

SUPREME COURT OF QUEENSLAND

CITATION: *R v CD; R v CD; Ex parte Attorney-General (Qld)* [2026]
QCA 143

PARTIES: **In CA No 135 of 2025:**
R
v
CD
(applicant)

In CA No 137 of 2025:
R
v
LM
(applicant)

In CA No 87 of 2025:
R
v
LM
(respondent)
EX PARTE ATTORNEY-GENERAL OF QUEENSLAND
(appellant)

In CA No 88 of 2025:
R
v
CD
(respondent)
EX PARTE ATTORNEY-GENERAL OF QUEENSLAND
(appellant)

FILE NO/S: CA No 87 of 2025
CA No 88 of 2025
CA No 135 of 2025
CA No 137 of 2025
SC No 1214 of 2023

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Conviction)
Sentence Appeal by Attorney-General (Qld)

ORIGINATING COURT: Supreme Court at Brisbane – Date of Convictions: 19 April 2024; Date of Sentences: 31 March 2025 (Freeburn J)

DELIVERED ON: 4 August 2026

DELIVERED AT: Brisbane

HEARING DATE: 31 March 2026

JUDGES: Mullins P, Bradley JA, Hindman J

ORDERS: **In CA No 87 of 2025:**

- 1. Appeal allowed.**
- 2. Sentence imposed on 31 March 2025 varied in the following respects:**
 - (a) Count 4: Order that the offender be imprisoned for a period of seven years; and**
 - (b) Order that 18 April 2027 be fixed as the date the respondent will be eligible for parole.**

In CA No 88 of 2025:

- 1. Appeal allowed.**
- 2. Sentence imposed on 31 March 2025 varied in the following respects:**
 - (a) Count 4: Order that the offender be imprisoned for a period of eight years; and**
 - (b) Order that 18 April 2028 be fixed as the date the respondent will be eligible for parole.**

In CA No 135 of 2025:

- 1. Extension of time to appeal against conviction granted.**
- 2. Appeal dismissed.**

In CA No 137 of 2025:

- 1. Extension of time to appeal against conviction granted.**
- 2. Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the applicants, who are husband and wife, seek leave for an extension of time to appeal against their convictions on two counts of rape and two counts of indecent treatment of a child under 16 under care – where the husband does not seek leave to appeal against his additional conviction on three counts of supplying the dangerous drug cannabis to a minor – where the applicants contend there was a miscarriage of justice at their trial because the primary judge failed to direct the jury on the use that could be made of evidence of the husband supplying cannabis to the complainant in assessing the guilt of the wife, and evidence of an inappropriate conversation held

by the wife with the complainant in assessing the guilt of the husband – whether a direction should have been given to mitigate the risk that the jury might impermissibly reason that the cannabis supplies and inappropriate conversation took place as part of a plan between the applicants to intoxicate and sexually exploit the complainant

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the Attorney-General appeals against sentences imposed on husband and wife co-offenders – where the husband and wife were convicted of two counts of rape and two counts of indecent treatment of a child under 16 under care – where the husband was also convicted of three counts of supplying the dangerous drug cannabis to a minor – where the wife was sentenced to imprisonment for six years with a parole eligibility date after serving less than one quarter of the head sentence – where the husband was sentenced to imprisonment for seven years with a parole eligibility date after serving less than one third of the head sentence – whether the sentences imposed were manifestly inadequate in all the circumstances – whether the Court should exercise its residual discretion to re-sentence the respondents

Corrective Services Act 2006 (Qld), s 184

Criminal Code (Qld), s 210, s 349, s 669A

Evidence Act 1977 (Qld), s 132C

Penalties and Sentences Act 1992 (Qld), s 9, s 11, s 15, s 160D

Victims of Crime Assistance Act 2009 (Qld), s 15

Brawn v The King (2025) 99 ALJR 872; [2025] HCA 20, cited

Bugmy v The Queen (1990) 169 CLR 525; [1990] HCA 18, cited

CMB v Attorney-General (NSW) (2015) 256 CLR 346; [2015] HCA 9, cited

Director of Public Prosecutions (Vic) v Dalglish (2017) 262 CLR 428; [2017] HCA 41, cited

Director of Public Prosecutions (Vic) v Mokhtari [2020] VSCA 161, approved

HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, applied

House v The King (1936) 55 CLR 499; [1936] HCA 40, applied

Lacey v Attorney-General (Qld) (2011) 242 CLR 573; [2011] HCA 10, cited

Malvaso v The Queen (1989) 168 CLR 227; [1989] HCA 58, cited

Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, applied

R v Basic (2000) 115 A Crim R 456; [\[2000\] QCA 155](#), considered
R v Burton [\[2014\] QCA 37](#), considered
R v CDF [\[2024\] QCA 207](#), cited
R v Coutts [\[2016\] QCA 206](#), cited
R v Free; Ex parte Attorney-General (Qld) (2020) 4 QR 80; [\[2020\] QCA 58](#), cited
R v GAR [\[2014\] QCA 30](#), considered
R v Hernando (2002) 136 A Crim R 451; [2002] NSWCCA 489, cited
R v Kahu [\[2006\] QCA 413](#), considered
R v KBQ [\[2026\] QCA 123](#), cited
R v Lee [\[2012\] QCA 239](#), considered
R v O'Sullivan and Lee; Ex parte Attorney-General (Qld) (2019) 3 QR 196; [\[2019\] QCA 300](#), applied
R v Pham (2015) 256 CLR 550; [2015] HCA 39, applied
R v Press [\[1997\] QCA 7](#), considered
R v Randall [\[2019\] QCA 25](#), cited
R v Raymond [\[1994\] QCA 441](#), considered
R v RAZ; Ex parte Attorney-General (Qld) [\[2018\] QCA 178](#), cited
R v Rogan [\[2021\] QCA 269](#), cited
R v Sprott; Ex parte Attorney-General (Qld) [\[2019\] QCA 116](#), applied
R v Tait [1999] 2 Qd R 667; [\[1998\] QCA 304](#), cited
R v Teece [\[2019\] QCA 246](#), considered
R v Tory [\[2022\] QCA 276](#), considered
R v WBM [\[2020\] QCA 107](#), applied
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, applied
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, cited

COUNSEL: M L Longhurst for the applicants/respondents
 C N Marco, with J H Guy, for the respondent/appellant

SOLICITORS: Gatenby Law for the applicants/respondents
 Director of Public Prosecutions (Queensland) for the respondent/appellant

[1] **MULLINS P:** I agree with Bradley JA.

[2] **BRADLEY JA:** There are four proceedings before the Court:

- (a) On 23 April 2025, the Attorney appealed the sentence imposed on the respondent (**LM**) on 31 March 2025, following her earlier conviction for two counts of rape and two counts of indecent treatment of a child under 16 under care (the **sexual offences**), on the ground that the sentence was manifestly inadequate.¹
- (b) The same day, the Attorney appealed the sentence imposed on the respondent (**CD**) on 31 March 2025, following his earlier conviction for three counts of

¹ This is CA 87/25.

supplying the dangerous drug cannabis to a minor² (the **cannabis offences**), and the sexual offences on the ground that the sentence was manifestly inadequate.³

- (c) On 6 June 2025, CD applied for an extension of time within which to give notice of an appeal against his conviction on 19 April 2024, following trial, on the sexual offences.⁴
 - (d) The same day, LM applied for an extension of time within which to appeal against her conviction on 19 April 2024, following trial, on each of the sexual offences.⁵
- [3] CD and LM are married. Each offence was committed at their home, in December 2021, late at night or in the early hours of the following morning. They were co-offenders in each of the sexual offences. A child, then aged 15 years, was the complainant for each of the sexual offences (the **complainant**). She was also the person to whom CD made two of the supplies of cannabis. CD made the other cannabis supply to a friend of the complainant (the **friend**), then also aged 15 years.
- [4] On 19 April 2024, the fifth day of their trial, the jury returned the guilty verdicts. As events transpired,⁶ they would remain in custody and not be sentenced until a sentencing hearing on 31 March 2025.
- [5] CD was sentenced to imprisonment for seven years on the first of the two counts of rape. He was sentenced to lesser concurrent terms of imprisonment for the other sexual offences and the cannabis offences.⁷
- [6] LM was sentenced to imprisonment for six years on the first of the two counts of rape. She was sentenced to lesser concurrent terms of imprisonment for the other sexual offences.⁸
- [7] It is appropriate to consider the applications for an extension of time, and the intended appeals against conviction, before turning to the appeals against the sentences.

Extension of time to appeal against conviction

- [8] CD and LM did not take any step to initiate appeals against their convictions until more than a year after the period expired within which each was entitled to appeal. The Crown opposed an extension of time to allow the intended appeals to proceed. For the Crown, it was submitted that CD and LM had not provided a satisfactory explanation for the delay.

² *Drugs Misuse Act 1986* (Qld) (**DMA**), s 6(1)(d) and (2)(a).

³ This is CA 88/25.

⁴ This is CA 135/25. CD did not seek to appeal from his conviction of the cannabis offences. Nor did he seek leave to appeal against his sentence.

⁵ This is CA 137/25. LM did not seek leave to appeal against her sentence.

⁶ On 18 June 2024, the sentence hearing was adjourned to a date to be fixed. It was then listed for hearing on 27 September 2024. On 24 September 2024, it was again adjourned to a date to be fixed. Finally, it was listed on 31 March 2025.

⁷ His concurrent sentences were four years on the second count of rape, 12 months on each of the three cannabis supply counts, and six months on each of the two counts of indecent treatment.

⁸ Her concurrent sentences were four years on the second count of rape, and six months on each of the two counts of indecent treatment.

- [9] When LM and CD were convicted, they knew that they would not be sentenced until at least 30 June 2024. By that date, the period for either of them to commence an appeal against conviction would have expired. At that time, each had a separate legal team. The reasonable inference is that LM and CD each decided not to appeal within the appeal period.
- [10] The sentencing hearings were adjourned to allow LM and CD to obtain reports from psychologists. Those reports are dated 22 and 26 November 2024. After the reports were received, the sentencing hearing was listed for 31 March 2025, to accommodate the primary judge and all counsel. This explains the delay between the convictions and the sentences.
- [11] LM did not change her solicitors between the trial and the sentencing hearing. So, that does not explain her delay at that time. CD engaged his present solicitors in August 2024,⁹ about three months after the appeal period had expired. CD had the new solicitors for a further nine months before he gave them instructions to appeal.
- [12] The respondents' now common solicitor conferred with each of them after the sentences were imposed. He said each respondent was "content" with the sentence imposed. He said they were given "advice of the effect of an appeal on their ability to bring an application for Parole." This concern might explain a short delay after sentences before they started the appeals. For CD any concern was brief. He gave instructions for an appeal about two weeks after being sentenced.
- [13] The respondents suggested a link between the Attorney's appeals against the sentences and their conviction appeals. According to his solicitor, CD gave instructions to appeal his conviction on 15 April 2025. This was before the Attorney instituted her appeal against CD's sentence.
- [14] It is possible LM's decision to appeal was "triggered" by the Attorney's appeal. She gave instructions to appeal her conviction on 15 May 2025, about six weeks after she was sentenced, and about three weeks after the Attorney's appeal.
- [15] Taken as a whole, the respondents' reasons for delay in bringing the appeal would not justify an order to extend time. This is not fatal to their applications, however. If either conviction appeal has merit, it may be in the interests of justice to allow the appeal to be heard to avoid a possible miscarriage of justice.¹⁰
- [16] The proposed conviction appeals are advanced on the same basis, by common submissions advanced by their common legal representatives, and in terms that appear arguable. If there are to be challenges to the convictions, it is preferable that they are determined before the Attorney's sentence appeals. In all the circumstances, the Court should extend the time for LM and CD to appeal against their convictions and rule on their appeals.

Appeals against conviction

- [17] The respondents have in common a single ground of appeal: that there was a miscarriage of justice at the trial because the primary judge failed to direct the jury about the use the jury could make of two parts of the evidence in considering their verdicts on the sexual offence counts for each respondent.

⁹ This is based on the affidavit of a solicitor of the firm filed in this Court.

¹⁰ *R v Tait* [1999] 2 Qd R 667, 668 [5].

[18] Those parts are:

- (a) The evidence of several witnesses about the supply of cannabis to the complainant and the friend (the **cannabis supplies**) before the sexual offences were alleged to have been committed; and
- (b) The evidence of the complainant that LM asked her inappropriate personal questions (the **inappropriate conversation**), also before the sexual offences were alleged to have been committed.

[19] The respondents do not submit there was an error of law.¹¹ Their contention is that the absence of a direction about the use of this evidence was an error or an irregularity in the conduct of the trial that could realistically have affected the reasoning of the jury to its verdicts.¹² They submit that a direction should have been given to mitigate the risk that the jury might reason that the supply of cannabis and the inappropriate conversation took place as part of some greater plan between LM and CD to intoxicate and sexually exploit the complainant.

The evidence at the trial

[20] The trial commenced on 15 April 2024. Each respondent was represented by an experienced defence counsel at the trial and at the preliminary hearing. The evidence the Crown would adduce at the trial about the cannabis supply and the inappropriate conversation was in the complainant's police interview, recorded on 4 January 2022, her prerecorded evidence in court, taken on 17 November 2023, and the friend's police interview, recorded on 6 March 2022. On 26 March 2024, orders had been made in terms of the parties' agreed drafts for the editing of the prerecorded evidence and the supply of copies of it.

The supply of cannabis

[21] On the first day of the trial, the edited version of the police interview with each of the complainant and the friend and the complainant's prerecorded evidence was played to the jury. The friend then gave evidence and was cross-examined by defence counsel for each of the respondents. In her evidence-in-chief, the friend was not asked about and did not refer to the supply of cannabis or the inappropriate conversation. The only additional evidence the friend gave at the trial about the supply of cannabis was adduced by defence counsel in cross-examination.

[22] The complainant and the friend had spent the day together at the complainant's home. It was the December school holidays. They wanted to spend the night together at the house where the friend and the friend's mother were then living.¹³ The friend called her mother to ask about a sleepover. Her mother agreed, but said she was out visiting the respondents. The friend's mother picked them up from a train station and drove them to the respondents' home. It was a large house on an "acreage" some distance from surrounding houses.

[23] When the friend and the complainant arrived at the respondents' home it was dark. The complainant was introduced to the respondents. She had not met them before.

¹¹ *MDP v The King* (2025) 99 ALJR 969, 984 [57] (Edelman J), 989 [78], 992-993 [100]-[102] (Gleeson, Jagot and Beech-Jones JJ).

¹² *Brawn v The King* (2025) 99 ALJR 872, 874 [3], 876 [9], [10].

¹³ This was referred to as the friend's "nan's house".

The friend's mother was friendly with the respondents, particularly with LM. CD had taught the friend martial arts when she was younger. CD's defence counsel adduced from the complainant that she and the friend had not had any alcoholic drinks or any cannabis before they went to the respondents' home.

- [24] It would be artificial to consider the evidence about the cannabis supplies without also considering the evidence of the two girls consuming alcohol.
- [25] The complainant, the friend, LM, and the friend's mother gave consistent evidence in the following respects. The respondents and the friend's mother were "drinking". When the two girls arrived, CD offered them both an alcoholic drink. The friend asked her mother, who, according to the friend, "said we could have one 'cause we were like at home." The friend's mother said she allowed her daughter to have a few alcoholic drinks because she wanted to know how much alcohol her daughter could "handle". Both girls said they were asked if they wanted another drink "and we said yeah." The friend said she had a "milk drink" served in "cocktail" glasses. The friend thought it was made with vodka. The complainant gave evidence that they sipped a "dirty banana cocktail", but did not drink it because it was "really strong". The complainant said she consumed "a raspberry lemonade".
- [26] After the hand-mixed drinks, both girls said they each had a pre-mixed "blueberry cruiser". This was consistent with LM's evidence that, in addition to the drinks made for them, the girls were helping themselves to alcohol. The complainant said LM told them they could find these drinks downstairs in a fridge in the respondents' bedroom.¹⁴ LM's defence counsel adduced evidence from the friend that the two girls went downstairs to the respondents' bedroom and "got some blueberry cruisers from there".
- [27] The friend said she watched CD roll a joint, which he gave to her and the complainant. They both smoked it. The complainant said she inhaled "two or three puffs." The friend said it was a mixture of tobacco and cannabis. She said she "felt high" after smoking the joint. The friend's mother said she saw her daughter and the complainant have one joint, but she did not see who gave it to them. LM gave evidence that the two girls had shared a joint, but denied that CD had given this to them.
- [28] All witnesses gave evidence that at about 11.00 pm, after the drinks and the joint, the friend began vomiting on the upstairs deck. The friend's mother and the respondents came to help. LM held back the friend's hair while she vomited. CD cleaned up the deck with a hose. LM, the complainant, and her friend said the friend then lay on the couch upstairs and changed from tracksuit pants into shorts LM provided.
- [29] The friend said her mother tried to take her and the complainant home, but LM "was like insisting that we could stay" because LM "was meant to be doing our nails the next morning." She said her mother said she would "take us home and ... bring us back tomorrow" and LM "was just insisting that we could stay 'cause it's a hassle to try and get me in the car 'cause I was sick." The friend said her mother "finally just agreed to let us stay 'cause I said that I'll be alright 'cause I didn't really wanna get in the car anyway." The complainant's evidence was that CD said, "Why don't you stay?" and that LM said, "Yeah, stay, because you can get your nails done." In her evidence, LM said she told the friend's mother "that the girls can stay ... it's not a problem."

¹⁴ LM referred to this room as the "granny flat". It was common ground that it was the bedroom of CD and LM.

- [30] The friend's mother left the respondents' house, taking a younger child home with her. LM said this was between about 12.30 am and 1.00 am.
- [31] The complainant's evidence was that CD offered her a second joint, after her friend had vomited. She said she tried not to inhale because she did not want to have any more. LM was not present.
- [32] Neither defence counsel challenged the complainant's evidence about consuming the cannabis and the alcoholic drinks. The friend agreed with CD's defence counsel that she "got pretty intoxicated that night ... from some cannabis and some alcohol". Both defence counsel suggested to the complainant in cross-examination that she was "intoxicated" and did not "really remember what happened".
- [33] CD's defence counsel told the jury the complainant was "a person who had alcohol and cannabis on that night" and:
- "[T]here was intoxication, there was alcohol, there was cannabis. So don't think that this was a sober person making a judgment to not get into the bed on that night."
- [34] LM's defence counsel told the jury, "The girls were drinking. It seems people were smoking cannabis."

Consideration of the evidence about cannabis supplies

- [35] In *HML v The Queen*, Kiefel J explained:
- "It is not possible to discuss the probative force of evidence without identifying the way in which it may be used and the issue to which it relates."¹⁵
- [36] The Crown led the cannabis supply evidence because it was the basis of the three cannabis offences alleged against CD on the indictment. Those counts were supply only, without an element of stupefying intent.¹⁶
- [37] The Crown led no evidence about the effect on the complainant of smoking the joints. The complainant's evidence minimised her use of cannabis, taking two or three puffs of the first joint and trying not to inhale the second.
- [38] The first joint was supplied in the presence of the friend's mother. There was no evidence of any sexual context for the cannabis supply. There was no evidence that any sexual or flirtatious remark or conduct accompanied either joint. Indeed, no evidence was adduced that CD showed any sexual interest in either girl.
- [39] Although LM knew CD had shared a joint with the two girls, there was no reason to think she knew CD had provided a second joint to the complainant later in the evening. LM was not present when CD offered her a second joint.
- [40] The cannabis supply evidence was adduced with notice and without objection. Some of it was adduced by defence counsel. Defence counsel for each respondent sought to use the evidence to discredit the complainant.

¹⁵ (2008) 235 CLR 334 (*HML*), 494 [491].

¹⁶ Such as under the *Criminal Code*, s 316.

- [41] The evidence of the two girls consuming alcohol and cannabis was also part of the *res gestae* of the charged sexual offences. It explained the circumstances in which the friend's mother had departed for the evening, leaving the two girls in the care of the respondents. It explained the complainant going with the respondents to their bedroom, unaccompanied by her friend, and the absence of the friend at the time she said the sexual offences were committed. It explained the complainant feeling a bit unsteady on her feet, dizzy when sitting on the respondents' bed, unable to resist the respondents' control, and "blacking out" during the charged sexual offending. It was relevant to answer questions that may fairly have been expected to arise in the minds of the jurors in a case of this kind. It was relevant to negative an inference which the jury might otherwise have drawn that the key part of the complainant's evidence was curious, unlikely or even implausible.¹⁷
- [42] In these ways, the evidence was necessary for an understanding of the narrative.¹⁸ It assisted the jury in the evaluation of the complainant's evidence about the charged sexual offences and bore upon an assessment of the probability of the existence of a fact in issue: whether the respondents committed the acts alleged in the indictment.
- [43] It was also relevant to the respondents' common defence case, that the complainant's recollection of the evening was unreliable because she was intoxicated by cannabis and alcohol, and that she went to sleep in an inebriated state in the respondents' bed, woke up in that unfamiliar place and, disoriented, suffered a panic attack.
- [44] The respondents' submission that the cannabis supply evidence was "simply inadmissible" against LM should be rejected.

The evidence about the inappropriate conversation

- [45] The prosecutor referred to the inappropriate conversation evidence briefly in opening the Crown case:

"Now, [the complainant] will tell you that [LM] asked [the complainant] a few questions that she thought were a bit inappropriate. She asked whether [the complainant] was bi-sexual. She asked how old she was. [The complainant] told [LM] that she was only 15 and was not bi-sexual. [LM] also asked her questions like whether she had a boyfriend and whether she had had sex before, so whether she was a virgin. [The complainant] became uncomfortable at that stage and didn't answer any of those questions.

After a while, [LM] asked if [the complainant] wanted to go downstairs. [The complainant] believed that both of the [respondents] were going to take her downstairs to go into the same bedroom as [her friend] to go to sleep, so she went with them. At that stage, [the complainant] will tell you that she started feeling a bit unsteady on her feet and was starting to feel the effects of the alcohol and the cannabis. As [the complainant] walked towards the room where she assumed that [her friend] was in, the [respondents] told her to go into another room, which was their bedroom. [The complainant] said she felt scared but she did what she told them – what she was told to do."

¹⁷ HML, 497-498 [500] (Kiefel J).

¹⁸ HML, 352 [6] (Gleeson CJ), 477-480 [423]-[433], 485 [457] (Crennan J).

- [46] The complainant had told police in the recording played to the jury that, after CD had supplied a second joint, CD “went somewhere.” She said, “I don’t really know where he went”. She then spoke about a conversation with LM.
- [47] The complainant told the police:
- “[T]hen the lady started asking me like all these weird questions, like are you bisexual? Um, do you have a boyfriend? Like, are, are you a virgin? Asking all these questions and I started getting a really like weird um feeling i-, in my stomach and um, and I didn't really know what to do. Then I started getting scared”.
- [48] There was no evidence that CD knew of these questions or the complainant’s answers.
- [49] The complainant said CD then returned and LM said, “oh, let’s take [the friend] downstairs”. The friend said the respondents took her down to a spare bedroom, where she lay on the bed and went to sleep.
- [50] The complainant told police she remained upstairs, “just sitting there on my phone”. She said the respondents “came back up and then they were like um come, come down, come back downstairs”. She said she went downstairs with LM.
- [51] She told police she was going to go into the spare bedroom where her friend was sleeping, but:
- “[LM] was like no, go in the other room and I was like oh, um okay ‘cause I didn’t wanna be, like say no and, just in case they did something like hurt me, tell me to hurry up and get in there and then um I went in there and then like [INDISTINCT] they came in and then, and then I was like, I, I don’t like know from the start when they came, came in but I seen them come in and then I was really like blurry and like I couldn't really see much and I was getting really dizzy. So I sat down like on their bed-ish, like on the um end of their bed. I sat down there and like um, and then [INDISTINCT], they started taking my clothes off and then I didn’t really know what to do ‘cause I was just like feeling really sick like and my head was spinning and then um, and then I blanked out.”
- [52] The complainant then spoke to the police about the sexual acts, which she said the respondents committed in the respondents’ bedroom. This evidence was the basis of the sexual offences alleged on the indictment.
- [53] At the preliminary hearing, the prosecutor did not ask the complainant about the inappropriate conversation with LM. Neither defence counsel cross-examined the complainant about it.
- [54] When LM gave evidence, her defence counsel did not ask about the inappropriate conversation.
- [55] LM gave evidence of a different sequence of events. LM said that about 30 minutes after the friend stopped vomiting, she told the complainant, “You can head down to where the spare room is. We’re just going to shut everything off, grab [the friend], and we’ll bring her down there.” LM said after she and CD put the friend into bed in the spare room, they did not know where the complainant had gone. She said CD

found that someone was in the respondents' bed, and LM identified the person as the complainant. She said the complainant's clothes were all over the floor. She said she woke the complainant, who was "extremely startled" and "started crying", asking:

"Where am I? What's going on? Where's [the friend]? Why am I in here? Where's [the friend]? ... Where's my clothes? Where's my clothes?"

- [56] This formed the respondents' defence case that the complainant, intoxicated by cannabis and alcohol, found her own way to the respondents' bed, and, when awakened by LM, had a panic attack.

- [57] The prosecutor placed the inappropriate conversation evidence in a time sequence in the closing address. The transcript has her initially using the adjective "appropriate" instead of "inappropriate", which is corrected in the extract below:

"After the [respondents] put [the friend] to bed, the [respondents] went back upstairs to [the complainant], and that's when the [in]appropriate questions were being asked, and that's when [CD] gave her that Coke drink. He gave her another joint. After a while, the [respondents] took [the complainant] downstairs, and that's when they led her to the room and they raped her."

- [58] The prosecutor returned to it in her summary of the evidence:

"[The friend's mother] left with [her younger daughter]. [The friend] was on the couch. [The complainant] stayed on the deck. [LM] started asking [the complainant] personal questions. That's when [the complainant] started to get scared. She's taken the Snapchat photo. The [respondents] and [the complainant] went downstairs. She went to go into [her friend's] room, but the [respondents] told her to go into their room. She was feeling sick and dizzy, so she sat down on the bed. [CD] started taking her clothes off. He was rubbing her arm and lifted her shirt up before [the complainant] blanked out."

- [59] Neither defence counsel mentioned the inappropriate conversation in their addresses to the jury. In summing up the evidence, the primary judge did not refer to the inappropriate conversation.

Consideration of the inappropriate conversation evidence

- [60] The prosecutor used the inappropriate conversation evidence as part of the narrative sequence that took events from the deck upstairs to the respondents' bedroom downstairs. The inclusion of this part of the complainant's evidence meant that CD and LM did not just "appear" in the bedroom or at the deck ready to assist her downstairs. It made the complainant's evidence of the charged sexual offences understandable to the jury, taking its place in the course of the evening's events.

- [61] The evidence of this sequence was relevant to rebut the defence case at the trial that the respondents "lost" the complainant while they were putting the friend to bed; and that the complainant ended up in the bedroom without their assistance.

- [62] The respondents' submission that the evidence of the inappropriate conversation was "simply inadmissible" against CD, should be rejected.

The “plan”

- [63] The Crown case was that the respondents acted together in taking the intoxicated complainant down to their bedroom, undressing her and committing the sexual offences against her. Each was a party to the other’s sexual offending. However, the prosecutor did not suggest to the jury that the respondents had a plan to intoxicate the complainant and sexually exploit her from the time of the first cannabis supply.
- [64] The friend’s mother brought the two girls to the respondents’ home. There was no suggestion CD or LM was involved in the mother’s decision to do so. LM did not text the respondents’ home address to the complainant or to the friend. It was the friend who wanted to go to the respondents’ house, as a step in getting to her home.
- [65] The respondents deferred to the mother’s authority before serving alcoholic drinks to the girls. It was the mother who allowed the girls to drink alcohol and who raised no objection to them sharing a joint. The two girls consumed alcohol only while the friend’s mother was present.
- [66] The two girls were not to stay overnight at the respondents’ home. This changed only when the friend was unwell, and the mother agreed to leave the two girls in the respondents’ care. There could not have been any earlier plan to offend against the complainant. Only the second joint was supplied to the complainant after the friend’s mother left the house.
- [67] After the departure of the friend’s mother, there was no evidence that LM and CD were alone together before they both took the friend down to the spare bedroom. The respondents had been keeping an eye on the friend after she vomited, LM arranging a change of clothes and CD bringing a bucket, in case she was ill again. Then the complainant had been alone with CD when the second joint was supplied. Then, she had been alone with LM when the inappropriate conversation occurred. The opportunity for the respondents to agree on a “plan” was when they took the friend to the spare room and before they returned upstairs to suggest they accompany the complainant down to bed. On the evidence, the respondents taking the complainant down to their bedroom was an opportunistic decision at the end of a night in which all participants had been consuming intoxicating substances. The jurors were entitled to reason that the respondents decided to offend against the complainant only moments before they took her to their bedroom or perhaps half an hour before. Whichever way they may have reasoned, it could not have occasioned a miscarriage of justice.
- [68] His Honour gave the usual directions about drawing inferences and directed the jury “not to indulge in intuition, speculation or guesswork.” Neither defence counsel sought any direction or redirection on this topic.
- [69] No counsel raised with the primary judge a risk the jury might infer from the cannabis supply evidence or the inappropriate conversation evidence (or both together) that from early in the evening the respondents had a plan to intoxicate and sexually exploit the complainant. Neither defence counsel sought a direction of the kind the respondents now contend the primary judge ought to have given. This gives an indication of the atmosphere at the trial and the view each defence counsel took of the effect of the evidence. The primary judge raised no such concern. As the respondents’ appeal counsel noted, his Honour enjoyed a “considerable advantage” over this Court in being able to consider:

“the appearance of the complainant, the demeanour of the witnesses, [each] offender’s appearance and conduct in court, the impression produced by words and the ‘atmosphere’ of the proceeding.”¹⁹

- [70] In the circumstances of the trial, such a specific direction would bring the idea of a longer-standing “plan” to the attention of the jury before they retired to consider their verdicts. If either defence counsel considered requesting a direction, there was a sound forensic reason not to do so, weighing it against the atmosphere of the trial.

Conclusion on the conviction appeals

- [71] The absence of a direction about the use of the cannabis supply evidence and the inappropriate conversation evidence did not occasion a miscarriage of justice. The respondents’ appeals against their convictions should be dismissed.

Attorney’s appeal against sentence

- [72] The Attorney contends that the sentence imposed on each respondent was manifestly inadequate.

The structure of the sentences

- [73] The most serious offence for each respondent was the first rape count. The primary judge imposed the head sentence for that count, considering the overall criminality of each respondent’s multiple offences.²⁰
- [74] The primary judge imposed a head sentence of seven years’ imprisonment on CD and exercised a discretion to fix 31 March 2026 as the date CD would be eligible to apply for parole.²¹ For LM, his Honour imposed a head sentence of six years’ imprisonment and exercised the discretion to fix 30 September 2025 as her parole eligibility date.
- [75] Between the convictions and the sentencing hearing, each respondent had served 346 days of pre-sentence custody. Appropriately, the primary judge declared this period as time already served under their respective sentences.²² The effect of the declaration and the exercise of discretion to fix the parole eligibility dates was that CD was required to serve less than one third of his head sentence in custody before becoming eligible to apply for parole,²³ and LM was required to serve less than one quarter of her head sentence in custody before becoming eligible for parole.²⁴

Manifest inadequacy

- [76] In *Veen v The Queen [No 2]*, the majority explained that:

“sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from

¹⁹ Referring to *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116, [10].

²⁰ *R v Nagy* [2004] 1 Qd R 63, 72-73 [39] (Williams JA; Jerrard JA and Muir J agreeing). His Honour imposed lesser concurrent sentences for the other offences.

²¹ The discretion was exercised under section 160D(3) of the *Penalties and Sentences Act 1992* (Qld) (PSA).

²² As required by PSA, s 159A(1) and (3)(c).

²³ 711 days/2,556 days = 27.82 per cent.

²⁴ 529 days/2,191 days = 24.14 per cent.

unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.”²⁵

[77] In *Markarian v The Queen*, the High Court emphasised:

“As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.”²⁶

[78] The weight to be given to relevant considerations was always a matter for the judge in the exercise of the sentencing discretion.²⁷

[79] In *R v Pham*, French CJ, Keane and Nettle JJ explained the application of this category of challenge to a sentence:

“Appellate intervention on the ground of manifest excessiveness or inadequacy 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.”²⁸

[80] Put shortly, to succeed the Attorney must surmount “two hurdles”:

“The first is to locate an appellable error in the sentencing judge's discretionary decision. The second is to negate any reason why the residual discretion of the [appellate Court] not to interfere should be exercised.”²⁹

[81] The Attorney invites the Court to conclude that each sentence is so disproportionate to the offending that the primary judge's sentencing discretion must have miscarried, and an error of principle can be inferred.³⁰ To overcome the second hurdle, the Attorney must persuade the Court that the circumstances “bring the particular case within the rare category in which a grant of leave to the Attorney-General to appeal against sentence is justified.”³¹ The residual discretion requires careful consideration, distinct from the identification of error in the sentences.³²

²⁵ (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

²⁶ (2005) 228 CLR 357, 371.

²⁷ *R v Coutts* [2016] QCA 206 [4].

²⁸ (2015) 256 CLR 550, 559 [28(7)].

²⁹ *R v Hernando* (2002) 136 A Crim R 451, 458 [12] (Heydon JA), quoted with approval in *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 (**CMB**), 359 [34] (French CJ and Gageler J).

³⁰ *House v The King* (1936) 55 CLR 499, 505.

³¹ *Malvaso v The Queen* (1989) 168 CLR 227, 235 (Deane and McHugh JJ), approved in *Everett v The Queen* (1994) 181 CLR 295, 299-300 (Brennan, Deane, Dawson and Gaudron JJ), and confirmed in *CMB* at 366-367 [57] (Kiefel, Bell and Keane JJ).

³² *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116, [11].

The Attorney's submissions

- [82] The Attorney contends the inadequacy of each sentence is demonstrated by both the length of the head sentence and the early parole eligibility date, such that the sentence for each respondent is “disproportionate to the gravity of the offending.”
- [83] The Attorney submitted that the features the primary judge had identified in the sentencing remarks did not merit the leniency afforded to each respondent in all the circumstances. The Attorney submitted that the sentences did not provide “sufficient recognition of the objective seriousness of the offending, [and] the impact [on] the complainant”, and did not give appropriate weight to “the sentencing purposes of deterrence, community protection and denunciation.” The Attorney noted the other circumstances included each respondent’s “continued lack of remorse, their failure to accept accountability for their actions, and [the] lack of insight it shows of their offending behaviour.”
- [84] Although some of the Attorney’s submissions might seem to be specific criticisms, the Attorney did not submit that the primary judge had made any specific legal error. In each case, the error asserted was one to be inferred from the sentence imposed.
- [85] It is convenient to consider firstly the leniency factors identified by the primary judge, and then the other matters relevant to the sentence imposed on each respondent.

The reasons for leniency

- [86] The primary judge explained “five factors” had persuaded him to “exercise some leniency” in the sentences.

The references and “good character”

- [87] The first two factors his Honour found favoured leniency were: the “extraordinary references” the respondents tendered; and the view of some referees that the offending was “out of character”.
- [88] The Court may receive information in any form for a sentencing hearing.³³ However, in sentencing, the Court should take care before accepting a submission that a person who has committed a sexual offence against a child can be fairly described as having a good character.
- [89] The unquestioned acceptance of subjective, non-professional or irrelevant opinions about an offender’s risk of reoffending, or prospects of rehabilitation, is to be discouraged. An appearance that such views are being given weight, or worse, that character references are being considered as mitigating the seriousness of the offender’s criminality, is to be avoided. It may undermine the denunciation of the offender’s conduct. These considerations are in addition to the potential distress and trauma of a complainant when the Court gives status to personal praise for an offender.
- [90] The respondents placed seven references before the primary judge.
- [91] Four referees gave general recommendations. One of their sons described CD and LM as “amazing parents” and CD as “an amazing role model.” A friend and supplier

³³ PSA, s 15(1).

of work materials wrote that CD was “trustworthy, dedicated and hardworking”, a “confident and supportive father” and “mentor” to his two sons, and a “passionate and dedicated” friend. She said both respondents were “hardworking, family oriented, and honest people”. She offered her “support” and considered it “an honour to vouch for their character and integrity.” A close friend of LM from her beauty therapy studies described the respondents as “kind” and “incredibly caring and trustworthy people”. A veterinarian wrote that the respondents had “integrity and respect for the rules that govern the dog breeding world.”

- [92] The other three referees addressed the respondents’ “good character” directly. CD’s parents were “horrified when the charges were made” and described the offending as “so out of character”. LM’s friend from primary school wrote she was “shocked” to hear of the sexual offence charges and believed it was “out of character”. Another friend wrote, “I strongly believe that the alleged behaviour is completely out of character” and “therefore believe this is not something they would do.”
- [93] On a fair assessment, the referees proceeded on the basis that the applicants did not commit the offences of which they had been convicted. Some stated as much.
- [94] Had the friend’s mother known that the respondents were a risk of sexual offending against a child of her daughter’s age, it seems impossible that she would have brought the two 15-year-old girls to the respondents’ home at night, authorised them to consume the alcohol and cannabis there, and left them overnight in the respondents’ care. The respondents’ apparent good character assisted them in committing the sexual offences against the complainant. In the circumstances, the “good character” references should be given no weight.³⁴

Hardship on remand

- [95] The third factor favouring leniency was the effect of imprisonment on remand on the respondents’ blended family and their individual mental health.

Effect on blended family

- [96] The Court was required to consider the hardship that a sentence would have on each respondent, having regard to their relevant characteristics, including parental status,³⁵ and the probable effect on a family member for whom either respondent was the primary caregiver.³⁶
- [97] Detention on remand had adverse consequences for each respondent and for their family. The respondents’ counsel submitted that there was a significant and novel factual matter which justified the leniency in the parole eligibility dates:

“The novelty of this matter is that, typically, the hardship which would otherwise have been faced by the family unit by the incarceration of one parent was exponentially compounded by the incarceration of both parents at once. This was another ‘good reason’ to support the learned sentencing judge’s finding that the family unit had encountered devastating hardship and to inform the exercise of the discretion [in fixing the parole eligibility dates].”

³⁴ After the respondents were sentenced, amendments to the PSA inserted s 9(3A)-(3D) and (6A), which control the use of “good character” evidence. See: *R v KBQ* [2026] QCA 123, [54]-[55].

³⁵ PSA, s 9(2)(fa).

³⁶ PSA, s 9(2)(fb)(i).

- [98] LM's counsel told the primary judge that, while on remand, "Her family unit has been separated" and "the boys have gone to live with other relatives." CD was angry about "the impact of his incarceration on his children".
- [99] CD's two sons had been about 16 and 14 when CD committed the offences, and about 19 and 18 when he was convicted and remanded in custody. By the time of the sentencing hearing, the two sons were 20 and 19, living "independently on the Gold Coast", and maintaining "regular contact" with CD. LM had lost contact with her younger son before the offending, when she married CD. LM's older son was 13 at the time of the offending, 16 when LM was convicted, and about 17 at sentence. By then, he was living with relatives in a regional town.
- [100] The parental responsibilities of the respondents, particularly the consequences of their sentences for the youngest, who was still a child, fell to be considered by his Honour in the determination of each sentence. There is no good age at which a child might have a parent taken into custody. When both parents are imprisoned, the effect is compounded. However, save in exceptional circumstances, a person who commits a serious sexual offence against a child under 16 must serve an actual term of imprisonment.³⁷ For such an offender, a sentence of imprisonment is not a last resort and a sentence that allows them to stay in the community is not preferable.³⁸ Neither defence counsel submitted that there were exceptional circumstances. The two older children (of CD) were adults when the sentences were imposed, and, sadly, the youngest of the three who was in the respondents' care would be an adult before either respondent would become eligible for parole.

Effect on LM's mental health

- [101] Both LM's parents were problematic drinkers. Her mother left the family for about two years when LM was born, later telling LM she was unwanted and the cause of the family breakdown. The family moved frequently, due to unstable accommodation and work.
- [102] LM was sexually abused by a friend of her father at age four, by a teacher at age eight, and by an older sister's boyfriend at age nine, including forced vaginal penetration. Her mother knew of the abuse and did not do anything. LM stopped going to school in year five, aged nine. She stayed home "and no one asked why".
- [103] LM worked in hospitality from 14 years of age. She had her first child at 16, a son. She left home at 17. By age 19, LM was in another relationship. It involved significant domestic violence, including frequent physical, emotional and sexual abuse. She had a second son. LM then did vocational training in beauty therapy. She worked in a clinic for about two years. The relationship lasted about nine years.
- [104] The Court was required to have regard to LM being the victim of domestic violence and her history of being abused.³⁹ Any effect of the domestic violence on LM was a mitigating factor for sentence.⁴⁰
- [105] In 2021, aged about 29, LM married CD. By then, they had been in a relationship for about four years. They met through their children's common school. In 2020, news

³⁷ PSA, s 9(4)(c).

³⁸ PSA, s 9(4)(b).

³⁹ PSA, s 9(2)(gb)(i) and (iii).

⁴⁰ PSA, s 9(10B)(a).

of the pending marriage led LM's former partner to leave the State with her youngest son, with whom she has since had very little contact. LM provided beauty services from home. She "managed" her older son and CD's two sons in a blended family. She was a breeder of French bull dogs on their 30-acre home property. She assisted CD with administrative tasks in his business. LM cared for her father in the respondents' home until he passed away in February 2023.

- [106] LM told Dr Freeman, a registered psychologist, that she and CD "experimented with other males and females" in "threesomes". They watched pornography, but "not every night". LM "considered maintaining a satisfactory sexual relationship" with CD prior to their arrest, "although she became reluctant to have third party encounters after apprehension". Dr Freeman gave as an example, LM's comment, "Nothing seems safe. You could be charged with something because someone said something. The stress of it all."
- [107] Dr Freeman provided a "provisional diagnosis" that LM "presented with symptoms consistent with a Persistent Depressive Disorder", due to "exposure to a range of emotional stressors and personal hardship over an extended period of time e.g., sexual abuse, domestic violence, recent loss of father, etc." The psychologist also considered it likely LM had "a comorbid Post Traumatic Stress Disorder" because of "sustaining significant trauma, not least multiple episodes of sexual abuse." These required "secondary assessment for confirmation."
- [108] He respectfully suggested that it was "reasonably foreseeable that the personal deprivations associated with a custodial environment will exacerbate [LM's] depression and associated psychological distress. Given this, it is probable that an ongoing custodial episode will create a greater level of hardship (for her) compared to the average inmate."
- [109] At the sentencing hearing, LM's counsel relied on Dr Freeman's report to submit that LM's "likely diagnoses will likely exacerbate her conditions and that any [of] her time in custody to be more difficult than it would on a person in normal health".⁴¹ This was a factor calling for leniency in LM's sentence.

Effect on CD's mental health

- [110] CD grew up as the only child of parents in a stable and settled relationship, unaffected by any domestic violence or parental substance abuse. He learned martial arts to defend himself from racist bullying at high school. He completed year 12 with an OP score of 5. He commenced, but did not complete, a university course in marine biology. He completed an apprenticeship as a vehicle mechanic. He worked in that role before setting up his own business, based at his home.
- [111] At 23, CD married his first wife, who was then 19. They had two sons. They separated when the younger son was less than a year old. There was a "protracted custody dispute over four years", ending with CD obtaining custody of both children. Shortly after separating from his first wife, CD commenced a six-year relationship with another partner, who had an infant daughter from an earlier relationship. CD described this relationship as "volatile towards the end" and his partner as "violent at times." No submission was made that this experience should affect CD's sentence.

⁴¹ Citing *R v Pope; Ex parte Attorney-General (Qld)* [1996] QCA 318. Counsel submitted that Dr Freeman's report did not show "a causal connection between [LM's] mental health and her offending".

- [112] In 2014, CD met LM through the school their children attended, and they became friends. Each was then in another relationship. Their relationship commenced in 2017, when CD was about 36 years of age and LM was 25. CD said it was a “perfect” marriage, with a satisfying sex life.
- [113] Dr Ellis-Smith, a registered psychologist with forensic endorsement, reported that CD had not been diagnosed with “a mental illness, other than having identified some symptoms of periodic depression when facing challenging circumstances.” CD had not “sought clinical support whilst in custody”. He had seen his general practitioner with symptoms of depression in 2010, during the contested custody dispute with his first wife. After he was charged with these offences, he made several attempts at suicide, each stopped by LM or one of his sons. He denied any current plans or suicidal ideation.
- [114] Dr Ellis-Smith identified some personality-related matters for further investigation. CD’s answers to one psychometric assessment (PAS) indicated he had a higher risk of “experiencing clinical problems” than “a typical person living in the community.” The typical risks for adults in prison were not reported. Dr Ellis-Smith did not report that CD’s mental health would be more adversely affected in custody than any other prisoner.
- [115] CD did not have the relevant mitigating factors identified for LM at [101]-[109] above.

Good behaviour on remand

- [116] On remand, LM completed roles in the textile workshop, the canteen and bulk store, the “Recycling for Sight” workshop, and accommodation cleaning. She had good attendance, understood and carried out instructions, took directions well, and asked questions to clarify instructions. She appeared to get on well with her peers and behaved in an appropriate manner.
- [117] LM had completed three courses for a Certificate III in hospitality. She had applied to take further courses.⁴² She contributed to supporting the development of the “Strategy for Women and Girls” accused or convicted of crime.
- [118] CD did not commit any breaches on remand. He completed some courses and worked as a unit cleaner.
- [119] Their respective good behaviour in pre-sentence custody indicated it was unlikely their conduct would be an impediment to future parole applications.

Risk of reoffending

- [120] The risk of reoffending is relevant to each sentence because it could affect the assessment of each respondent’s prospects of rehabilitation,⁴³ and the need to protect the complainant and other children from the risk of either reoffending.⁴⁴
- [121] CD completed two psychometric assessments (PAS and HSAQ) for Dr Ellis-Smith “to assist in the identification of personality variables impacting on current risk of re-

⁴² “Build, Don’t Break” and “Transformation On The Outside”.

⁴³ PSA, s 9(6)(g).

⁴⁴ PSA, s 9(6)(d).

offending.”⁴⁵ Dr Ellis-Smith did not express a conclusion on CD’s risk of reoffending based on his responses to either assessment.

- [122] CD’s PAS responses also indicated a “marked potential for problems within the Psychotic Features domain”, “potential for problems with persecutory thinking”, and an “indication of paranoid features”. Dr Ellis-Smith reported that CD was “very likely to be impulsive, sensation-seeking, and reckless at times and to disregard convention and authority.” She “strongly recommended” follow up “to identify treatment needs consistent with disorders often associated with acting out behaviours, such as drug abuse, antisocial and borderline personality, alcoholism, and mania.”
- [123] Dr Ellis-Smith noted that CD’s HASQ responses “indicate he does not hold cognitive distortions associated with sexual contact with children,” because “his expressed attitudes were entirely consistent with lawful and moral viewpoints.”
- [124] Dr Ellis-Smith considered CD’s sexual offending was “most unlikely to be repeated given their charges/conviction and subsequent imprisonment”. However, Dr Ellis-Smith found there was a “clear need” for CD to develop “situational awareness, responsible substance use, and consequential thinking” by engaging in “psychological counselling to address the circumstances contributing to/surrounding these risk factors.”
- [125] Dr Freeman gave no actuarial risk assessment for LM, noting there were “no scientifically well validated actuarial scales predicting risk for female sex offenders.”
- [126] Nevertheless, Dr Freeman offered the opinion about LM that:

“Given the lack of broader deviant criminal ideation (and absence of clear observable sexual deviancy), the risk of recidivism can be considered in the low-risk category. Additionally, she does not present with psychopathic tendencies, which has been proven to predict sexual recidivism. More broadly, it is noteworthy that sexual recidivism is one of the least likely committed crimes, compared to drug and property re-offences, and she has not shown a tendency to engage in a broader range of offending behaviours e.g., criminal versatility. Furthermore, research has demonstrated that the application of legal sanctions can create a specific deterrent effect among certain individuals in regards to reducing the risk of recidivism, and she: (a) presents as an individual with such typology as she is primarily pro-social in nature and (b) dislikes personal deprivations associated with a custodial environment.”
- [127] It is difficult to assess the respective respondent’s risk of serious sexual reoffending against a child on reports by a psychologist unable to explore the underlying cause of that offending. Within the limits of the evidence before the primary judge, it was open to his Honour to conclude that LM might be at low risk of such recidivism. That conclusion was less well supported in respect of CD, an entrenched cannabis user with marked potential for psychotic problems and a need for psychological counselling to address his risk factors.

⁴⁵ Dr Ellis-Smith cautioned that, “The relevant literature supports the assessment of attitudes as a measure of an individual’s risk of further offending (...), while also acknowledging that self-reported attitudes in circumstances such as [CD’s] (denial of offending) may reflect self-interest and attempts to project a certain image.”

Serving sentences in the community

- [128] LM had no prior criminal offending and no record of juvenile delinquency. This contrasted with CD, who had an entrenched reliance on cannabis, and other potential problems identified by Dr Ellis-Smith, despite his positive family, educational, employment and social background.
- [129] At the sentencing hearing, CD's counsel told the primary judge he could not "sensibly argue" that CD's parole eligibility should be set earlier than "the halfway point". LM's counsel had noted Dr Freeman's conclusion that she was a low risk of recidivism, and that she had "significant aims" to "rebuild her life", especially by re-establishing her relationship with her estranged child. LM's counsel had submitted that it was "open" to the trial judge to fix a parole eligibility date for her "perhaps slightly less than a-half, perhaps after 40 per cent or something in that nature", on account of LM's mental health complications and because her time in custody would be or had been more onerous on that account.
- [130] The primary judge concluded that "the community's interests and your interests are probably best served by you serving a good part of your sentence in the community rather than in custody."⁴⁶
- [131] A person convicted of a sexual offence after trial is eligible for parole after serving half of their sentence in custody,⁴⁷ unless the Court exercises a discretion to fix an earlier or later parole eligibility date.⁴⁸
- [132] Commonly, the Court has fixed an earlier eligibility date to reduce the severity of the sentence it would have imposed to take account of a guilty plea.⁴⁹ Where the offender has entered an early plea, and shown remorse, cooperation and efforts at rehabilitation, the date has often been fixed at one third of the head sentence.
- [133] Neither respondent pleaded guilty, expressed remorse, cooperated with the administration of justice, or undertook any rehabilitation. Neither counsel at the sentencing hearing submitted that parole eligibility ought to be fixed after one-third of the sentence. Here, one looks for the reasons the primary judge significantly advanced the parole eligibility date for each respondent, as one would if his Honour had significantly delayed parole eligibility for either. This is not because either sentence should be the result of applying a conventional approach to the circumstances or substantially set by a predetermined range. It is merely to understand the sentences imposed and consider the parties' submissions in these appeals.
- [134] In the appeals, the respondents' counsel submitted that the early parole eligibility dates were "not justified by leniency" but enhanced "the rehabilitative prospects of the respondents to achieve community protection" through "a lengthier period of community supervision."
- [135] That each respondent is a potential threat to children and the community can be inferred from the facts of their offending. It was not possible for either psychologist to explore therapeutically the underlying cause of the sexual offending against a child.

⁴⁶ Referring to PSA, s 9(1)(b).

⁴⁷ *Corrective Services Act 2006* (Qld), s 184(2).

⁴⁸ PSA, s 160D(3).

⁴⁹ PSA, s 13(1).

It seems doubtful a program or therapy to deal with the risk of re-offending could be selected without an understanding of their respective aetiologies.

- [136] Neither CD nor LM had undertaken any step towards rehabilitation. Neither had indicated a willingness to engage in rehabilitation. No program or therapy had been proposed to help either change their behaviour so that they do not re-offend. Their denial of the offending excludes each from undertaking sexual offender rehabilitation programs while in custody.
- [137] The Court is left with the usual tools of personal deterrence. Little weight could be given to the rehabilitative effects of an early parole release on the unassessed and unassisted respondents.
- [138] Neither respondent had offended since their crimes against the complainant in December 2021. Given the context of their arrest, charging, committal for trial, trial, convictions, and imprisonment on remand, the absence of offending in this period is not a sign of unassisted rehabilitation.

Conclusion on the leniency matters

- [139] By any measure, each was a lenient sentence for an adult convicted after a trial of multiple serious sexual offences against a child under 16 under care.
- [140] The leniency factors in the sentencing remarks do not explain either sentence imposed. The references and “good character” statements do not assist. None of the other leniency factors explains the combination of a lenient head sentence and early parole eligibility for CD. The greater hardship LM is likely to experience in custody, her experience of domestic violence, her disadvantaged background, and her likely low risk of recidivism, explain a more lenient head sentence for her than for CD and some moderation of her parole eligibility. They do not explain the combination of a very lenient head sentence and her very early parole eligibility.
- [141] Before determining whether either sentence is manifestly inadequate, it is appropriate to consider the matters to which the Court is required to have regard primarily in sentencing offenders for sexual offences against a child; and the decisions about sentences imposed on other sexual offenders that were referred to as perhaps comparable to the respondents’ offending.

Sentencing for sexual offences in relation to a child under 16

- [142] There are ten specific matters the Court is to have regard primarily in sentencing a sexual offender against a child.⁵⁰ The first five are about the victim of the sexual offence, although the fourth also relates to the protection of other children from the risk of reoffending. The sixth matter relates to general deterrence to protect children. The remaining four matters are the personal circumstances of the offender, most of which have been noted above.
- [143] It is convenient to consider them in those three groupings.

Matters about the situation of the complainant

- [144] The *first matter* is the effect of the sexual offending on the child complainant.⁵¹

⁵⁰ PSA, s 9(6). There is an eleventh, “any matter relating to the safety of children.”

⁵¹ PSA, s 9(6)(a).

- [145] At the sentencing hearing, there was no controversy about the complainant's victim impact statement. Neither respondent challenged the information in it. The consequences she mentioned were not unusual or unexpected. The primary judge said it explained the "serious consequences of the offending", describing it as "a powerful document." His Honour noted the impact of "this type of offence on a teenager" was an "aggravating feature."
- [146] The complainant's life "changed dramatically" because of the respondents' offending. She left school and discontinued her education. She left her home to live with her grandmother, which affected her relationship with her mother and brothers, whom she left behind. She suffered from a loss of appetite and anxiety attacks. She did not like to be alone and feared going to work each day by herself. She had trust issues, especially finding it hard to build relationships with adults.
- [147] It was open to the primary judge to be satisfied, on the balance of probabilities, that the information in the complainant's victim impact statement was true, to the appropriate degree, given the adverse consequences of the information for each respondent.⁵²
- [148] The complainant was vulnerable due to her age, her consumption of alcohol and cannabis, and being alone in an unfamiliar place. The house was on a large block of land, without other houses nearby. The only adult she knew well in attendance that evening, her friend's mother, had gone home, leaving her in the care of the respondents, and her friend was in bed unwell. She did not know the address. She was unable to give it to another friend, whom she texted to rescue her after the offences were committed.
- [149] In *R v Free; Ex parte Attorney-General*, this Court observed that there has been an "increasing understanding of and recognition by courts, in more recent decades, of the profoundly damaging impact of sexual offences on child victims".⁵³
- [150] The **second matter** is the age of the child.
- [151] The complainant was 15 years old at the time of the offences. Her age, known to each respondent, was an aggravating circumstance of the rape offences and an element of each of the two indecent treatment offences.⁵⁴
- [152] Due to her age, the sexual offending could cause immediate harm, adversely affect her psychological, social, and educational development, and affect various areas of her life in the long-term, as her victim impact statement indicated. As this Court has said, "even a single sexual offence against a child may have terrible and enduring consequences".⁵⁵
- [153] The complainant's age showed the significant age difference with each respondent. CD was 40 at the time of the offending and LM was 29. This explained how the offending conduct affected the complainant's trust of and interactions with adults generally.

⁵² Evidence Act, s 132C; Victims of Crime Assistance Act 2009, s 15.

⁵³ (2020) 4 QR 80, 103, [69], citing as examples *Franklin v The Queen* [2019] NSWCCA 325, [126]–[127]; *R v Cattell* (2019) 280 A Crim R 502, 521–522 [109]–[111]; and *Director of Public Prosecutions (Vic) v Dalgliesh* (2017) 262 CLR 428, 447 [56]–[57].

⁵⁴ Criminal Code, s 210(1)(d) and (e).

⁵⁵ *R v RAZ; Ex parte Attorney-General (Qld)* [2018] QCA 178, [23] (Sofronoff P; Gotterson JA and Boddice J agreeing).

- [154] The **third matter** is the nature of the sexual offences.
- [155] The primary judge summarised the sexual offending in the sentencing remarks addressed to the respondents:
- “[CD] and [LM], the jury found that you both then took [the complainant] downstairs to your bedroom and took her clothes off. [The complainant] says that she blacked out and when she awoke, [CD] was having sex with her. She says she blacked out again, and when she regained consciousness, she observed the two of you having sex, while [LM] had her fingers in [the complainant’s] vagina. She recalled a pornographic video playing.”
- [156] As the summary makes plain, the respondents committed the sexual offences in concert: two adults preying upon a child. The respondents raped the complainant twice: once by CD penetrating her vagina with his penis while LM lay naked beside her; and then by LM penetrating the complainant’s vagina with her fingers while CD penetrated LM from behind. Each respondent was a party fully engaged in the other’s acts. The two outnumbered and overwhelmed the complainant. Their sexual offending was opportunistic, but nonetheless deliberate and predatory.
- [157] Each respondent knew the state of the complainant, which rendered her more vulnerable and manifestly unable to consent to any act. LM told the scared, dizzy, intoxicated complainant to “get comfortable” as the respondents undressed her, before she lost consciousness. The forced vaginal penetration of an unconscious child is an egregious example of exploitation of a person. When the complainant woke up, crying and panicking, both respondents persisted with the first, more serious, rape, with LM telling the complainant to “be quiet”, before she lost consciousness again. The respondents stopped the second rape only when the complainant, having again regained consciousness, withdrew in a panic to the other end of the respondents’ bed.
- [158] These were not brief sexual offences. They were carried out over a protracted period, with the complainant subdued under their joint control, until the complainant was able to maintain consciousness and retreat from them.
- [159] The maximum penalty for each of the rape offences was life imprisonment,⁵⁶ marking it as among the most serious forms of criminal offending in this State. For indecent treatment of a child under 16 who was 12 or more years of age and under care, the maximum penalty was imprisonment for 20 years.⁵⁷ These maximum penalties were relevant to sentencing the respondents.⁵⁸
- [160] The maximum penalties, which have increased over time, and the specific offence of indecent treatment of a child under 16, are objective indications of the community’s attitude to such offending. This is relevant to the sentencing purpose of denouncing an offender’s conduct by imposing a sentence that accords with legitimate community expectations.⁵⁹ As this Court has stated, “Being sensitive to the community’s attitude about a particular kind of offence is part of the exercise of judicial discretion.”⁶⁰

⁵⁶ *Criminal Code*, s 349(1).

⁵⁷ *Criminal Code*, s 210(4).

⁵⁸ PSA, s 9(2)(b).

⁵⁹ *Markarian*, 389 [82] (McHugh J).

⁶⁰ *R v O’Sullivan and Lee; Ex parte Attorney-General (Qld)* (2019) 3 QR 196, 234 [103], citing *R v Kilic* (2016) 259 CLR 256, 267 [21] (Bell, Gageler, Keane, Nettle and Gordon JJ).

- [161] At the sentencing hearing, the submissions for CD focussed on comparing CD's sexual offending with that in other cases put before the primary judge. CD's counsel submitted that there was "clearly no violence at all inflicted" by CD on the complainant. As the primary judge noted, it was relevant that there was no physical harm nor any threat of physical harm to the complainant or anyone else. The absence of physical injury to the complainant was not a mitigating factor. It was the absence of a potentially aggravating factor.⁶¹
- [162] In *Director of Public Prosecutions (Vic) v Mokhtari*, the Victorian Court of Appeal observed:
- "The very act of rape is inherently serious, simply by virtue of the invasion of the victim's bodily integrity without consent. It is, quite simply, an act of violence, whether or not accompanied by other violent conduct. The violation is physical, emotional and psychological. It follows that, aggravating features apart, all acts of non-consensual penetration are objectively serious, irrespective of the form and the extent of the penetration."⁶²
- [163] Those observations followed *Director of Public Prosecutions (Vic) v Dalgliesh*, in which the majority described how the courts had developed "an awareness of the violence necessarily involved in the sexual penetration of a child" by a mature adult.⁶³
- [164] It would be wrong to regard either of the two rape offences as "non-violent" in any reasonable sense. The vulnerability of the complainant, lapsing in and out of consciousness, meant that the respondents did not need any significant additional violence to carry out their criminal intentions. As the prosecutor submitted, it might be said there was "no violence greater than that necessary to enable the [respondents] to rape and abuse [the complainant]." That the respondents targeted a vulnerable complainant, likely to be seriously adversely impacted by their offending, indicates a high level of criminal culpability, even without unnecessary additional violence.
- [165] The **fourth matter** is the need to protect the complainant, or other children, from the risk of either respondent reoffending.⁶⁴
- [166] Here, the respondents, within hours of taking a 15 year old girl under their care, exploited her youth and her intoxicated state to commit terrifying, dehumanising offences. They betrayed an attitude that the child could be used to satisfy their sexual desires without regard to her intrinsic rights or the consequences the offending would have for her. The offending was opportunistic, against someone previously unknown to either respondent. The victim child was defenceless to their predations. Their offending revealed each respondent as a genuine danger to the complainant, and other children. There was an obvious need to protect against the risk of them reoffending.
- [167] The detention of a sexual offender in custody serves to protect the child offended against and other children from the risk that the prisoner will reoffend. Practically, it is a complete protection while the offender is in custody.

⁶¹ *R v CDF* [2024] QCA 207, [35](d) (Bond JA; Brown JA and Kelly J agreeing).

⁶² [2020] VSCA 161 (*Mokhtari*) [41] (Maxwell P, Beach and Weinberg JJA).

⁶³ *Director of Public Prosecutions (Vic) v Dalgliesh* (2017) 262 CLR 428, 447 [57] (Kiefel CJ, Bell and Keane JJ).

⁶⁴ PSA, s 9(6)(d).

- [168] Detention in custody is not the only means to advance the purpose of protection. Supervision, work, training and treatment while in custody may enhance the purpose. The protective purpose may be served by a sentence that provides conditions to help the offender to be rehabilitated and by a sentence that punishes them sufficiently to deter them from committing the same or a similar offence once released. It may also be served by a period of supervision in the community before the sentence is completed, but the timing and conditions of the parole are beyond the scope of the sentence, save that the parole eligibility date fixes the earliest time community supervision may begin. The Court may pursue the purpose of child protection in determining a head sentence and a parole eligibility date. In each case, much depends upon the circumstances of the offence and the offender. The challenges in the respondents' circumstances are noted at [135]-[137] above.
- [169] The ***fifth matter*** is the relationship between each respondent and the complainant.
- [170] Each respondent was an adult entrusted with the care of the complainant in their home. The primary judge, with respect, correctly, referred to the respondents as having joint responsibility for her care. It was a care the respondents actively sought. Counsel for CD rightly described the offending as "a significant abuse of trust". This was an aggravating factor, relevant to the sentences to be imposed.⁶⁵
- [171] The ***sixth matter*** is the need to deter similar behaviour by other offenders to protect children.⁶⁶
- [172] A small proportion of sexual offences against children are reported, and fewer result in prosecution, conviction and sentence. Sentences imposed on offenders of this kind should have a general deterrent effect. As a general observation, it may be accepted that the more lenient the sentence imposed, the lesser its likely effect in deterring other offenders and protecting children.

Matters particular to the respondents

- [173] The ***seventh matter*** is the respondents' respective prospects of rehabilitation, including the availability of any medical or psychiatric treatment to cause CD or LM to behave in a way acceptable to the community. These matters are considered at [120] to [128] above. LM likely has a low risk of recidivism, but nothing is known of the origin of her offending, and so nothing of an effective intervention. For CD personal deterrence is the only identified counter to reoffending.
- [174] The ***eighth matter*** is the respondents' respective antecedents, age and character.
- [175] CD's counsel told the primary judge he was "a longtime cannabis user". CD told Dr Ellis-Smith that he began smoking cannabis when at university, and he "smoked from time to time" before he was remanded in custody in April 2024. The psychologist's assessment was that "his use of cannabis has been long standing and his reliance on the drug is entrenched."
- [176] CD was before a Magistrates Court in December 2009, when aged 28, and in November 2021, at age 40, about a month before the present offending. Each time it was for charges of possessing cannabis and pipes. CD told Dr Ellis-Smith:

⁶⁵ R v WBM [2020] QCA 107, [48] (Applegarth J; Fraser and Mullins JJA agreeing).

⁶⁶ PSA, s 9(6)(f).

- (a) In 2009 “his former wife made complaints to police about him, following an acrimonious separation” and “during a police search of his home he surrendered a quantity of cannabis and a pipe.” His use of cannabis increased during the Family Court custody process with his former wife, which seems to have lasted from 2008 to 2013.
 - (b) In 2021, LM’s “former partner made complaints to police about her” and “during a police search of his home [CD] disclosed he had possession of some cannabis and a pipe.”
- [177] CD’s criminal history was minor, as the prosecutor conceded. No conviction was recorded on any of the charges. The history was relevant, because it framed the three supply offences as an escalation in his drug-related offending. It showed the supply offences were not “out of character”. It tended to show earlier lenient sentences had not effectively deterred CD from committing the supply offences. As a sign of CD’s entrenched reliance on cannabis, it had some relevance to his prospects of rehabilitation. It was a matter the Court could consider in determining CD’s character.⁶⁷
- [178] LM has overcome a highly disadvantaged background. CD had no such challenges, but has an entrenched substance use problem, requiring counselling, and some other issues to be investigated.
- [179] The **ninth matter** is remorse or lack of it. The respondents accepted, with respect correctly, that the primary judge did not find that either had shown remorse, insight or accountability for their crimes.
- [180] A lack of remorse is of primary consideration in sentencing for sexual offences.⁶⁸ It was an obvious impediment to forming a favourable view of the respondents’ respective prospects for rehabilitation. The respondents’ lack of remorse justified placing greater emphasis on denunciation of their offending.⁶⁹ Its absence took away a reason to ameliorate the time either should serve in custody to serve the purposes of community protection, deterrence and denunciation.
- [181] The **tenth matter** is the report of each psychologist. The content of each report has been summarised at [101]-[109] above for LM and [110]-[115] above for CD.

Comparable cases

- [182] In *R v Raymond* [1994] QCA 441, an 18-year-old offender of low normal intelligence, with no previous convictions, pleaded guilty to rape and an unrelated attempted burglary. The adult complainant was awakened by someone having intercourse with her in the early hours of the morning. When she switched on the light, the offender fled. The complainant suffered stress and depressive episodes, had difficulty sleeping, low self-esteem and difficult personal relationships since the offending. The Crown case was “overwhelming”, and the guilty plea was “a frank recognition of the inevitability of conviction.” The Court found the “substantial emotional and psychological effects on [the complainant] were serious, aggravating features of the rape offence”. After reviewing prior appeal decisions, the Court refused leave to

⁶⁷ PSA, s 11(1)(a).

⁶⁸ PSA, s 9(6)(i).

⁶⁹ *R v O’Sullivan and Lee; Ex parte Attorney-General (Qld)* (2019) 3 QR 196, 238 [130].

appeal the sentence of imprisonment for eight years with parole eligibility after serving three years.

- [183] *The Queen v Press* [1997] QCA 7 concerned the rape of a 17-year-old complainant who, only partially awake at 4.30 am, thought she was having intercourse with her boyfriend. The 34-year-old offender entered a guilty plea and co-operated with the police, supplying body samples for scientific analysis. He had some residual permanent disability to his face and his vision from a beating by the complainant's boyfriend and his stepfather immediately after his offending was uncovered. The majority reduced the nine-year sentence to seven years and brought forward his parole eligibility from four years to three years.⁷⁰
- [184] In *R v Basic*,⁷¹ McMurdo P reviewed six decisions of the Court on sentences for rape offences between 1981 and 1997.⁷² The sentences ranged from nine years to 14 years. The lower sentences had been imposed on offenders with the mitigating factors of a guilty plea or youth. Only one reviewed case (*R v Q*⁷³) involved a complainant under 18. She was 17; and the offender, aged 23, was sentenced to nine years' imprisonment with a recommendation for early parole after three and a half years. After the review, her Honour concluded that the eight year head sentence, without any recommendation for early parole, imposed on Mr Basic, "a mature man", after his guilty pleas to rape offences against a 19 year old complainant, was within the appropriate sentencing range of seven to 10 years.
- [185] Six years later, in *R v Kahu*,⁷⁴ a 20-year-old offender pleaded guilty to the rape of a heavily intoxicated 15-year-old girl he had not met before the offending. The force used, "whilst not great, was sufficient to overcome any resistance" from the smaller, intoxicated complainant. This Court found the sentence of eight and a half years was not manifestly excessive. As Williams JA put it, "a significant penalty was called for." In separate reasons, Keane JA examined the President's earlier review in *Basic*, explaining that her Honour had "reviewed the decisions of this Court relating to the range of sentences for the rape of a young woman alone in a public place where there has not been a brutal bashing of the victim, and where the offender had no like prior convictions." His Honour concluded that the review had demonstrated sentences for offences of that type were between seven and 10 years "where the offender has pleaded guilty."⁷⁵
- [186] About six years later in *R v Lee*,⁷⁶ a 48-year-old neighbour was convicted after trial of one count of rape and one of attempted rape of a 15-year-old girl, who had been drinking alcohol and sharing cannabis in his apartment. While dancing, the offender pushed himself up against the complainant and began to kiss her and touch her. He pushed her onto a couch, pulled her trousers down, against her protests, and penetrated her vagina with his penis. He then told her to have a shower, where he joined her, pushed her up against a wall, and tried to penetrate her again. The offender had a reasonably good work history. He lived with a sister and supported a son. He had a history of minor assault and drug offences for which he had not served any time

⁷⁰ (Fitzgerald P and McPherson JA; Fryberg J dissenting).

⁷¹ (2000) 115 A Crim R 456, 459-460 (McPherson JA and Mackenzie J agreeing).

⁷² The decisions and sentences were: *Pini* (1981) 14 years; *George* (1991) 9 yrs; *Soper* (1994) 11 yrs; *Sorby* (1995) 9 yrs (after trial); *Q* (1994) 9 yrs; and *O'Brien* (1997) 11 yrs.

⁷³ [1994] QCA 390.

⁷⁴ [2006] QCA 413.

⁷⁵ At [41] (Williams JA and Mackenzie J agreeing).

⁷⁶ [2012] QCA 239.

in custody. On appeal, this Court concluded the sentence of six years' imprisonment was not manifestly excessive.

- [187] Two years later, in *R v GAR*, Muir JA reviewed the sentencing decisions to that time and concluded that:

“...sentences for rape do not tend to exceed 10 or 11 years unless accompanied by substantial violence. Where the violence is not substantial and there is a timely guilty plea, a sentence of less than 10 years is the norm. No rule of thumb, of course, can be applied. The circumstances of each case must be addressed”.⁷⁷

- [188] In *GAR*, the offence was opportunistic. It did not involve substantial violence above the act of rape in a secluded area. The offence was a short episode of unprotected penetration. It caused the adult complainant significant distress. There was no remorse and there were doubts about the offender's prospects of rehabilitation. The conviction followed trial, so no reduction was made to reflect a guilty plea. The sentence of 12 years' imprisonment was set aside, and ten years imposed, with no early parole eligibility date.

- [189] In *Burton*,⁷⁸ a 41-year-old offender raped a 19-year-old complainant. He entered her bedroom without permission and took advantage of her being asleep and grossly intoxicated. After conviction at a trial, he was sentenced to imprisonment for nine years. On appeal, with the Crown conceding it appeared “too high”, the sentence was reduced to eight years with parole eligibility after serving one-half.

- [190] In *Teece*,⁷⁹ the offender, aged 29, raped an adult woman sleeping in her bed, having been invited into the house. There had been a significant breach of trust. He was convicted after a trial. He did not challenge his head sentence of seven years' imprisonment, only the failure to fix a parole eligibility date after serving three years instead of the statutory position of three and half years, which he contended made the sentence manifestly excessive. Leave was refused, the Court concluding:

“The decision to set no recommendation for parole in the circumstances of this case, where the appellant was convicted after a trial for the rape of a sleeping woman in her bed, breaching her trust and that of her husband with long lasting adverse impacts for her, was not unreasonable or plainly unjust.”⁸⁰

- [191] More recently, in *R v Tory*,⁸¹ a 42-year-old offender raped a 19-year-old complainant, who had come to the offender's home to purchase a vehicle. In a shed at the back of the home, he penetrated her vagina with his penis, holding her with one arm and placing his hand across her mouth. After a few minutes he ejaculated inside her. The conviction followed a trial. In his police interview, the offender had said the complainant agreed to intercourse. The Court declined to find a sentence of six years imprisonment with parole eligibility after serving three years was manifestly excessive.

⁷⁷ [2014] QCA 30, [33] (Fraser JA and Morrison JA agreeing).

⁷⁸ [2014] QCA 37.

⁷⁹ [2019] QCA 246.

⁸⁰ [2019] QCA 246 [45].

⁸¹ [2022] QCA 276.

- [192] Care should be taken in interpreting a decision that a sentence is not manifestly excessive to assist in deciding whether another sentence is manifestly inadequate. The fact that an offender challenged a sentence does not indicate the challenge had any substantial merit. In the context of the material factors and mitigating ones in the other sentences above, *Lee* and *Tory* were plainly not heavy sentences.
- [193] Also, as this Court noted in *Free*, the “increasing understanding ... of the profoundly damaging impact of sexual offences on child victims” in recent decades “has also been reflected in increasing sentences.”⁸² Care should be taken with older sentencing “yardsticks” for these offences.

Is either sentence manifestly inadequate?

- [194] Noting sentences that have been imposed in other cases is useful only if accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The bare sentences that have been imposed reveals very little that is useful if the sentencing Court is not told why those sentences were passed.⁸³ Similarity between cases matters only if the similar facts and circumstances are material to the sentence. As this Court observed in *R v Sprott; Ex parte Attorney-General (Qld)*:

“it is necessary to identify the particular factors represented by cases within the range as well as by the instant case and then to articulate how particular principles make those factors material and render the instant sentence erroneous. To draw attention only to the numerical result of a sentence and then to compare that result to other numerical results achieves nothing. Consistency of sentencing, which is the aim of the jurisdiction to entertain an appeal against sentence by the Attorney-General, will be achieved by ensuring that there is a comparable outcome in cases that are relevantly comparable. The corollary is that there must be different outcomes in cases that are relevantly different. A study of numbers alone is irrelevant to the task of achieving consistency except as a starting point.”⁸⁴

- [195] In light of the primary statutory considerations and the matters of significance in the comparable cases, the material factors in the respondents’ offending were: the complainant was a child of 15; she was more vulnerable by being intoxicated; she was under the care of the respondents; the two respondents cooperated to commit the offences against the child in company; violence was necessarily involved in the sexual penetration of a child; the sexual offending, including two rape offences and two indecent treatment offences, occurred over an extended period in the early hours of the morning. Mitigating factors, that were material in other sentences, were not present in the respondents’ cases: a guilty plea; a youthful offender; an end to the offending when the complainant showed distress; remorse after the offending; and a commitment to rehabilitation.
- [196] Unlike the offenders for whom a sentence between seven and 10 years, or under 10 years, had been said to be the norm in 2000, 2006 and 2014, the respondents committed their crimes against a 15-year-old child and did not plead guilty. The

⁸² (2020) 4 QR 80, 103 [69].

⁸³ *Wong v The Queen* (2001) 207 CLR 584, 606 [59] (Gaudron, Gummow and Hayne JJ).

⁸⁴ [2019] QCA 116, [15] (Sofronoff P; Gotterson JA and Henry J agreeing).

respondents' crimes involved concerted conduct by two mature adult offenders, each a party to the rape committed by the other, against a child under their care. The other sentencing decisions canvassed above did not involve rape offences against an unconscious child, the more serious offence persisted with despite the child regaining consciousness and showing significant distress.

- [197] Each respondent's offending called for a sentence that served the purpose of making it clear that, acting through the Court, the community denounced the sort of conduct in which each respondent was involved.⁸⁵ The respondents' counsel submitted that a head sentence primarily serves the relevant sentencing purposes of general deterrence and denunciation,⁸⁶ and the minimum custodial component of a sentence, effected by the fixing of a parole eligibility date, primarily serves the purposes of rehabilitation, specific deterrence, and community protection.⁸⁷ There is sense in that approach, but it cannot be applied as an inflexible principle. The strong community interest in the custodial component of a sentence requires a parole eligibility date to serve and not undermine the purpose of denunciation of the offending conduct, as the respondents' counsel accepted. Both elements of a sentence might be said also to serve the purposes of just punishment and recognition of the harm done by an offender to the victim of the offence.⁸⁸
- [198] The respondents' head sentences were significant, but low by comparison with the sentences imposed for broadly analogous sexual offending in other cases. The denunciative effect of each head sentence was undermined by the significantly advanced parole eligibility date. The sentence imposed on each respondent after their trial was more lenient than the sentences imposed in other cases for objectively less serious offending against adult complainants or by youthful offenders, which had been accompanied by guilty pleas.
- [199] CD's offending was aggravated in a way that suggests the protection of the complainant, other children, and the public, as well as his just punishment, required a sentence with a period in actual custody not shorter than the usual 50 per cent for an offender convicted after a trial. As CD's counsel at the sentencing hearing appreciated, there was no mitigating factor that could justify a sentence under which he could apply for parole after serving less than one-third of the head sentence. The leniency is not explained by the primary judge's observation that CD had sons and was "a hard worker with a consistent employment background." His Honour must have made an error of principle in sentencing CD.
- [200] It was appropriate to impose a lesser head sentence on LM than CD. The hardship she is likely to experience in custody due to her mental health, her experience of domestic violence, her disadvantaged background, and her likely low risk of recidivism would explain some additional moderation in fixing her parole eligibility date, perhaps after serving 40 per cent of her head sentence in custody, as her counsel submitted at the sentencing hearing. Nonetheless, from the combination of such a lenient head sentence and eligibility for parole after serving less than a quarter of her sentence in custody this Court should infer that his Honour made an error of principle in sentencing LM. The respondents' submission that each head sentence

⁸⁵ PSA, s 9(1)(d).

⁸⁶ *R v Rogan* [2021] QCA 269 at [18]. These purposes are found in PSA, s 9(1)(c) and (d).

⁸⁷ *Bugmy v The Queen* (1990) 169 CLR 525, 531–532 (Mason CJ and McHugh J); *R v Randall* [2019] QCA 25, [38]. These purposes are found in PSA, s 9(1)(b), (c) and (e).

⁸⁸ *R v Randall* [2019] QCA 25, [37].

fell within a sound exercise of the sentencing discretion should be rejected. The head sentence and the parole eligibility date fixed in each respondent's sentence infer inconsistency in the application of relevant principles.⁸⁹ Neither sentence is what the law requires and what the community legitimately expects of the sentencing process for such offences.

- [201] The inferred error is sufficiently serious to be within the "rare category" justifying a grant of leave to appeal. The Attorney-General has satisfied the onus to negate any reason why the residual discretion not to interfere should be exercised. This intervention is required to maintain public confidence that the sentencing process affords just punishment, the protection of children and the community, the denunciation of the offending conduct, specific deterrence, and the deterrence of other offenders from such serious offending. The residual discretion should be exercised, to impose a sentence on each respondent that seems proper to the Court.⁹⁰

The re-sentencing

- [202] The Attorney urged the Court to impose sentences of eight years on CD and seven years on LM for the first count of rape, and make no order about parole eligibility for either. This would leave each respondent eligible to apply for parole after having served one half of the head sentence. This accorded with the submissions put for the Crown at the sentencing hearing.
- [203] The matters relevant to the sentences and the other sentencing decisions raised before this Court have been considered above. They lead to a conclusion that the head sentence for CD's offending should be imprisonment for no less than eight years, with eligibility for parole after serving four years in custody. The concurrent sentences imposed on CD for each other offence and the declaration of pre-sentence custody should remain unaltered.
- [204] The additional mitigating factors for LM lead to a conclusion that her head sentence should be no less than seven years' imprisonment, with parole eligibility after serving three years. The concurrent sentences imposed on LM for each other offence and the declaration of pre-sentence custody should remain unaltered.
- [205] The Court may give effect to the sentences by varying the sentence imposed on each respondent.

Final disposition

- [206] The Court should order:
- (a) In CA No 87 of 2025:
1. Appeal allowed.
 2. Sentence imposed on 31 March 2025 varied in the following respects:
 - a. Count 4: Order that the offender be imprisoned for a period of seven years; and
 - b. Order that 18 April 2027 be fixed as the date the respondent will be eligible for parole.

⁸⁹ *Wong v The Queen* (2001) 207 CLR 584, 605 [58] (Gaudron, Gummow and Hayne JJ).

⁹⁰ *Criminal Code*, s 669A; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573.

- (b) In CA No 88 of 2025:
 - 1. Appeal allowed.
 - 2. Sentence imposed on 31 March 2025 varied in the following respects:
 - a. Count 4: Order that the offender be imprisoned for a period of eight years; and
 - b. Order that 18 April 2028 be fixed as the date the respondent will be eligible for parole.
- (c) In CA No 135 of 2025:
 - 1. Extension of time to appeal against conviction granted.
 - 2. Appeal dismissed.
- (d) In CA No 137 of 2025:
 - 1. Extension of time to appeal against conviction granted.
 - 2. Appeal dismissed.

[207] **HINDMAN J:** I agree with Bradley JA.