SUPREME COURT OF QUEENSLAND

CITATION:	*Penhaligon v Attorney-General for the State of Queensland* [2026] QCA 225
PARTIES:	**NATHAN JOHN PENHALIGON** (appellant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 2151 of 2026 SC No 767 of 2026
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2026] QSC 73 (Smith J)
DELIVERED ON:	6 November 2026
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2026
JUDGES:	Boddice JA, Doyle JA, Morrison AJA
ORDERS:	**1. Appeal is dismissed.** **2. The appellant pay the respondent's costs of this appeal.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – where the appellant was detained for an offence of a sexual nature – where the appellant unlawfully entered the complainant's home while she slept and sexually touched her – where "violence" includes intimidation and threats – whether the offending involved violence or intimidation – whether the offence was a "serious sexual offence" *Criminal Code* (Qld), s 349 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 3, s 5, s 8, s 13, s 22, Sch 1 *Al-Kateb v Goodwin* (2004) 219 CLR 562; [2004] HCA 37, cited *Attorney-General for the State of Queensland v Phineasa* [2013] 1 Qd R 305; [2012] QCA 184, considered *Kynuna v Attorney-General for the State of Queensland* [2016] QCA 172, considered

Tilbrook v Attorney-General for the State of Queensland [2012] QCA 279, considered

COUNSEL: S B Robb KC, with A C Bellas, for the appellant
R M O'Gorman KC, with R H Berry, for the respondent

SOLICITORS: Bell Criminal Lawyers for the appellant
C E Christensen, Crown Solicitor for the respondent

[1] **BODDICE JA:** I agree with Doyle JA that the decision below was correct.

[2] Doyle JA's comprehensive summary of the legislative regime and the factual basis for the appellant's plea of guilty to the index offences allows me to briefly state my reasons.

[3] First, the factual basis upon which the appellant entered a plea of guilty to count 9 supported the primary judge's inference that the complainant had suffered significant psychological harm as a consequence of the commission of that offence. Whilst the primary judge ought not, in my view, to have had regard to the complainant's statement in summarising the factual circumstances of that offence, as the relevant information contained in that statement was not part of the agreed statement of facts, the reference to that statement in [40(h)] of the primary judge's judgment does not vitiate the inference properly drawn by the primary judge. That conclusion follows from the fact that the sentencing judge had correctly recorded that the circumstances of the offence would have been "a terrifying experience". A reference to the complainant's stress by reason of that expression adds nothing to the relevant inference drawn by the primary judge.

[4] Second, in determining whether an offence of a sexual nature involved violence within the meaning of the Act, the nature of the offence itself is a relevant factor. Here, rubbing the complainant's leg in the area of her vagina, in circumstances where it occurred on a mattress in the sanctity of her own home, was a violation of her person involving more than mere physical contact.

[5] Third, once it is accepted that the offence, the subject of count 9, was an offence of a sexual nature, the circumstances in which it was committed properly fell within count 9 being an offence of a sexual nature, involving violence. As was observed in *Phineasa*, the violence contemplated by the Act includes circumstances which caused a complainant significant psychological harm.

[6] I agree with the orders proposed by Doyle JA.

[7] **DOYLE JA:** The central issue in this appeal is whether or not the appellant is someone detained in custody serving a period of imprisonment for a "serious sexual offence" as defined in the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) (**the Act**). There is no dispute that he is serving a period in custody by reason of having committed a sexual offence. But for it to be a serious sexual offence for present purposes involves satisfaction of a further element, namely that the offence was one "involving violence".

[8] On 17 April 2026 the primary judge held[1] that the appellant is a "prisoner" within subparagraph (a) of the definition of that term in s 5(6) of the Act, finding that the offence was a "serious sexual offence". That is challenged in this appeal.

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[1] *Attorney-General for the State of Queensland v Penhaligon* [2026] QSC 73 (**Reasons** or **R**).

The Act

[9] Section 5 of the Act provides as follows:

> "**5 Attorney-General may apply for orders**
>
> (1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.
>
> (2) The application must—
>
> (a) state the orders sought; and
>
> (b) be accompanied by any affidavits to be relied on by the Attorney-General for the purpose of seeking an order or orders under section 8; and
>
> (c) be made during the last 6 months of the prisoner's period of imprisonment.
>
> (3) On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (***preliminary hearing***) to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order.
>
> (4) The return date for the preliminary hearing must be within 28 business days after the filing.
>
> (5) A copy of the application and any affidavit to be relied on by the Attorney-General must be given to the prisoner within 2 business days after the filing.
>
> (6) In this section—
>
> …
>
> ***prisoner***—
>
> (a) means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence …"

[10] In addition, Schedule 1 to the Act defines two relevant terms as follows:

> "***serious sexual offence*** means an offence of a sexual nature, whether committed in Queensland or outside Queensland—
>
> (a) involving violence; or
>
> (b) against a child; or
>
> (c) against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be a child under the age of 16 years.
>
> …
>
> ***violence*** includes the following—

(a) intimidation;

(b) threats."

[11] That someone is a prisoner within s 5(6) is a precondition for further steps to be taken under the Act to determine if (in the absence of some orders designed to protect the community) there is an unacceptable risk that the prisoner will commit a serious sexual offence: s 13 of the Act. If so, the court has powers to make orders which will affect the prisoner's liberty or rights if released from prison.

Background

[12] The appellant has a significant criminal history. I need not set that out for the purposes of this appeal. The history since 2009 includes a conviction for unlawful carnal knowledge of an intellectually impaired person and a number of convictions for indecent acts in a place with intent to insult or offend. Directly relevant to the present appeal are offences to which the appellant pleaded guilty in the District Court on 23 September 2022. The primary judge summarised them in his reasons as follows:

> "[8] As to the index offences on 23 September 2022 in the District Court of Cairns, the respondent pleaded guilty and was convicted and sentenced in relation to the following offences:
>
> (a) One count of burglary and stealing (Count 4);
>
> (b) One count of entering dwelling and commit indictable offence (Count 9);
>
> (c) Two counts of indecent act in any place with intent to insult or offend any person (Counts 6 and 8);
>
> (d) One count of indecent act in any place to which the public are permitted access (Count 7);
>
> (e) One count of failing to comply with reporting (Count 1);
>
> (f) One count of receiving tainted property (Count 2);
>
> (g) Two counts of fraud (Counts 3 and 5);
>
> (h) One count of stealing (Count 10); and
>
> (i) Two breaches of separate suspended sentences."

[13] The preliminary issue for the primary judge in this case was whether Count 9 was a "serious sexual offence" for the purposes of the Act.

Facts concerning Count 9

[14] The primary judge summarised the facts for Count 9 as follows:

> "[14] In respect of Count 9 the [appellant] immediately went next door, pushed his hand through gauze across the doorway, unlocked the screen door from inside and entered the unit. Another woman (who was 68) was asleep on a mattress in the living room. He then laid on the mattress with his head near her feet, pulled her underwear up and rubbed her in her inner thigh

> close to her vagina. She awoke and screamed. The [appellant] grabbed her mobile phone and ran from the unit. At about 9.20pm police located him, and the [appellant] was so drug affected he could not be interviewed."

[15] The timing of Count 9 is that it followed immediately after the appellant had come from an adjoining property where the offending the subject of count 8 had taken place.

[16] The facts recited by the primary judge were taken from a Schedule of Facts which had been provided to the District Court in connection with the appellant's conviction and sentencing. The primary judge also had before him an affidavit of the Director of Public Prosecutions which exhibited a copy of his office's file relating to the appellant. That file included a statement given by the complainant to the police in relation to Count 9 in February 2020. That statement contains some details in addition to, or perhaps putting a slightly different shade on, some of the facts as stated in the Schedule of Facts.

[17] The appellant took objection to the primary judge acting on the basis of that statement to the police and also submitted the primary judge made findings not explicitly referred to on the evidence. The controversy as to the facts is of small compass.

[18] In finding that Count 9 was a serious sexual offence the primary judge stated:

> "[40] In the present case, I consider the offending is to be distinguished from the cases relied on by the respondent. All of the following facts need to be considered:
>
> (a) The respondent deliberately broke into the complainant's house.
>
> (b) The complainant and the respondent were strangers to each other.
>
> (c) The complainant was a lady in her late 60's.
>
> (d) She was vulnerable and asleep.
>
> (e) Unlike in the respondent's cases, the respondent lay next to her. An intention to commit a sexual offence can clearly be inferred.
>
> (f) The respondent deliberately lifted the complainant's nightie and then her underpants.
>
> (g) Crucially, the touching was a rubbing very close to the vagina on the inner thigh. I consider the area near the vagina is to be distinguished from the buttock area as was the case in *Phineasa*. But for her waking and screaming, it is likely digital penetration (at the least) would have occurred.
>
> (h) The complainant screamed and was very frightened about what he was trying to do to her. She was very shaken and mentally very stressed.
>
> (i) Judge Farr was correct to find that this would have been a terrifying experience which breached the sanctity and security she felt.

> (j) I infer the complainant suffered significant psychological harm. I consider this is quite different from the case of *Kynuna*. In that matter, this could not be inferred presumably because of the facts. In that case, the nurse had noticed Mr Kynuna had urinated in his bed. She had assisted him to remove his clothing for a shower and it seems he grabbed her hand and put it on his genitals momentarily before she pulled it away. That case did not involve the deliberate break in of a dwelling and the sexual assault of a vulnerable sleeping complainant." (citations omitted)

[19] The view, expressed in R[40(f)] that the appellant "lifted the complainant's nightie" is not one of the agreed facts put before the sentencing judge. Nor indeed does the complainant's statement to the police say this. In that statement she stated that when she woke up "My nightie was pulled up over my left hip and my underpants were exposed". This is consistent with her nightie having been pulled up by the time the appellant lay next to her.

[20] It was submitted the finding in R[40(h)] goes further than the agreed statement of facts. That agreed statement states that the complainant "woke up and screamed". That she was very shaken and felt mentally very stressed is only something that appears expressly in the statement given to the police. In my view even without that having been said in the statement to the police it would be proper for a court to infer from her waking, seeing a stranger on her mattress lying next to her, having that stranger rub adjacent to her vagina and her screaming, that the complainant would be very frightened and very stressed.

[21] Finally, it is submitted that the finding in R[40(j)] that the complainant suffered "significant psychological harm" was not open on the statement of facts. As is clear from the primary judge's reasons he was drawing an inference of such harm. I doubt the primary judge was seeking to express a medical diagnosis of the complainant's mental condition. Rather it is an inference, much as that in R[40(h)], as to the stress and alarm she would have experienced immediately (and likely for some time afterwards).

[22] In the end in my view it makes no difference to these identified findings by the primary judge whether or not the statement to the police is taken into account. I am content, therefore, to proceed on the basis most favourable to the appellant and exclude from consideration any additional facts provided in the statement to the police.

[23] That said, there is no reason in principle in my view why the statement to the police cannot be relied on in the hearing to determine an issue under the Act (viz as to whether the sexual offence for which the appellant is in custody is one involving violence).

Construction of the Act

[24] There is no dispute on appeal that the offence the subject of Count 9, is an offence of a sexual nature and committed within Queensland.

[25] The controversy concerns whether it was one "involving violence".

[26] The objects of the Act include:

> "(a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community."

[27] The designation of something as a serious sexual offence is a plank in the scheme designed by Parliament for the protection of the community from a risk of serious danger. It will enliven the power of the court to make a continuing detention order or supervision order: s 13. Either such order will affect the rights of the prisoner (having served the imposed term) to be released and the terms upon which he or she is released. To achieve this Parliament needs to use clear language: *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19]-[20].

[28] The description of something as of a sexual nature admits a very wide range of activities. Many of them will involve the offender making physical contact with the complainant; but some will not. To be a 'serious sexual offence' the offence of a sexual nature must involve violence.

[29] The use of the word "involve", in my view, shows that Parliament had in mind that an analysis be undertaken of the facts of each case to determine if the offender deployed violence. It does not mean that violence must itself be an element of the charged offence.

[30] The constructional difficulty which arises is because Parliament has not provided a requirement that the violence, intimidation or threats rise to some defined level of severity.

[31] It is convenient to start with consideration of a number of decisions in this Court which have analysed the language employed in the Act.

Phineasa

[32] In *Attorney-General for the State of Queensland v Phineasa* [2013] 1 Qd R 305 this Court upheld the primary decision that the prisoner was not in custody for a 'serious sexual offence'. Muir JA (with whom the other members of the Court agreed) concluded that "None of the offences relied on by the appellant involved force sufficient to constitute 'violence' within the meaning of the Act". In that case the physical contact with the complainant was that the prisoner pulled her underpants to one side and touched her buttocks, and was also on one occasion "rubbing and grabbing the woman's bottom": see page 307.

[33] The gravamen of the reasoning was (emphasis added):

> "[28] The definition of serious sexual offence plays a pivotal role in the operation of the Act. Final orders which may result in a continuing detention order or a supervision order may be made **only if the prisoner is a serious danger to the community in the absence of such an order.** A prisoner is, by definition, a serious danger to the community if there is an unacceptable risk that the prisoner will commit a serious sexual offence if released from custody or if released from custody without a supervision order.

[29] A serious sexual offence is **thus** an offence, the commission, or potential commission, of which may represent 'a serious danger to the community'. **One should not attribute to the Parliament in using the words 'serious danger to the community' the intention that they have a meaning quite different from, and in fact, the converse of their meaning in normal usage.** If the appellant's argument is accepted the language under consideration is singularly inappropriate and misleading.

…

[36] I agree with Margaret Wilson J's conclusion in *Tilbrook* that to constitute 'violence' for present purposes something more than mere physical contact is required. I am also of the view that 'violence', for present purposes, does not equate to the application of force, however limited, irrespective of the harm caused or likely to be caused to the person to whom it was applied.

…

[38] As I trust emerges from earlier discussion, the 'violence' referred to in the definition of serious sexual offence **is force significantly greater in degree than mere physical contact or even, at least as a general proposition, acts such as pawing, grasping, groping or stroking.** The language of ss 8 and 13, in particular, is inconsistent with the application of the Act to sexual offences other than of a very serious kind where offending against adults is concerned. Those sections are addressing conduct of such a nature, that the risk that a prisoner, assumed to be a member of a particular class, might engage in it and harm a member or members of the public if released from custody or if released without a supervision order, is regarded as unacceptable. Consequently, **the 'violence' contemplated by the Act (excluding for present purposes threats and intimidation) would normally involve the use of force against a person to facilitate the 'rape' of that person within the meaning of s 349 of the *Criminal Code* or which caused (or in the case of predicted conduct would be likely to cause) that person significant physical injury or significant psychological harm**.

[39] It is unnecessary for present purposes to explore the question whether and to what extent there may be 'violence' for the purposes of the Act not involving intimidation, threats or the application of physical force to a person. Nor is it desirable or appropriate to attempt any greater degree of definition of the meaning of 'violent'. It will always be necessary to determine whether conduct involves 'violence' by reference to the particular facts and circumstances of the case under consideration. However, rape, involving as it does the violation of the victim's body would normally, if not invariably, involve 'violence'." (citations omitted)

Tilbrook

[34] Later that same year this Court decided *Tilbrook v Attorney-General for the State of Queensland* [2012] QCA 279. In that case the facts showed the prisoner (in July 2007) came up behind a woman in a car park, "grabbed her with both hands on her breast and squeezed her tightly. This caused her pain": [3]. In the course of another offence (in March 2009) the prisoner "lifted her skirt and squeezed her buttock": see [3]. Then in November 2009 the prisoner pulled up the complainant's dress from behind, "touched her stomach and back area in an attempt to pull her underwear down… He rubbed his hand on her vaginal area over the top of the leotards": [3]. The primary judge found that this conduct was "violence" for the purposes of the Act: [7].

[35] In overturning that conclusion Muir JA (Gotterson JA and Atkinson J agreeing) said (emphasis added):

> "[25] Although the appellant's offending was of a nature likely to shock and distress the complainant, and did cause shock and distress, that harm was generally similar in degree to that which most victims of sexual offences could be expected to experience. **The offending conduct, in terms of the harm likely to be inflicted or actually done, was at the lower end of the spectrum of the sexual offending regularly dealt with in the District Court.**
>
> [26] The appellant's conduct, reprehensible though it undoubtedly was, falls short of that necessary to constitute a serious sexual offence. The same observations have general application to the other two offences.
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> …
>
> [28] The conduct involved in 12 November 2009 offending, involving as it did an attempt to pull down the complainant's underwear and the rubbing of a hand on the complainant's clad genital region, seems to me to be more intrusive and offensive in nature than the conduct involved in the 2007 offending. However, the November 2009 offending occurred in daylight in a well trafficked area and thus may have been less likely to engender fear and distress than the July 2007 offending. Also less force seems to have been exerted by the appellant than in the July 2007 offending. The complainant, in her victim impact statement, described having become very nervous and worried for her safety in locations such as car parks. Her sleep was adversely affected and she changed her working schedule, presumably to avoid travelling out of daylight hours. Nevertheless, for the reasons already given, it does not appear to me that the force applied by the appellant to the complainant and the other circumstances of the offending were of such a nature and degree as to constitute a 'serious sexual offence'."

Kynuna

[36] Finally, for present purposes this court decided *Kynuna v Attorney-General for the State of Queensland* [2016] QCA 172. A series of offences were under consideration

including one involving a nurse treating the prisoner. She was assisting him in a shower when he grabbed her hand and put it on his genitals and held it there until she pulled her hand away: [13]. The court cited with approval the reasoning in *Phineasa*.

[37] The court also stated (emphasis added):

> "[60] The reference to 'the adequate protection of the community' in s 22(2) and s 22(7) is clearly a reference to that term as explained in s 13, that is, adequate protection of the community from the unacceptable risk that the appellant will commit a serious sexual offence, namely **one involving serious violence of the kind discussed in *Phineasa*, which caused or was likely to cause significant physical injury or significant psychological harm. So much was rightly accepted by the primary judge.** The judge rejected the appellant's submission that the risk of his sexual reoffending was not a risk of serious sexual offending under the Act. After referring to *Phineasa*, his Honour concluded that forcibly placing the nurse's hand on the appellant's genitals was likely to cause significant psychological harm. His Honour was therefore finding that, in terms of this Court's analysis in *Phineasa*, the appellant's offence against the nurse was a serious violent offence as it was likely to cause her significant psychological harm.
>
> [61] Whilst not diminishing the repugnant nature of the offence, there was no evidence that it caused the complainant significant psychological harm and no evidence from which the judge could infer this. A complainant might suffer significant psychological harm from such conduct but this was by no means probable or inevitable. The appellant's offending against the nurse was no more likely to cause significant psychological harm than the equally inappropriate and unpleasant offending in *Phineasa*. The judge erred in finding the offence against the nurse was a serious sexual offence under the Act.
>
> …
>
> [63] I consider that the appellant has established the primary judge erred in concluding that the offending against the nurse which constituted the breach of the appellant's supervision order was a serious sexual offence under the Act. This error means that this Court must re-exercise its discretion to determine whether the appellant should be released on a supervision order under s 22. If so, the appeal must be allowed and it is unnecessary to consider the second ground of appeal." (citations omitted)

[38] There are aspects of the reasoning in these decisions about which I have reservations. There is a degree of circularity in reasoning that Parliament's use of the expressions "serious sexual offence" and a "serious danger to the community" requires that a serious sexual offence is intended to be limited to those sexual offences which can be described as only at the high end of some spectrum of sexual offences. Rather, by the Act Parliament has identified serious sexual offences as those which involved violence, intimidation or threats, not some sub-set of them. It is consistent with that language that Parliament had recognised all sexual offences where violence,

intimidation or threats are involved as being serious even if some are more serious than others. The serious danger to the community lies in the risk of the release of sexual offenders who have not been rehabilitated and who are likely to reoffend.[2]

[39] There are sound reasons for rejecting a construction that any mere physical contact (force applied by a touch no matter how fleeting) of itself could be said to involve violence. That construction was discussed and rejected in this court in *Attorney-General (Qld) v Phineasa* [2013] 1 Qd R 305. Neither party invited us to depart from that conclusion in that decision. In *Phineasa*, at [25], Muir JA (with whom White JA and Philippides J agreed) stated:

> "[25] If the appellant's argument is to be accepted, the words 'involving violence' are virtually otiose. Any physical contact of a sexual nature would necessarily involve violence. That would leave outside the definition only offending which did not involve physical contact such as indecent exposure and voyeuristic conduct, as long as the offending conduct did not constitute 'intimidation' or 'threats'."

[40] Indeed, Parliament's use of the word "violence" readily can be understood as requiring something more than any form of touching or mere physical contact. However, it is quite another thing to conclude that there is always a level of pawing, grasping, groping or stroking which, because it is inherent in some types of sexual offending, is thereby not "violence". An accused who squeezes a complainant's breast (through her clothes) with sufficient force to cause pain can in my view be said to have committed a sexual offence which involved violence: cf *Tilbrook* at [3]. Similarly to employ force to grab a person's hand and then hold that person's hand on an accused's penis is, in my view, capable of being described as a sexual offence involving violence.

[41] The language used in the Act does not mandate that the violence, intimidation or threats rise to some defined level of severity (such as that the force cause bodily harm or fear for one's safety, or indeed that the violence be exceptional).

[42] The normal meaning of violence captures the use of force without it requiring an elevated level of brutality or vehemence. Parliament has chosen a word which is apt to bring within its scope physical contact within a wide range.

[43] The meaning of 'violence' given in the Macquarie Dictionary is:

> "1. rough force in action: the violence of the wind.
>
> 2. rough or injurious action or treatment: to die by violence.
>
> 3. any unjust or unwarranted exertion of force or power, as against rights, laws, etc.; injury; wrong; outrage.
>
> 4. a violent act or proceeding.
>
> 5. rough or immoderate vehemence, as of feeling or language; fury; intensity; severity…".

[44] Accordingly, the application of force with the characterisation of it being *rough* is within the definition.

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[2] This is the view expressed in the explanatory notes for the Bill leading to the Act.

Discussion

[45] However, in order to dispose of this appeal it is unnecessary revisit all of the discussions in those earlier decisions.

[46] They each recognise that the nature of the offence itself is a relevant factor to consider. Thus the passages quoted from *Phineasa*, adopted in those other decisions, (albeit in each case as obiter dictum) recognise that rape of its nature is such a violation of the complainant's body that it would normally if not invariably involve 'violence'. The Attorney-General in the present appeal submitted that the appellant's conduct including, as it did, rubbing the complainant's leg in the area of her vagina is commensurately violating and accordingly the physical contact which occurred can be said to have the additional element of involving violence.

[47] Further, none of these cases gave close consideration to the expanded meaning of violence as including intimidation and threats. In *Phineasa* the discussion appearing at [38] explicitly excluded consideration of threats and intimidation.

[48] The issue for the primary judge in this case, and now in this appeal is whether the appellant was in custody for a sexual offence which involved violence including intimidation or threats.

[49] The Macquarie Dictionary defines intimidate as:

> "1. to make timid, or inspire with fear; overawe; cow.
>
> 2. to force into or deter from some action by inducing fear: to intimidate a voter."

[50] The Oxford English Dictionary similarly states it as:

> "The action of intimidating or making afraid; the fact or condition of being intimidated; now, esp. the use of threats or violence to force to or restrain from some action, or to interfere with the free exercise of political or social rights"

[51] Both provide unremarkable definitions of threats in terms of some form of declared conditional menace or action.

[52] In my view the primary judge was correct to conclude that the appellant was in custody for a serious sexual offence having regard to the description of "violence" including "intimidation" and "threats".

[53] A woman in her late 60s alone at home, awakes on a mattress to find a strange man (40 years of age) lying (feet near her head) on the mattress with her. He had plainly entered her home unlawfully. Her nightie was lifted exposing her underwear and he had pulled up her underwear. He was using his hand to rub very close to her vagina. Adopting the Macquarie definition of intimidation, the appellant's conduct could readily be said to inspire fear in her; and indeed she screamed and as the primary judge inferred was very shaken and stressed. The reasons stated by the primary judge at R[40] include those things which in my view establish the appellant's conduct as involving violence and intimidation. This conclusion is reinforced if regard is had to the complainant's statement to the police.

[54] That is sufficient in my view to dispose of the appeal without having to go further and assess whether the violence and intimidation employed fell at the top of some notional spectrum of force and intimidation. That said, this outcome is consistent with the reasoning in *Phineasa* that rape (as an example) is of its nature a violent offence. While the material did not suggest the rubbing was of a force or ferocity as to be likely to cause physical injury to the complainant, the form of the sexual offence here was itself an intimate and violating one.

[55] For these reasons in my view the decision below was correct. The appropriate orders are:

1. Appeal is dismissed.

2. The appellant pay the respondent's costs of this appeal.

[56] **MORRISON AJA:** I have had the opportunity of reading the draft reasons prepared by Boddice and Doyle JJA. I agree that the appeal must be dismissed for the reasons given by their Honours, subject to some comments on one aspect.

[57] The hearing before the primary judge was a preliminary hearing under s 8 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

[58] Accordingly, s 7(2) permitted the affidavit in support to contain "statements based on information and belief if the person making it states the sources of the information and the grounds for the belief".

[59] Here, Mr Fuller effectively did that by exhibiting the complainant's statement made to the police. In the context of a preliminary hearing that is the equivalent of his saying: The complainant described the conduct in her police statement as follows.

[60] Whilst that material went somewhat further by way of description than the agreed facts put before the sentencing judge, the primary judge hearing the preliminary hearing was not, in my view, confined to the agreed statement of facts. The two hearings are distinct in nature and purpose.

[61] There is no necessity to decide the bounds of the material that may be considered on such a preliminary hearing. Here, for the reason explained by Doyle JA, the difference between the agreed statement of facts for the purpose of sentencing, and the facts put before the court for the purpose of the s 8 hearing, was not significant. If the difference was of greater consequence one can imagine the need for greater care as to consideration of admissibility and use.

[62] Accordingly, I agree with the view expressed in paragraph [23] of the reasons of Doyle JA.