

SUPREME COURT OF QUEENSLAND

CITATION: *R v Johnson* [2026] QCA 195

PARTIES: **R**
v
JOHNSON, Lindsay Derain
(applicant)

FILE NO/S: CA No 327 of 2025
DC No 1957 of 2024

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane – Date of Sentence: 4 December 2025 (Farr SC DCJ)

DELIVERED ON: 2 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 15 June 2026

JUDGES: Bowskill CJ, Boddice JA, Henry J

ORDERS: **1. Application for leave to appeal sentence granted.**
2. Appeal allowed, to the extent that the sentence imposed in the District Court on 4 December 2025 is varied by adding the following additional order:

Pursuant to s 159A(3B) *Penalties and Sentences Act 1992* (Qld):

a. The dates between which the offender was held in pre-sentence custody are stated to be 19 October 2023 to 3 December 2025.

b. That time is calculated to be a period of 777 days.

c. It is declared none of that time is taken to be imprisonment already served under the sentence.

CATCHWORDS: CRIMINAL LAW – APPEAL AGAINST SENTENCE – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – GROUNDS FOR INTERFERENCE – where the applicant was sentenced to concurrent terms of imprisonment to be served cumulatively on a sentence he was presently serving – where the applicant offended while on parole for previous offending – where the offending was inherently serious – where the learned sentencing judge omitted from his orders the formal pre-sentence custody declaration pursuant to

s 159A(3B) *Penalties and Sentences Act 1992* (Qld) – where the applicant complains the parole eligibility date set made the sentence manifestly excessive – where the applicant was a recidivist offender and in particular need of personal deterrence – whether the sentencing judge erred in application of the totality principle – whether the sentencing judge erred in not taking into account time served before the applicant was released on parole

Criminal Code (Qld), s 668E(3)

Penalties and Sentences Act 1992 (Qld), s 9(1), s 13, s 156A, s 159A(3B), s 188

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37, explained

McCartney v The Queen (2012) 38 VR 1; [2012] VSCA 268, cited

Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited

R v Berns [2020] QCA 36, cited

R v Braeckmans (2022) 10 QR 144; [2022] QCA 25, cited

R v DAB (2022) 13 QR 217; [2022] QCA 268, cited

R v Hatahet (2024) 282 CLR 392; [2024] HCA 23, cited

R v Hitchcock [2019] QCA 60, cited

R v McAnally [2016] QCA 329, cited

R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited

R v Ponsonby [2024] QCA 229, cited

COUNSEL: C E Oswald for the applicant
 N E Friedewald for the respondent

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

[1] **BOWSKILL CJ:** I agree with Henry J.

[2] **BODDICE JA:** I agree with Henry J.

[3] **HENRY J:** The applicant belatedly pleaded guilty to the following offences, for which the following sentences were imposed, on 4 December 2025:

Count 1: armed robbery in company – four years’ imprisonment;

Count 2: unlawful use of a motor vehicle with intent to facilitate the commission of an indictable offence in company – two years’ imprisonment;

Count 3: breaking and entering premises and stealing – two years’ imprisonment;

Count 4: entering premises with intent to commit an indictable offence – nine months’ imprisonment.

- [4] The sentences were ordered to be served concurrently with each other but cumulatively upon a previous sentence still being served by the applicant, the full-time expiry date of which was to be 20 February 2026. The learned sentencing Judge fixed the applicant's parole eligibility date as 20 February 2027.
- [5] The sentences have the practical effect that the applicant will have to serve a minimum of one year of his four-year head sentence, after he has completed serving a previous sentence, for which he was on parole when he committed these offences and which was still being served out at the time of sentence. No declaration of any kind was made regarding the applicant's period of pre-sentence custody. However, the learned sentencing judge clearly intended that no part of the applicant's pre-sentence custody was to be taken as time already served under the sentences imposed by his Honour.
- [6] The applicant seeks leave to appeal his sentence on the following grounds:
- Ground 1: The learned sentencing Judge erred in his application of the totality principle when determining the applicant's parole eligibility date.
- Ground 2: The learned sentencing Judge erred in failing to declare the applicant's pre-sentence custody as required by s 159A(3B) *Penalties and Sentences Act 1992* (Qld).
- Ground 3: The sentence is manifestly excessive.
- [7] There is no substance to proposed grounds one and three. The complaint of error in ground two is correct, but it was merely an inconsequential oversight with no bearing upon whether the sentence was the result of a legally flawed determination. It is convenient to dispense with that complaint of error, before explaining why the other grounds lack merit.

The omission of a pre-sentence custody declaration requires correction

- [8] Ground two complains that the learned sentencing Judge erred in failing to declare the applicant's pre-sentence custody as required by s 159A(3B) *Penalties and Sentences Act 1992* (Qld).
- [9] Section 159A *Penalties and Sentences Act* has the practical effect that:
- whenever an offender is sentenced to serve (a day or more of) actual imprisonment for an offence and has been held pre-sentence for a period in custody in relation to proceedings for that offence (for a day or more);
 - the sentencing court must state the dates and calculate the duration of that period and declare whether all, part or none of it is taken to be time served under the new sentence (and if it is to be 'part', declare what part).

The requirement for such an order applies regardless of whether the offender has also been in pre-sentence custody for other reasons.

- [10] If the sentencing judge does not make the order, the default position under s 159A(1) may be that all the pre-sentence custody must be taken to be time served. However, that need not be decided. Such an outcome would be incompatible with the nature of the sentence here, for it was imposed to be served cumulatively upon the then yet to expire pre-existing sentence.

- [11] It is clear from the sentencing remarks that the learned sentencing judge intended no part of the applicant's pre-sentence custody should be declared as taken to be imprisonment already served under the new sentence. But that result was legally inevitable in the circumstances of this case.¹ Because the applicant committed the robbery offence on parole, s 156A *Penalties and Sentences Act* mandated that the four year head sentence it attracted must be served cumulatively. In such a situation, the decision of this Court in *R v Braeckmans*² requires that s 159A be read subject to s 156A, precluding s 159A from operating to permit a reduction of the cumulative sentence by allowing any pre-sentence custody spent serving the preceding sentence to be taken to be time served under the cumulative sentence.
- [12] To remove doubt, while s 156A only applies to the robbery sentence, it was not argued that there was any error in exercising the discretion to impose the sentences for all four counts concurrently as between each other and cumulatively on the previous sentence; nor could it be sensibly argued in the circumstances of this case.
- [13] In implementing the sentencing result determined and clearly intended by the learned sentencing Judge, there remained no discretionary choice to be exercised as to the order to be made under s 159A. The only possibility was that no part of the pre-sentence custody, during which the applicant had been serving his previously imposed sentence, could count as time served under his Honour's sentence. The only order which could therefore have been made under s 159A was an order under s 159A(3B) stating the pre-sentence custody dates and calculation but declaring that no pre-sentence custody was to be taken as time served under the sentence.
- [14] With or without such an order the sentence determined by his Honour could only be regarded as operating on such a basis. The merits of grounds one and three thus fall to be assessed on that basis.
- [15] Nonetheless, as academic as it may seem, it remains that his Honour should actually have stated the dates between which the applicant was held in pre-sentence custody, calculated that period and declared that no part of it was taken to be imprisonment already served under the sentence. That was necessary 'as part of the sentencing order', pursuant to s 159A(3B).
- [16] That error of omission was a purely technical oversight which could easily be corrected – as such an omission usually is – on a sentence re-opening pursuant to s 188 *Penalties and Sentences Act*.
- [17] What should be done by this Court in circumstances where the other proposed grounds of appeal have no prospects of success? It could simply refuse the application for leave to appeal, and the parties could apply below for correction of the oversight on a sentencing re-opening. I would ordinarily favour that course, particularly if the oversight was the only error contended for in support of the leave application, for leave applications to this Court should not be encouraged merely for the purpose of making a correction which can still be made below. However, given the extent to which the additional matters raised in this leave application require this Court's engagement in consideration of the sentence below, it is convenient to simply tend to the oversight here. The parties' submissions conceded the Court had the

¹ Compare *R v DAB* (2022) 13 QR 217, [19].

² (2022) 10 QR 144.

power to do so but the legal foundation for being able to do so was not materially addressed.

- [18] The pathway for doing so is to grant the application for leave to appeal sentence and deploy the operation of s 668E(3) *Criminal Code* (Qld), which provides:

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

- [19] The High Court explained in *Kentwell v The Queen*,³ that where the exercise of a sentencer's discretion is vitiated by error giving rise to a legally flawed determination this Court should re-exercise the sentencing discretion. But it also explained that not all errors in the sentencing of offenders 'vitiates the exercise of the sentencer's discretion'.⁴ It went on to give an example of an inconsequential failure to make orders required by sentencing legislation in New South Wales as not affecting the exercise of the sentencer's discretion. In a similar vein the present oversight was inconsequential to the determination of the resulting sentence, for the cumulative imposition of the sentence meant the sentence which was imposed would operate in the way intended by the sentencing judge with or without the overlooked order.
- [20] The oversight here did not give rise to a legally flawed determination, so there is no need for this Court to re-exercise the sentencing discretion. But that does not preclude this Court from deploying s 668E(3). The technical oversight meant that a statutorily necessary component of the sentence order was missing. As a result, it is open to this Court to hold the opinion 'some other sentence' – namely the same sentence including the order – 'is warranted in law and should have been passed'.
- [21] Such a conclusion, if adopting the express language of s 668E(3), would cause this Court to allow the appeal, quash the sentence and substitute the same sentence accompanied by the order which should have been made. However, where allowing an appeal resulting in a sentence which only varies in some respects from the sentence below, the convention typically followed by this Court, in implied compliance with s 668E(3), is to allow the appeal to the extent of varying the sentence which was imposed below. Abiding that convention, I would grant leave to appeal and allow the appeal to the extent of varying the sentence by the addition of the overlooked order.

The sentence was not manifestly excessive

- [22] Proposed ground three complains the sentence was manifestly excessive. Such a ground in effect complains that because the sentence resulting from the exercise of the sentencing discretion was unreasonable or plainly unjust it may be inferred there must have been some error in its exercise.⁵
- [23] The applicant's counsel argued the fixing of the parole eligibility date on 20 February 2027 rendered the sentence plainly unreasonable or unjust. In advancing that argument, particular emphasis was placed upon totality considerations, but reliance was also placed on the fact the applicant had pleaded guilty and the alleged

³ (2014) 252 CLR 601, 617.

⁴ (2014) 252 CLR 601, 618.

⁵ *House v The King* (1936) 55 CLR 499, 505.

desirability of the applicant being on parole to best serve the protection of the community.

The pleas of guilty were belated

- [24] The learned sentencing judge did not regard the applicant's guilty pleas as timely. His Honour observed:

You have heard the Crown submit that I should take the view that it is a timely plea of guilty, but I do not. Not given the fact that the indictment was presented in October last year, that the matter has been listed for trial, a 590AA hearing had been listed, and apparently that all only stopped because DNA evidence resulted in you being aware that your DNA was located ... in a relevant place. It is only after that, that the matter was set down for sentence. That, in and of itself, indicates that there is no element of remorse, or if there is, it is very little insofar as the plea of guilty is concerned, as opposed to it being nothing more than a recognition of the inevitable outcome if you were to be so foolish as to run a trial.

- [25] His Honour therefore took the fact the applicant had pleaded guilty into account, as required by s 13 *Penalties and Sentences Act*, but evidently concluded that should not result in a material reduction of the sentence. That conclusion was well open to his Honour and it does not attract an argument of specific error.
- [26] The relevance of the pleas of guilty to the applicant's focus upon the parole eligibility date as allegedly giving rise to a manifestly excessive sentence is returned to below.

The offending was serious

- [27] Counts one and two involved an incident early in the morning of 19 October 2023 with the balance of the offending occurring early that afternoon.
- [28] The complainant in counts 1 and 2 had returned by car from prayer at his Mosque, parked near his house and commenced napping in the driver's seat of his car with the doors unlocked and keys in the ignition. He was awoken by the applicant, who was dressed in a black hoodie with a black mask covering his face and was holding a knife. The applicant opened the car door and punched the complainant multiple times, while also trying to pull him from the vehicle and saying 'get out of the car'. The complainant began yelling for help. While this was happening another masked offender approached the passenger side door of the car, opened it and searched the contents of the glove box, emptying it out on to the passenger's seat. A third offender, stood nearby. The applicant felt inside the complainant's clothes pockets and removed the complainant's phone. The applicant's DNA was later detected on the complainant's jacket. The applicant also took the complainant's wallet from the drivers' side door and one of the other offenders removed the keys from the ignition.
- [29] The three offenders then moved from the car, seemingly headed away up the street around a corner. In the wake of this attempted carjacking the complainant left his car to seek help at a nearby residence. However, the offenders then ran back down the street, entered the complainant's car and drove away.
- [30] In the afternoon, using the car stolen in the commission of counts 1 and 2, the applicant arrived at the residence of the complainant in counts 3 and 4. She was inside

on a Zoom meeting but heard noise at her back door and then front door. She checked a CCTV camera which revealed the applicant, a stranger to her, banging on her front door. The applicant then opened the garage door and entered. He stole some water bottles located inside. The complainant observed the applicant enter the garage on the CCTV camera and called the police. Before fleeing the premises the applicant entered the complainant's motor vehicle in the garage and rummaged through the glove box of the car in the garage.

- [31] The applicant left when the police arrived but was arrested later that evening.
- [32] All of the applicant's offending was objectively serious, particularly so count 1, the armed robbery in company, which was effectively an attempted carjacking.

The applicant was a recidivist offender in need of personal deterrence

- [33] The court below was informed in general terms of the applicant's traumatic upbringing, early drug use and ensuing cycle of addiction. Little detail was advanced about that, doubtless because the relevance in mitigation of an offender's early life challenges logically tends to diminish as the offender continues to re-offend as an adult.
- [34] By the time the applicant committed the subject offences, aged 27, he had accumulated a significant criminal history commencing from when he was 17. His past offending included dangerous operation of a vehicle, assault, wilful damage, stealing, receiving tainted property, fraud and drug offences. More concerning, it also involved the commission of like offences to those the subject of this matter, namely three offences of burglary, two of entering dwellings with intent, 17 offences of unlawful use of a motor vehicle, one attempted unlawful use of a motor vehicle and two unlawful entries of vehicles, one involving the circumstance of aggravation of violence in company because it was a carjacking.
- [35] The applicant had been sentenced to multiple terms of imprisonment and had repeatedly offended while on parole. The subject offences were committed while he was on parole.
- [36] The applicant's recidivism meant that of the purposes of sentencing identified in s 9(1) *Penalties and Sentences Act* the sentencing purpose of personal deterrence carried particular weight.
- [37] One of the applicant's arguments appeared to rely upon the sentencing purpose of community protection as supporting the imposition of an earlier parole eligibility date than was imposed here. The argument seemed to be that the applicant had to be released at some point, so it would protect the community if he was released on supervised parole for a lengthy period. To the extent part of that argument impliedly relied upon an assumption the applicant would be released on parole when eligible, it must be disregarded because, as the High Court found in *R v Hatahet*,⁶ a prisoner's prospect of being released on parole is not relevant to the judicial task of sentencing. In any event it was not made apparent how the community would be better protected by an earlier parole eligibility date. In light of the applicant's recidivism, and his past preparedness to re-offend while on parole, it was strongly in the interests of community protection that he serve a substantial proportion of his present unbroken run of imprisonment in actual custody before being eligible for release on parole.

⁶ (2024) 282 CLR 392.

The head sentence was unremarkable

- [38] The imposition of concurrent sentences for the four offences, with the most significant sentence attaching to the armed robbery in company, which is punishable with life, was also orthodox.⁷ That the applicant had been on parole at the time of his offending also provided a principled basis to impose the sentences cumulatively upon his existing sentence. In any event, as earlier explained, s 156A *Penalties and Sentences Act* required that the head sentence, for armed robbery in company, had to be imposed cumulatively.
- [39] His Honour concluded that, setting aside allowance for the applicant's accumulation of custody resulting from the imposition of a cumulative sentence, a total sentence of five years' imprisonment was appropriate. Such a head sentence was comfortably within the range of a sound exercise of the sentencing discretion having regard to the seriousness of the offending and the applicant's recidivism.
- [40] Because the effect of the sentences being imposed cumulatively was an accumulation in the potential total unbroken period of imprisonment the applicant would be obliged to serve, the totality principle in this context required the learned sentencing judge to take that total into account, moderating the sentence as needs be to arrive at a just sentence, which was not too crushing or more severe than justified by reason of the accumulation.⁸ His Honour did so, moderating the head sentence down to four years.
- [41] No complaint is made about the head sentence. The target of the complaint of manifest excess is the parole eligibility date.

The applicant's recidivism weighed substantially against an early parole eligibility date

- [42] The applicant's pattern of recidivism was relevant to the fixing of his parole eligibility date, in the following way.
- [43] When offenders have co-operated with the administration of criminal justice by entering timely guilty pleas, such co-operation may mitigate the sentence which would otherwise have been imposed had the offender gone to trial.⁹ This is not only because of the mitigating consequences of such co-operation in the individual case but also because of the systemic desirability of signalling that guilty defendants who plead guilty will usually receive a lighter sentence than guilty defendants who deny guilt and are found guilty at trial. Where sentences of imprisonment are imposed such mitigation may be reflected in the quantum of the head sentence, or the date set for parole eligibility (or release),¹⁰ or in mixed degrees in both.
- [44] When mitigation is reflected in the date set for parole eligibility it may result in the setting of a generous parole eligibility date, materially earlier than the half-way point of the term, sometimes as early as the one-third point, sometimes earlier. But that will not always be the result. An offender who keeps on committing criminal offences like the present applicant cannot expect to keep receiving such generously mitigated sentences; even more so if that offender's plea of guilty is belated like the present applicant's.

⁷ *R v Nagy* [2004] 1 Qd R 63.

⁸ *Postiglione v The Queen* (1997) 189 CLR 295, 308; *R v McAnally* [2016] QCA 329 [41]-[43].

⁹ Section 13 *Penalties and Sentences Act* provides the fact an offender has pleaded guilty 'must' be taken into account but only requires that the sentence 'may' on that account be reduced.

¹⁰ See for example *R v Hitchcock* [2019] QCA 60 [18]; *R v Ponsonby* [2024] QCA 229 [3].

- [45] A pattern of recidivism may properly result in a shift in the relative degree of weight attached to the varied purposes of sentencing. Most obviously, there will be a need to give greater weight to personal deterrence, deterring the offender from committing the same or similar crimes, and that may result in such an offender having to serve a more substantial proportion of minimum time in actual custody, than a less recidivist offender, before being eligible for release on parole.
- [46] The fixing of the parole eligibility date here was complicated by the applicant's recent custodial history, to which these reasons will shortly turn. However, the starting point is that the applicant was a recidivist offender whose pleas of guilty were not timely. He was back before the court for serious offending of a kind previously committed by him, and there was therefore a need to impose a sentence calculated at having a substantial, personally deterring effect. Relative to that very material consideration his late pleas of guilty did not carry significant weight in mitigation. It was well within the range of a sound exercise of the sentencing discretion to require the applicant to serve a substantial proportion of his term of imprisonment in actual custody before being eligible for release on parole.

The applicant's recent custodial history was relevant to the fixing of a parole eligibility date

- [47] The present sentence relates to offending committed on 19 October 2023, which is also the date the applicant has been in continuous custody since. The offending of 19 October 2023 was the culmination of a course of offending since 5 August 2023, the balance of which was the subject of a Magistrates Court sentence on 29 August 2024. That balance of offending was unlawful use of a motor vehicle, unlawful possession of dangerous drugs, obstruct police, three offences of failures in respect of a needle or syringe and two offences of possessing a knife in a public place.
- [48] Consideration of the merit of the applicant's complaint about his parole date is informed by the following series of relevant sentencing events:

08/06/22	Commencement of pre-sentence custody regarding the District Court sentence of 28/02/23 below.
28/02/23	Sentenced in the District Court to 3 years and 6 months imprisonment. 265 days from 8/06/22 declared time served under the sentence (140 days pre-sentence custody prior to 8/06/22, when serving a previous sentence, declared not to be pre-sentence custody for the sentence then being imposed). Parole eligibility date 18/03/23. The effective full time expiry date of this sentence would have been 3 years and 6 months from 8/06/22, i.e. 7/12/25.
15/06/23	Released to Board ordered parole (so he had served about 1 year of a sentence of 3 years and 6 months).
05/08/23- 19/10/23	Commission of multiple offences for which sentenced in Magistrates Court on 29/08/24 (as at 5/08/23, when started offending on parole, he had served about 1 year and 2 months of the sentence of 3 years and 6 months, leaving about 2 years and 4 months for it to run from 19/10/23, i.e. to 20/02/26).
19/10/23	Commission of the offences the subject of this application for leave to appeal. Received back into custody.
20/10/23	Board ordered parole suspended.

29/08/24	Sentenced in Magistrates Court to 18 months imprisonment, 315 days from 19/10/23 declared time served under the sentence. Parole eligibility date 29/08/24.
04/12/25	Sentence the subject of this application for leave to appeal imposed in the District Court: 4 years imprisonment, parole eligibility date 20/02/27.
20/02/26	Revised full time expiry date of the District Court sentence.

- [49] The applicant's submissions appeared to characterise the Magistrates Court sentence as having increased the applicant's run of actual imprisonment and imply that had not been taken into account. However, the revised full time expiry date of the District Court sentence of 20 February 2026 is consistent with the Magistrates Court sentence being served concurrently with it and the revision occurring because, once the applicant started re-offending on parole, his remaining time at large until re-entering custody on 19 October 2023 did not count towards service of his sentence.
- [50] The present sentence represents the continuation of an accumulation of a continuous period of imprisonment from 19 October 2023, including the remaining period of the previous District Court sentence, which did not expire until 20 February 2026, after the sentence. The burden of the total accumulation of continuous time in custody since 19 October 2023 was taken into account by the learned sentencing judge. It informed consideration of an apt sentence range, including the setting of a parole eligibility date.

There was a broad range within which a just parole eligibility date could be set

- [51] Determination of an appropriate parole eligibility date in order to arrive at a just overall sentence does not occur in isolation. It occurs by reference to all the variable circumstances of the case. In a case like the present those circumstances include whether the offender's time in pre-sentence custody is spent serving out an existing sentence, how much longer that sentence has to run, whether the head sentence is to be served cumulatively upon the existing sentence and the degree to which discounting for the mitigating circumstances of the case and the totality principle is already reflected in the head sentence.
- [52] Such a constellation of variables distinguishes this case from those simpler cases where the pre-sentence custody was spent on remand for the charges being sentenced.¹¹ In a case of this kind it is inevitable that the potential range within which a parole eligibility date should be set is broad and that there is more than one way to reason to an appropriate parole eligibility date.
- [53] The latter point is well illustrated by comparing two potential approaches to arriving at a just parole eligibility date here. The first approach is the approach taken below. The learned sentencing judge imposed a sentence which was cumulative upon the sentence the applicant was continuing to serve. However, because the sentence imposed would not commence until after the completion of the former sentence, and the totality of that accumulation needed to be moderated to avoid too crushing an effect, his Honour moderated the sentence in two ways. First, he materially moderated the head sentence, which he considered should be five years' imprisonment, down to four years' imprisonment. Second, he set a parole eligibility

¹¹ *R v Berns* [2020] QCA 36.

date, namely 20 February 2027, which, once the sentence begins, will be reached after the applicant has only served one quarter of that sentence.

- [54] On one view such an approach, giving rise to an eligibility date at the one quarter mark proportionate to the head sentence, is generous for such a recidivist offender, so in need of personal deterrence. However, such a sentence preserves the punitive sting of personal deterrence by also seeing to it that the offender must serve out his previous sentence before this sentence commences. The approach taken by his Honour was logically based. It appears to have made fair allowance for the cumulative consequence of the sentence by setting the parole eligibility date at such a short point into the newly imposed sentence of imprisonment. It did not result in a sentence which appears to be unreasonable or plainly unjust.
- [55] Another approach, to reason towards a just parole eligibility date for such a recidivist offender, may instead have been to set it by reference to the total unbroken run of imprisonment which the applicant commenced serving from his re-entry into custody and hypothetically could continue to serve until the expiry of the cumulatively imposed sentence. To allow for the needed punitive sting of personal deterrence the parole eligibility date could then be set at a point after which the applicant had served half that total in actual custody. After the applicant re-entered custody on 19 October 2023, he was obliged to serve a further period of about two years and four months to 20 February 2026 before starting to serve the four year sentence presently under consideration. The period of unbroken imprisonment the applicant commenced serving from 19 October 2023, allowing for the addition of the cumulative four year sentence, is a period of six years and four months. Half of that period would be three years and two months. This approach would therefore have resulted in a parole eligibility date at about 19 December 2026.
- [56] On one view such an approach is generous for such a recidivist offender in that it has regard to the duration of the balance of a sentence which was imposed before the present offending, to punish the offender for earlier crimes. However, such a sentence preserves the punitive sting of personal deterrence because it requires the offender to serve at least half of the potential overall period of imprisonment the offender is exposed to serving since re-entering custody.
- [57] In the context of the present case this second approach is also logically based, it too makes fair allowance for the cumulative consequence of the sentence and it too does not appear to give rise to a sentence which is unreasonable or plainly unjust.

The parole eligibility date did not result in a sentence which is manifestly excessive

- [58] These reasons should not be understood as suggesting those two approaches are the only ways to arrive at an appropriate parole eligibility date as a component of a just overall sentence. Nor should they be understood as suggesting that the second approach is preferable to the first. However, the second approach is useful in the present context to test the complaint of manifest excess.
- [59] The parole eligibility date imposed by his Honour, under the first approach, namely 20 February 2027, was two months later than the parole eligibility date of 19 December 2026 to which the second approach would give rise. That the second approach gives rise to a parole eligibility date which is only two months apart from the date arrived at by the learned sentencing judge under the first approach does not

bespeak manifest excess. To the contrary, it confirms the conclusion the parole eligibility date arrived at by his Honour was comfortably within the range of a sound exercise of the sentencing discretion.

[60] Ground three has no prospect of succeeding.

There was no error in the application of the totality principle when determining the applicant's parole eligibility date

[61] Ground one complains the learned sentencing judge erred in his application of the totality principle when determining the applicant's parole eligibility date. Most of the applicant's arguments in support of this ground were more relevant to the complaint in ground three, that the fixing of the parole eligibility date on 20 February 2027 rendered the sentence manifestly excessive.

[62] The only lingering material argument of the applicant, not already dealt with in considering ground three above is that his Honour erred by not taking into account the applicant's earlier period of custody, prior to him having been released on parole on 15 June 2023.

[63] The applicant in effect submits that the present sentence should have been reduced to take into account the previous period which the applicant had served in custody, under previous sentences, before he was released on parole and committed the present offences. His Honour observed of that period that it was 'before the commission' of the present offences and thus 'of no particular relevance'. Those observations were plainly correct. The relevant period of custody, which his Honour did take into account, is the unbroken run of custody which began when the applicant re-entered custody after offending while on parole.

[64] Having chosen to offend on parole the applicant exposed himself to the dual outcomes of having to continue to serve his previous sentence back in custody and serve his sentence for his further offending. The time spent serving the previous sentence after he was returned to custody and began his unbroken run of custody was relevant in the way already explained and his Honour properly took it into account. But no sound reason was advanced as to why the applicant should also have had his sentence for the further offending moderated because he had served a period of time in custody prior to his release and commission of the further offending while on parole. That earlier period formed no part of the totality of the potential unbroken run of custody the applicant would be facing as a result of the cumulatively imposed sentence and was logically irrelevant to the moderation required by the totality principle.¹²

[65] Ground one has no prospect of succeeding.

Orders

[66] The only basis established for granting leave to appeal is to allow this Court to correct the oversight of the necessary order under s 159A(3B) *Penalties and Sentences Act*.

[67] I would order:

¹² The Victorian Court of Appeal concluded to similar effect in *McCartney v The Queen* (2012) 38 VR 1, 20-21.

1. Application for leave to appeal sentence granted.
2. Appeal allowed, to the extent that the sentence imposed in the District Court on 4 December 2025 is varied by adding the following additional order:

Pursuant to s 159A(3B) *Penalties and Sentences Act 1992* (Qld):

- (a) The dates between which the offender was held in pre-sentence custody are stated to be 19 October 2023 to 3 December 2025.
- (b) That time is calculated to be a period of 777 days.
- (c) It is declared none of that time is taken to be imprisonment already served under the sentence.