following sentences were the subject of the appeal:

1. Count 2 (torture): three years' imprisonment;

2. Count 8 (torture): five years' imprisonment;

3. Count 10 (torture): seven years' imprisonment;

4. Count 11 (rape): nine years' imprisonment; and

5. Count 13 (rape): nine years' imprisonment.

A serious violent offence declaration was made.

[49] Chief Justice de Jersey wrote the judgment of the court[15] and made the following observations as to the facts before moving to comparable cases.[16] First, his Honour noted that the respondent had a prior criminal history in relation to the property and person of the complainant and that at the time of offending, was the subject of a domestic violence order. Second, his Honour noted that counsel for the Attorney-General had emphasised the psychological torment suffered by the complainant at the hands of the respondent, including comments that she suffered "prolonged, relentless psychological abuse and torment" as a result of "extremely frightening situations"; that the complainant had "tried to placate [the appellant] by not fighting back"; and that the respondent's "hold" over the complainant was "complete".

[50] Counsel for the Attorney-General contended for a range of 12 to 14 years' imprisonment. Reference was made to the cases of *R v S*;[17] *R v Chinfat*;[18] *R v Taiters*;[19] and *R v McCauley*;[20] and counsel for the respondent referred to the cases of *R v Lonesborough*;[21] *R v Sambo*;[22] *R v Edwards*;[23] *R v Robinson*;[24] and *R v Hunt*.[25]

[51] The Chief Justice noted that *S* involved offending of a comparable nature, but noted that it had occurred on only one occasion. His Honour concluded that the appropriate sentencing range for the offending in *Rankmore* was in the order of 12 to 14 years' imprisonment.

[52] In *S*, Williams J[26] described a range of 10 to 12 years' imprisonment and an effective sentence of 12 years' imprisonment was actually imposed (but no serious violent offence declaration was applied as the case was handed down prior to that change to sentencing law). *S* involved one count of unlawful wounding, two counts of unlawful assault occasioning bodily harm, one count of deprivation of liberty, two counts of indecent assault involving oral intercourse, two counts of indecent assault involving anal intercourse and two counts of rape, in the context of a de facto relationship where the parties were by the date of the offence living apart but maintaining social contact. In that case, the sentencing judge took into account the fact that there was a domestic violence order against the applicant at the time of the offending, that it was a bad case of its kind, that there had been what he termed "systematic torture" of the complainant over five hours, the fact that a weapon had been used, and the extensive criminal history of the appellant (mostly consisting of serious property offences).

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15 Williams JA and Mullins J concurring.
16 At [34].
17 [1997] QCA 287.
18 [1995] QCA 508.
19 [2001] QCA 324.
20 [2000] QCA 265.
21 [1999] QCA 120.
22 [2000] QCA 191.
23 [1997] QCA 472.
24 [1997] QCA 66.
25 [1994] QCA 440.
26 Macrossan CJ and Byrne J concurring.

[53] The offending was triggered in *S* by the appellant's suspicions that the complainant had been associating with other men. The appellant produced a red Swiss pocket knife and threatened to disfigure her face. The appellant then proceeded to cut her above her left eyebrow and place that knife in the complainant's ear, under her nipples and to her navel, with further threats made. The complainant was repeatedly hit on the head and at one stage, she passed out. The appellant then cut off some of her hair and placed his fingers into her mouth pulling at her lips. After the complainant complained she was cold, an electric heater was placed on her stomach and the electrical cord attached to it was used to tie up her feet. The appellant then proceeded to force the complainant to perform oral intercourse on him, as well as engaging in acts of anal and vaginal intercourse. She managed to escape when she went to the bathroom and ran naked to the house next door.

[54] In *Chinfat*, a nine year sentence was substituted on appeal in place of the 12 year sentence imposed by the sentencing judge. *Chinfat* involved convictions on two counts of rape, three counts of assault, two counts of indecent assault and one count of indecent assault with a circumstance of aggravation and acquittals of two counts of rape and one of assault. There were no offences of torture. The offending occurred in the context of a domestic relationship and over the course of some seven years, and involved a defendant who had a very serious criminal history which included indecent assaults, deprivation of liberty and assault occasioning bodily harm. The offences were isolated incidents, mostly involving unwanted sexual contact by the appellant against the complainant (most seriously, the rape counts) and threats against her life and property. Count 8 is the only one which could be said to involve any public humiliation or degradation which characterises this case and involved the appellant putting his hand up the complainant's skirt and rubbing between her legs, and then telling their young son to "do this to Mum now".

[55] In *Taiters*, an eight year sentence was imposed for offending only one occasion, again without any torture. *Taiters* involved two counts of indecent assault, one of indecent assault with a circumstance of aggravation and one of rape. The appellant was originally sentenced to ten years' imprisonment, which was reduced to eight years' imprisonment on appeal. The offending was triggered when the complainant admitted to having had sexual intercourse with another man while the complainant and the appellant were separated. The appellant became enraged and began to disparage the complainant. He then proceeded to urinate on the complainant and perform a series of threats, acts of abuse and assaults over a period of six to seven hours. One incident involved ripping the complainant's clothes off and forcing her into a bath with very hot water. One incident involved the appellant shampooing the complainant's hair with such vigour he tore out some of her hair. The appellant then also inserted two fingers into the complainant's vagina and then began hitting and strangling the complainant with a belt. Finally, the appellant forced the complainant to fellate him and then have sexual intercourse with him.

[56] In *McCauley*, an eight year sentence was imposed for three counts of rape, which the Chief Justice in *Rankmore* also described as less serious. This offending occurred when the complainant stayed the night with the applicant. The applicant used a knife originally used to peel an orange to threaten the complainant into three separate acts of intercourse, identical in their nature. The applicant would request that the complainant perform oral intercourse on him. When the complainant refused, the applicant would threaten to anally rape her. The complainant would

then perform oral intercourse on the applicant. The applicant would then tell the complainant that they were going to have sex but would then anally rape her.

[57] The other cases were said to be inapplicable given the absence of torture and the fact that they involved 'more isolated, less sustained, cruel and relentless' offending than in *Rankmore*.

[58] The Attorney-General's appeal in *Rankmore* was allowed, the sentences appealed set aside and the following concurrent sentences imposed:

1. Count 2 (torture): six years' imprisonment;
2. Count 8 (torture): eight years' imprisonment;
3. Count 10 (torture): ten years' imprisonment;
4. Count 11 (rape): 12 years' imprisonment; and
5. Count 13 (rape): 12 years' imprisonment.

It may be noted that, consistently with *Rankmore* being an Attorney-General's appeal, a sentence at the lower end of the range was imposed on appeal.

[59] Returning to the present case, other matters are relevant to the sentence which should have been imposed. The applicant was 30 years old at the time of his offending. He was not a youthful offender and he was on a probation order at the time. At the time of the offences the subject of this application he was subject to probation for two years for offences of which he was convicted on 9 September 2014.

[60] Those offences were five counts of possessing dangerous drugs on various dates between April and June 2014, two counts of possessing a thing for use in the commission of a crime defined in Part 2 of the *Drugs Misuse Act* 1986 (Qld) and four counts of possessing utensils or pipes etc. for use. Between when that probation order was imposed and the date of the offences the subject of this application he had already been convicted of other offences committed during that period of probation including convictions on 20 October 2014 for assaulting or obstructing a police officer, unlawful possession of weapons category A, B or M and unlawful possession of suspected stolen property; on 4 December 2014 for breach of bail condition; on 15 January 2015 for breach of the probation order which had been imposed on 9 September 2014; on 5 March 2015 for possessing dangerous drugs for which he was sentenced to one month's imprisonment with his parole release date being 2 July 2015; and on 19 May 2015 for two subsequent breaches of probation orders.

[61] In addition to that, the applicant had a serious traffic history going back to 2000 including convictions for driving under the influence of liquor and one conviction for driving under the influence of drugs. He drove on innumerable occasions when he was unlicensed or disqualified.

[62] The applicant had a criminal history dating back to April 2003 when he was convicted of obstructing a police officer contrary to the provisions of the *Police Powers and Responsibilities Act* 2000 (Qld). Thereafter, he was convicted on four separate occasions of contravening a direction or requirement of a police officer under the *Police Powers and Responsibilities Act* and another offence of obstructing

a police officer. He was convicted on two occasions of possessing tainted property; on one occasion of committing a public nuisance; on four occasions of unauthorised dealing with shop goods; on one occasion of wilful damage to property; and one count of unlawful possession of suspected stolen property. He was convicted on one occasion in 2009 of possessing dangerous drugs; on two occasions in 2010 of wilful damage by graffiti; and one count of obstructing a police officer. In 2012, he was convicted of failing to comply with a requirement to stop a vehicle. He had a conviction for violence, assault occasioning bodily harm, committed in 2005. In addition he was convicted between 2007 and 2009 on one count of failure to appear in accordance with an undertaking under the *Bail Act* 1980 (Qld), one count of a breach of probation order, one breach of suspended sentence imposed for disqualified driving pursuant to which he was sentenced to three months imprisonment, and one breach of community service order.

[63] While none of the offences of which he had previously been convicted were by themselves particularly serious there is a persistent pattern of antisocial behaviour and failure to comply with court orders.

[64] The applicant does not have the benefit of any suggestion of remorse for his actions. Their devastating effects on the complainant, her mother and her father are set out in their victim impact statements.

[65] So far as physical impacts of the crimes committed on her, in addition to the pain and suffering caused at the time, the complainant now suffers from arthritis in the finger which was fractured and has a permanent disability in that hand which affects her ability to work as a beauty therapist. This is not to downplay the extensive bruising and scarring and pain suffered by the complainant at the time of and as a result of the violence inflicted upon her. There has unsurprisingly been a large emotional impact from the crimes leaving the complainant fearful, anxious and depressed. She reports that her trust in other people has been destroyed and she has lost many friendships. She has no desire to ever be involved in another serious intimate relationship.

[66] During the time of the applicant's offending against the complainant, she lost her job as he prevented her from going to work or contacting her employer. She was unable to work at all for many months after the offences and as previously mentioned her financial losses will continue due to the ongoing physical effects upon her as well as the psychological effects upon her. She has been left in debt as a result of the applicant's financial demands upon her during their relationship and has lost items that were precious to her.

[67] The factors which demonstrate the heinous nature of these offences calling for condign sentences include the way the applicant treated the complainant so callously, objectifying her, and humiliating and degrading her not only in private but in public.

[68] All of the factors mentioned tend to suggest that a notional sentence of 10 years and five months reduced to nine years to take account of the time spent in pre-sentence custody was the appropriate sentence to impose on count 3 to take account of all of the applicant's criminality. The reduction of the parole eligibility date after he had served one year and five months pre-sentence custody and three years and one month post-sentence custody was, for the reasons given earlier, perhaps overly

generous as was the sentencing judge's decision not to declare this particularly egregious example of rape and torture in a domestic relationship to be a serious violent offence.

[69] The error identified in the manner in which the sentence was imposed suggests that leave to appeal should be granted. However, as the sentence imposed was not manifestly excessive, there would be no utility in granting leave to appeal as the appeal would be dismissed.

[70] I would therefore refuse leave to appeal the sentence imposed.