CITATION:	*The King v McKell* [2024] NTSC 11
PARTIES:	THE KING
	v
	McKELL, Kyle
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22131108
DELIVERED:	8 March 2024
HEARING DATE:	24 November 2023
JUDGMENT OF:	Burns J

CATCHWORDS:

CRIMINAL LAW – Sentencing – Uncharged act – Evidence of uncharged second act of sexual intercourse led at trial – Found guilty on charged act of sexual intercourse – Whether uncharged act should be taken into account for the purpose of imposing greater punishment – Whether uncharged act should be taken into account for the purpose of determining the extent of leniency for the offender – Application of the *De Simoni* principle – Uncharged act can be taken into account for the purpose of determining whether offender entitled to leniency on the basis that the proven offending was isolated

Archbold's *Criminal Pleading Evidence and Practice* (40th edition)
Chitty, *Criminal Law*, 2nd ed (1826), vol. 1
Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A, s 33
Crimes Act 1958 (Vic) s 19
Criminal Code Act 1899 (Qld) s 650
Criminal Code Act 1983 (NT) s 131

Criminal Code Act Compilation Act 1913 (WA) s 1, s 391, s 393, s 582
Mental Health (Criminal Procedure) Act 1990 (NSW) s 19
Sentencing Act 1995 (NT) s 104

The Queen v De Simoni (1981) 147 CLR 383, applied.

Anderson v DPP [1978] AC 964; *Baines v R* [2016] NSWCCA 132; *Dominus Rex v Turner* (1718) 1 Str 140 [93 ER 435]; *Einfeld v R* [2010] NSWCCA 87; *Ex parte Attorney-General* [1986] 1 Qd R 190; *Fisher v R* [2008] NSWCCA 129; *Giles v DPP* (NSW) [2009] NSWCCA 308; *Henderson v The King* [2024] ACTCA 3; *Kingswell v The Queen* (1986) 60 A.L.J.R. 17; *Lago v R* [2015] NSWCCA; *Lovegrove v The Queen* [1961] Tas SR 106; *Murrell v R* (1985) 4 FCR 168; *Nguyen v R* [2016] HCA 17; *Peiris v R* [2014] NSWCCA 58; *Qing An v Regina* [2007] NSWCCA 53*; R v Anderson* [1978] AC 964; *R v Bavadra* [2000] NSWCCA 292; *R v Boney, ex parte Attorney-General* [1986] 1 Qd R 190; *R v Bright* [1916] 2 KB 441; *R v Cooksley* [1982] Qd R 405; *R v Courtie* [1984] A.C. 463; *R v D* [1995] QCA 329; *R v ED* (unreported, NSWCCA, 22 November 1996); *R v H* (1980) 3 A Crim R 53; *R v Harrison* (1909) 2 Cr App Rep 94; *R v Hill* [2014] NSWSC 1010; *R v Holyoak* (1995) 85 A Crim R 502; *R v JCW* [2000] NSWCCA 209; *R v J.R.D*. [2007] NSWCCA 55; *R v Kidd* [1998] 1 WLR 604; *R v King* (1925) 25 SR (NSW); *R v Mailes* [2003] NSWSC 707; *R v Medcraft* (1992) 60 A Crim R 181; *R. v. Merriman* [1973] A.C. 584; *R v MH* [2001] NSWCCA 117; *R v Nona* [2022] QCA 26; *R v O'Connell* [1993] 2 NZLR 442; *R v Olbrich* [1999] HCA 54; *R v Parsell* (1980) 28 SASR 369; *R v PJS* [2009] NSWSC 153; *R v Storey* [1998] 1 VR 359; *R v Teremoana* (1990) 54 SASR 30; *R v Toomey* [1964] Crim LR 419; *R v Welsh* [1983] 1 Qd R. 592; *Reg. v Huchison* [1972] 1 W.L.R. 398; *Regina v Swadling* [2004] NSWCCA 421; *Ross v R* [2016] NSWCCA 176; *Sills v R* [2011] NSWCCA 271; *Weininger v The Queen* [2003] HCA 14, referred to.

REPRESENTATION:

Counsel:

Crown:	J Moore
Accused:	S Robson SC

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Nil

Judgment category classification:	B
Judgment ID Number:	Bur2403
Number of pages:	57

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The King v McKell [2024] NTSC 11
No. 22131108

BETWEEN:

THE KING

AND:

KYLE MCKELL

CORAM: BURNS J

REASONS FOR RULING

(Delivered 8 March 2024)

[1] On 2 October 2023, the offender entered pleas of not guilty to the following two charges on an indictment dated 28 September 2023:

- Count 1, alleging that between 1 May 2021 and 17 May 2021 at Alice Springs he deprived CB of her personal liberty against her will.
- Count 2, alleging that between the same dates the offender had sexual intercourse with CB without her consent and knowing about or being reckless as to the lack of consent.

[2] After a jury trial the accused was convicted of both charges on 6 October 2023.

[3] The Court received submissions from the parties on sentence. As part of those submissions the Crown urged that I should take into account in sentencing the offender a further allegation that he had had sexual intercourse with CB without her consent which occurred shortly after the act of sexual intercourse in Count 2 upon which the offender was convicted by the jury. The offender gave evidence at his trial in which he accepted that both acts of sexual intercourse occurred but they had been consensual. The jury obviously rejected the evidence of the offender regarding the charged act of sexual intercourse. The offender submitted that I could not take that uncharged allegation into account in sentencing him on either Count 1 or Count 2.

[4] I have today imposed sentence on the offender. In doing so, I indicated that I took into account the alleged uncharged act of sexual intercourse only for the purpose of determining whether the offender was entitled to leniency in sentencing for the charged offences on the basis that the proven offending was isolated. I said in my sentencing remarks that I would separately publish reasons for that decision. These are those reasons.

The facts

[5] The offender and CB knew each other from attending Centralian Senior College together. During their time at school, around 2013 or 2014, they had consensual sexual intercourse on a couple of occasions. I infer that the offender and CB did not have any ongoing relationship between 2014 and 2021.

[6] In May 2021, the offender was 24 years old and CB was 26. They were both living in Alice Springs. The offender was residing at an address with his brother. On an unknown date between 1 May 2021 and 17 May 2021, CB was at the home of her friend DM. CB and the offender exchanged messages on Snapchat after having previously matched on Tinder. These messages were exchanged with the mutual intention of having sex.

[7] It was mutually understood that the sexual intercourse would occur at the offender's house, and the offender told CB that they had to wait until the offender's brother was asleep that night.

[8] At about midnight on the night that the messages were exchanged, the offender picked CB up in his single cab two-door utility from the address of DM. He did not say anything to CB about travelling to a location other than his home. The offender did not drive towards his home, instead turning to drive out of town. CB asked the offender where they were going, and the offender told CB that his brother was still awake. The offender started driving out of town along Undoolya Road. CB asked the offender to take her home as soon as she realised that they were heading out of town. The offender replied, "No, we'll just go out here for a bit."

[9] CB believed that the offender was going to drive her out into the bush and she felt scared and intimidated. CB did not know what was going to happen. CB asked the offender again to take her home while he continued to drive.

CB did not want to be in the car and felt that the offender would not stop the car.

[10] The offender turned off the road into an area that was dark and had no lighting. He drove to the top of a hill, described as Undoolya Hill, where there was an open area surrounded by rocks and bushland. The offender turned the car off and attempted to kiss CB. By this time CB had changed her mind about engaging in sexual intercourse with the offender. She again asked the offender to take her home to which the offender replied that his brother was still awake. When the offender attempted to kiss CB, she pushed him away and said, “No.” The offender again tried to kiss CB but she again pushed him away and said, “No.”

[11] The offender then reached over with his right hand and put his hand down CB’s pants and inserted his fingers into her vagina. CB tried to pull his hand out of her pants but was initially unsuccessful. CB told the offender to “fuck off.” CB managed to pull the offender’s hand from her pants using both of her hands. The penetration of CB’s vagina by the offender’s fingers lasted about one minute.

[12] The offender called CB “a fucking bitch” a few times, and CB responded by saying words to the effect of, “You can call me a fucking bitch all you want, it’s not happening out here.” CB asked the offender to take her home again. She thought about leaving by herself, but didn’t believe she could because she was “in the middle of nowhere” and it was dark.

[13] I will interrupt the narrative at this point to state that the Crown, both before the trial and in its opening to the jury, particularised the act of sexual intercourse alleged in Count 2 as the penetration of CB's vagina by the offender's fingers. In its opening to the jury, the Crown said:

> You'll hear about another act of sexual intercourse without consent during this encounter. The Crown hasn't charged that on the indictment. So it's what we call an uncharged act. It is quite a normal thing for there to be conduct in a criminal trial that is not charged on the indictment.
>
> In simple terms, it is there for context. It's there so you know everything that happened, how it went down, so that you don't consider these charged acts in a vacuum.
>
> Now, the Crown case is that the complainant did not consent to any form of sexual activity with the accused in the circumstances in which they took place including the uncharged sexual intercourse. But the Crown doesn't actually need to prove anything in relation to that uncharged act, it's just those two offences on the indictment the Crown has to prove beyond a reasonable doubt.

[14] It was the case for the offender that CB had agreed to go with him to Undoolya Hill, and had then engaged in consensual sexual intercourse with him. He gave evidence to that effect at his trial. It was, in the circumstances, inevitable that evidence of all of the sexual activity that took place at Undoolya Hill would be before the jury. No objection was taken on the part of the offender to the Crown leading evidence of what the Crown described as "the uncharged act".

[15] Returning to the narrative, CB testified that after she told the offender that she was not going to engage in sexual intercourse with him, the offender got out of the driver's seat of the car and walked around to the passenger door

and opened the door. He manoeuvred CB's legs so that her body was facing his while he stood by the passenger door. CB believed that the offender was attempting to have sexual intercourse with her, and she kicked at him a couple of times and said, "No, don't."

[16] The offender then returned to the driver's side of the car and sat in the driver's seat. The offender then called CB a "fucking bitch" again. CB believed she may have asked the offender to take her home again. The offender did not do so.

[17] At that point, CB said she was afraid and realised that the offender was not going to allow her to go home without sexual intercourse occurring. The offender got out of the car again and walked around to the passenger side. The offender bent the victim over outside the car, facing away from him, and had penile/vaginal intercourse with her. At one point, they moved back inside the car and sexual intercourse continued with CB on top of the offender.

[18] At some point while sexual intercourse was occurring, CB saw the headlights of another car coming towards them and she moved off the offender. Sexual intercourse ceased for about "a minute or two" until the other vehicle left, at which time the offender stood outside his vehicle and again engaged in sexual intercourse with CB while she was facing away from him. The offender ultimately ejaculated over the back and legs of CB.

The offender subsequently drove CB back to the house of DM and dropped her there.

The Crown's submissions

[19] It is arguable that the penile/vaginal sexual intercourse which occurred after the digital penetration of CB's vagina by the offender constitutes two separate acts of sexual intercourse, but nothing turns upon whether the evidence is properly characterised as involving one or two acts of sexual intercourse. The parties approached their submissions on the basis that the evidence involved a single alleged act of sexual intercourse, described as an uncharged act of sexual intercourse without consent. For convenience, I will simply refer to the evidence as evidence of the uncharged conduct.

[20] The Crown submitted that the evidence of the uncharged conduct established that he had engaged in an act of sexual intercourse with the victim without her consent additional to the act of sexual intercourse without consent in Count 2. The Crown submitted that evidence of the uncharged conduct may be taken into account in sentencing the offender for the offences found proved by the jury as follows:

a) first, evidence of the uncharged conduct established that the victims "ordeal" extended beyond the conclusion of the act of sexual intercourse in Count 2;

b) secondly, evidence of the uncharged conduct was relevant to, "in committing the charged offence, his motive, his sense of

wrongdoing at the time, the effects on the victim of his conduct and the significant degree of control that he was able to exert over the victim – particularly in the context of a serious deprivation of personal liberty"; and

c) thirdly, evidence of the uncharged conduct was relevant to establishing that the charged offending was part of a "continuing course of conduct" which must be viewed as more serious than an isolated incident.

[21] The Crown identified a number of features of the uncharged conduct which, it was submitted, made that alleged act of sexual intercourse without consent particularly egregious, including:

a) the offender did not wear a condom, exposing CB to a risk of disease and pregnancy;

b) the offender ejaculated inside CB's vagina, increasing the risk of pregnancy; and

c) the duration of the conduct was not fleeting.

[22] In essence, the Crown submitted that I was entitled, as part of the process of determining the facts upon which the offender was to be sentenced, to determine to the standard of beyond reasonable doubt that the accused had engaged in the uncharged act of sexual intercourse without consent. Having done so, the Crown submitted, I was entitled to take into account the

uncharged conduct in determining the objective seriousness of the charged offending and also to determine whether the offender was entitled to any leniency in sentencing for the proven offences. The Crown submitted:

> Whilst the Crown accepts that an offender must not be punished for a crime in which (sic) he has not been convicted, it is not the case that the uncharged conduct has no relevance to the sentencing exercise. If that was the case, the offender would be sentenced as if the ordeal ceased as soon as the count 2 offence was committed. That would be to ignore the proper context of the entirety of the offending.

[23] In support of its submission, the Crown cited the decisions in *Giles v DPP;*[1] *Ross v R*;[2] *Einfeld v R*;[3] *Baines v R*,[4] and *Lago v R*.[5]

The offender's submissions

[24] In his initial written submissions, the offender accepted that the uncharged conduct could be taken into account to rebut a claim for leniency. In subsequent submissions, the offender withdrew that concession and submitted that the uncharged conduct could not be taken into account for any purpose in sentencing him for the offences found proved by the jury.

[25] The offender submitted that the proposal that the uncharged conduct be taken into account in sentencing him was against fundamental principles prohibiting punishment being imposed for offences which had not been admitted by him or proven after trial on indictment in which the conduct was

---

1 [2009] NSWCCA 308 at [67] ('*Giles*').

2 [2016] NSWCCA 176 at [90] ('*Ross*').

3 [2010] NSWCCA 87 at [146] ('*Einfeld*').

4 [2016] NSWCCA 132 at [6] ('*Baines*').

5 [2015] NSWCCA 296 at [49] ('*Lago*').

the subject of a charge. The offender submitted that the Crown's proposal that I should determine whether I am satisfied that the offender engaged in the uncharged conduct (effectively determining that he had committed an offence of sexual intercourse without consent), represented the replacement of his right to trial by jury in respect of that conduct with "trial and conviction" by a sentencing court.

[26] In support of his submission, the offender referred to the decisions in *R v JCW*;[6] *R v D*;[7] *R v Nona*;[8] *R v Mailes*;[9] and *Fisher v R*.[10]

Review of the cases

[27] I will examine the cases cited by the parties, but a useful starting point is the decision of the High Court in *The Queen v De Simoni*.[11]

The Queen v De Simoni

[28] The offender in *De Simoni* entered a plea of guilty in the District Court of Western Australia to an indictment alleging that he stole money from FS with actual violence. This was an offence of robbery contrary to s 391 of the *Criminal Code* (WA). Section 393 of the *Criminal Code* (WA) provided that an offence of robbery carried a maximum term of imprisonment of 14 years, but if the offender wounded any person in carrying out the robbery, the

---

6 [2000] NSWCCA 209 at [54] ('*JCW*').

7 [1995] QCA 329 ('*RvD*').

8 [2022] QCA 26 ('*Nona*').

9 [2003] NSWSC 707 ('*Mailes*').

10 [2008] NSWCCA 129 ('*Fisher*').

11 (1981) 147 CLR 383 ('*De Simoni*').

maximum penalty for the offence was life imprisonment. Section 582 of the *Criminal Code* (WA) provided that if any circumstance of aggravation was to be relied upon, it must be pleaded in the indictment. The term "circumstance of aggravation" was defined in s 1 of the *Criminal Code* (WA) to mean "any circumstance by reason whereof an offender is liable to a greater punishment than that to which he would be liable if the offence were committed without the existence of that circumstance".

[29] The facts provided to the sentencing judge were not objected to by the offender. The facts contained a statement that the offender had struck a heavy blow with a piece of wood to the back of the victim's head during the robbery causing a wound requiring eight stitches. The indictment to which the offender pleaded guilty did not plead that the offence of robbery was committed in a circumstance of aggravation, being that the victim was wounded. The respondent was sentenced to 7 years imprisonment with a non-parole period of 4 years. He appealed against the sentence on the single ground that it was manifestly excessive.

[30] In the Court of Criminal Appeal of the Supreme Court of Western Australia the appeal was upheld and the sentence was reduced to one of 3 years imprisonment with 18 months non-parole. The appeal was upheld, not on the ground of manifest excess pleaded by the respondent, but on a ground raised by the Court of Criminal Appeal itself. The Court of Criminal Appeal held that the fact that the respondent had wounded the victim was a circumstance of aggravation within s 582 of the *Criminal Code* (WA) and that it was not

permissible for the sentencing judge, in imposing sentence, to have regard to any such circumstance of aggravation not pleaded in the indictment.

[31] The Crown applied for special leave to appeal to the High Court. The issues before the High Court on the application for special leave may be summarised as:

a) Was the Court of Criminal Appeal correct to hold that in sentencing the respondent for the offence to which he entered a plea of guilty, s 582 of the *Criminal Code*, properly construed, prohibited the sentencing judge from taking into account evidence of conduct which would amount to a statutory circumstance of aggravation which was not pleaded in the indictment?

b) Was the Court of Criminal Appeal in error in finding that the sentencing judge had relied upon the statutory circumstance of aggravation of wounding in sentencing the respondent?

[32] In granting special leave to appeal, upholding the appeal and remitting the matter to the Court of Criminal Appeal, all of the Justices (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ) answered the second stated question in the affirmative. For this reason the appeal was allowed and the matter remitted to the Court of Criminal Appeal for determination of the respondent's ground of appeal that the sentence imposed by the sentencing judge was manifestly excessive.

[33] With regard to the first stated question, the Court was divided. In delivering the leading judgment for the majority on this issue, Gibbs CJ, (with whom Mason and Murphy JJ agreed) held that the Court of Criminal Appeal had been correct in taking the view that, in sentencing the respondent, "it would not have been right for the trial judge to have had regard to the fact that the respondent had wounded his victim" (at 394).

[34] Gibbs CJ identified the crucial question as:

> …whether a judge can be said to rely upon a circumstance of aggravation within the meaning of s.582, when he takes that circumstance into consideration in imposing a sentence, and by reason of it inflicts a penalty more severe than he would otherwise have imposed.[12]

[35] His Honour rejected a submission by the Crown that s 582 only applied where the circumstance of aggravation would result in a greater maximum penalty being applicable to the offending. After holding that the plain words of the section did not support such a construction, his Honour went on to say:

> At first sight it may seem unlikely that the framers of the Code intended that an offender should be sentenced on the fictitious basis that no circumstance of aggravation existed when it is found by the trial judge that such a circumstance did exist, particularly when such a finding is based upon an unchallenged statement of facts made by the prosecutor after the offender has pleaded guilty. However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles, so far as it is relevant for

12 At 388.

> present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.[13]

[36] It is apparent that much of the judgment of Gibbs CJ to which I have so far referred concerned the proper construction of a statutory provision, being s 582 of the *Criminal Code* (WA). Later, at 389 and following, his Honour considered the position at common law, stating:

> At common law the principle that circumstances of aggravation not alleged in the indictment could not be relied upon for purposes of sentence if those circumstances could have been made the subject of a distinct charge appears to have been recognised as early as the 18th century: *Dominus Rex v. Turner*; and see Chitty, *Criminal Law*, 2nd ed. (1826), vol. 1, p. 231b.
>
> (Footnotes omitted)

[37] Gibbs CJ referred to numerous cases in which that principle had been applied in more recent times, including *R v Bright*,[14] and *Reg. v Huchison*.[15] The latter decision is particularly instructive because it was a case where the impugned circumstances taken into account on sentencing would not have warranted a conviction or convictions for "a more serious offence", in the sense of an offence carrying a greater maximum penalty than that for which the offender was being sentenced.

---

13 At 389.

14 [1916] 2 KB 441.

15 [1972] 1 WLR 398 ('*Huchison*').

[38] In *Huchison*, the offender pleaded guilty to an indictment containing a single count of incest with his daughter. The offender's position was that the offence of incest charged had been an isolated incident, but the victim's deposition alleged that there had been intercourse over a long period. The trial judge took evidence from both the offender and the victim and concluded that the offender had engaged in regular intercourse with the victim. On the basis of that finding, the trial judge sentenced the offender to a term of 4 years imprisonment.

[39] On appeal, Phillimore LJ gave the judgment of the Court of Appeal allowing the appeal and resentencing the offender, Huchison. In doing so, his Honour agreed with submissions made by Huchison's counsel that the course taken by the sentencing judge had, in effect, deprived Huchison of his right to trial by jury in respect of the alleged, uncharged acts of intercourse. Phillimore LJ acknowledged that if the defendant had entered his plea of guilty to a "sample count", matters would have been different. In such a case, his Honour said, "it is well understood that if that course is taken and the defence are notified, a judge is entitled to deal with the whole matter on the basis that the offence in fact was repeated more than once, or there were other similar incidents".

[40] In the subsequent case of *Nguyen v R*,[16] Bell and Keane JJ, at [28], described the "*De Simoni* principle" as an aspect of "the fundamental principle that no

16 [2016] HCA 17 ('*Nguyen*').

person should be punished for an offence of which the person has not been convicted". See also *R v Olbrich*.[17]

Giles v DPP

[41] The first decision in point of time referred to by the Crown was *Giles*. The offender in *Giles* sought leave to appeal against sentences imposed in the District Court on eight charges on an indictment involving sexual offending against his stepdaughter between 1995 and 1999. The offender also invited the sentencing court to take a further seven offences on a schedule pursuant to s 33 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Form 1') into account in sentencing him on Count 6 in the indictment. Leave to appeal was granted, the appeal was upheld and the applicant was resentenced on the ground that the sentencing judge had adopted an erroneous approach to sentencing which resulted in sentences whose notional starting points exceeded the maximum penalties. In a separate judgment, Basten JA noted that it was of critical importance that the offences encompassed points in a course of conduct and were, as the sentencing judge described them, "representative charges". In that context, his Honour made remarks about sentencing on representative charges.

[42] The particular passage in *Giles* cited by the Crown is found at [67] of the judgment of Basten JA, where his Honour said:

> The fact, *which is not in dispute*, that the applicant committed numerous additional offences, similar to those charged, is relevant to

17 [1999] HCA 54 at [18] ('*Olbrich*').

his state of mind in committing the offences charged, his motive, his sense (or absence of sense) of wrongdoing at the time, his willingness to control inappropriate urges for sexual gratification, the effects on the complainant of his conduct and by way of explanation of the fact that the conduct went undetected for a significant period.

(emphasis added)

[43] It is useful to examine the context in which that statement was made. In discussing the proper approach to sentencing on representative charges, Basten JA said, at [47] – [48]:

> There are two reasons why the problems generated by representative charges are intractable. One is that they involve a tension between the jealous protection properly afforded by the courts to the principal that no one should be punished for an offence without the conduct being proved beyond reasonable doubt, or admitted: *Anderson v DPP* [1978] AC 964 at 977-978 (Lord Diplock); *Murrell v R* (1985) 4 FCR 168 at 175 (Fox J, Bowen CJ agreeing); *R v O'Connell* [1993] 2 NZLR 442 at 443. On the other hand, there is a pragmatic consideration that the prosecution be able "to strike the proper balance between overloading an indictment, on the one hand, and, failing to reflect the alleged criminality by charging a limited range of counts, on the other hand": *JCW* at [64] (Spigelman CJ).

[44] Later, at [54], his Honour said:

> There are several ways in which the course of conduct, involving criminal activity extending beyond the charges and the matters mentioned on the Form 1 could, in principle, be taken into account. They are:
>
> (a) uncontroversially, to deny the offender any degree of leniency which might have followed had the charged offences been isolated episodes;
>
> (b) to allow the injury, emotional harm, loss or damage to the victim to be assessed globally, as resulting from the course of conduct, rather than discriminating (if that were possible) between degrees of harm caused by the charged offences and the whole of the harm;
>
> (c) to put each of the individual offences into a higher range of objective seriousness than would otherwise be the case, and

(d) to increase the degree to which the sentences are accumulated.

[45] Basten JA noted that the real issue in *Giles* was whether it was appropriate to take a course of conduct into account, to the extent it had been admitted, in order to place the individual offences in a higher range of objective seriousness than would otherwise be the case.

[46] After considering a number of authorities regarding the use to which evidence of uncharged conduct could be used in sentencing on representative charges, Basten JA expressed the opinion that the fact that the charged offences constituted part of an ongoing course of conduct placed them in a higher range of objective seriousness than would otherwise be the case. It was in this context that his Honour made the statement reproduced at [41] above.

[47] For reasons that will become apparent, it is important to consider how other members of the court in *Giles* approached this issue. Johnson J found the reasoning of Basten JA concerning sentencing on representative counts "persuasive" but was unwilling to join in Basten JA's analysis because it was a matter on which the court had not been fully addressed by the parties.

[48] RS Hulme J said, at [85]-[86]:

> The topic of representative charges has been the subject of innumerable references in this Court and I regarded as settled law in this State that conduct similar to that encompassed by the charges brought, but not itself the subject of charges, may not be taken into account so as to result in the imposition of a sentence higher than would be merited by the conduct charged. Authorities to this effect include *R v Holyoak*

(1995) 85 A Crim R 502; *R v ED* (unreported, NSWCCA, 22 November 1996) at page 10; *R v JCW* [2000] NSWCCA 209; 112 A Crim R 46; *R v MH* [2001] NSWCCA 117 (a 2 judge bench consisting of Wood CJ at CL and Greg James J, and wherein there is a reference to a number of earlier authorities); and *Fisher v R* [2008] NSWCCA 129.

While such conduct is relevant to deny the leniency that might be afforded if the conduct charged were regarded as an aberration or isolated, in light of what has been said in those authorities and others I see no basis for qualifying the basic approach by regarding the uncharged conduct as relevant to subjective features of an offender and thereby inspiring a higher sentence. I see no grounds for regarding the "surrounding circumstances" or the fact that the offences charged were only some of those committed by the Applicant as a reason for imposing penalties higher than otherwise appropriate.

[49] It is apparent that the opinion expressed by Basten JA that the fact that the charged offences constituted part of an ongoing course of conduct placed them in a higher range of objective seriousness than would otherwise be the case was not one adopted by the other members of the court. It is equally apparent that the court in *Giles* was dealing with representative charges.

Einfeld v R

[50] The next case in point of time referred to by the Crown was *Einfeld*. The applicant in *Einfeld* sought leave to appeal in the New South Wales Court of Criminal Appeal against the severity of sentences imposed on him for charges of perjury and perverting the course of justice to which he had entered pleas of guilty. The facts of the perjury charge are set out in the judgment of Basten JA at [7]-[11]:

The circumstances of the two offences may be summarised briefly. On 8 January 2006, the applicant's vehicle was photographed by a camera installed by the Roads and Traffic Authority in Macpherson Street, Mosman, travelling at 60kph in a 50kph zone: at [16].

Ten days later, on 18 January 2006, a penalty notice was issued and sent to the applicant. The applicant later gave evidence that he made a statutory declaration in response to the notice, but the declaration appears to have gone astray. On 12 March 2006, he signed a "Court election notice" as a result of which the matter was listed for hearing in the Local Court.

On 6 May 2006 he completed a "written notice of pleading" indicating his intention to plead not guilty. That document was witnessed by a solicitor. Attached to the document was a letter written by the applicant addressed to the "Presiding Magistrate of the Local Court of New South Wales". The letter, which was tendered in evidence, was headed "The Hon Justice Marcus R Einfeld AO QC PhD". The letter stated in part:

> "I am the defendant and the vehicle involved is mine but as I informed the Police in the notice returned at the time, my plea of not guilty is because I was not the driver of the car at the time and place stated. In fact I do not know the area where it occurred at all. On that day my car was in the control of a visiting friend from the United States to whom I lent it for a couple of days. ... She did not tell me where or with whom she had been driving or that she had been photographed speeding before returning to the US where she was unfortunately involved in a motor vehicle accident and died so I cannot get any more details.
>
> I am sorry for the late notice but I have been travelling out of Sydney. I am happy to come to the court on a convenient day to swear to these facts if required."

On 7 August 2006 the applicant gave evidence in the Local Court, including the following answers given to questions asked by his solicitor:

> "Q. Justice Einfeld, do you recall where you were on 8 January 2006?
>
> A. Yes, I was in Forster.
>
> ...
>
> Q. Did you take your vehicle with you?
>
> A. No.
>
> Q. What did you do with your vehicle?
>
> A. I lent it to an old friend of mine who was visiting from Florida.
>
> Q. I think that was Professor Theresa Brennan?
>
> A. Yes, it was.
>
> ...

Q. I think that some time after the 8th you received a notice advising that she had committed an offence whilst having your vehicle?

A. I did.

Q. Did you complete that statutory declaration which nominated her as the driver of the vehicle at the time of the offence?

A. I did.

Q. What did you do with that statutory declaration?

A. I sent it to the address that was given."

This evidence was the subject of the perjury charge.

[51] The false statement which was the basis of the charge of perjury was particularised by the Crown as the statement made by the applicant that he was not the driver of the identified vehicle on the date in question. In sentencing the applicant, the sentencing judge stated that "If it was knowingly false for Mr Einfeld to say in his evidence that he was not the driver of the vehicle on 8 January 2006 when the offence was committed, that it was necessarily also knowingly false for Mr Einfeld to say in his evidence that on 8 January 2006 he was in Forster and that he had lent the vehicle to Professor Teresa Brennan." On appeal, the applicant complained that the sentencing judge had wrongly taken into account a false statement which was not the subject of a charge.

[52] In addressing the applicant's complaint, Basten JA said, at [144]-[148]:

> There are various ways in which conduct constituting an uncharged offence may properly be taken into account. In *De Simoni,* Gibbs CJ referred to the decision of the English Court of Criminal Appeal in *R v Huchison* [1972] 1 WLR 398, in support of the principle his Honour was stating: at 390. *Huchison* involved a charge of a single count of incest between father and daughter, to which the appellant had pleaded guilty. However, the daughter's statement referred to repeated courses

of intercourse over a significant period. This material was relied upon by the sentencing judge. That was held to be inadmissible, but Phillimore LJ, in delivering the judgment of the Court, stated at 399:

> "Of course there are cases where the prosecution puts forward a count as a sample count, and in those cases it is well-understood that if that course is taken and the defence are notified, a judge is entitled to deal with the whole matter on the basis that the offence in fact was repeated more than once, or there were some other similar incidents. But that is not this case; this was put forward as a single offence …."

The use of sample (or representative) counts has been the subject of extensive consideration in recent years, noted by this Court in *Giles v Director of Public Prosecutions* (NSW) [2009] NSWCCA 308 at [45]-[66] (in my judgment), [85]-[86] (Hulme J) and [102] (Johnson J). There was nothing in the judgments in *De Simoni* which suggested that the Court was seeking to vary the approach to sentencing for representative charges.

To read the principle established by *De Simoni* beyond its immediate context would give rise to consequences which were not addressed and which would involve an extrapolation of the principle beyond that which is necessary to give effect to its purpose. For example, a course of unlawful conduct may well give rise to a number of possible charges. If the prosecution proceeds on one count only, it does not follow that the surrounding conduct cannot be taken into account in sentencing. The surrounding conduct cannot give rise to a more serious offence, but it can demonstrate the degree of seriousness with which the charged offence should be viewed.

The purpose underlying the principle is to avoid unfairness to the accused who may be faced (on the sentencing hearing) with complaints about his conduct which did not form part of the charge and which he did not expect to meet when he pleaded guilty. However, the fact that such conduct may be relevant often leads an offender to seek to establish the factual basis upon which the matter will proceed if he or she pleads to a particular count. Further, the elements identified in the present case as false, although not the subject of separate charges, were conceded by the plea in respect of the particular false statement. The applicant did not deny making the statements, nor could he deny their falsity. However, it was not the moral culpability flowing from their falsity which was taken into account; it was the characteristic attaching to the charged false statement, for which they provided the evidential basis.

Whether or not an offence is part of a planned or organised criminal activity is identified in the *Sentencing Procedure Act* as a matter of aggravation or mitigation, respectively: s 21A(2)(n) and (3)(b). It

> would be surprising if the law permitted such a matter to be taken into account so long as the evidence of planning (or the absence thereof) involved conduct which was not criminal, but did not permit it if the conduct itself involved a criminal activity. (If that were the general law, then such a limitation would properly be read into sub-ss (2) and (3): see s 21A(4).) However, for the reasons set out above, *De Simoni* does not impose such a restriction. The challenge to that part of his Honour's reasoning must be rejected.

[53] The particular passage in the above extract relied upon by the Crown was [146]. Although it is of no particular importance in the present case, I note that the *Sentencing Act 1995* (NT) does not contain a provision equivalent to s 21A (2)(n) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), referred to by Basten JA, requiring a sentencing court to take into account as an aggravating circumstance that an offence "was part of a planned or organised criminal activity".

Lago v R

[54] The next case cited by the Crown was *Lago*. The offender in *Lago* sought leave to appeal against sentences imposed for an offence of supplying a prohibited drug upon which he was convicted after a trial. The charged supply took place on 10 April 2013. Evidence of an earlier drug supply transaction which was not the subject of any charge was led by the Crown at trial as tendency evidence. The earlier supply transaction took place on 30 January 2013.

[55] In the sentencing proceedings, a Pre-Sentence Report prepared by Community Corrections recorded the offender as saying that he agreed with the facts as presented by the police but would not elaborate further than to

say “a mate asked me to help him out, I initially refused and arranged for someone else to drop off the drugs, but that fell through so I did it and got caught”. In a report from a psychiatrist used at the sentence proceeding, it was recorded that the offender had said, “It was the only time. I didn’t mean to do it.”

[56] In her sentencing remarks, the trial judge rejected the accounts given by the offender to Community Corrections and the psychiatrist. With respect to the evidence of the earlier drug supply on 30 January 2013, her Honour found, beyond reasonable doubt, that the offender supplied prohibited drugs to another person on that date, although the quantity of the drugs and the price paid were unknown. Her Honour went on to say:

> In any event, the relevance of that I accept is that, as the Crown said, and indeed defence counsel submitted, the Crown submitted I would find beyond reasonable doubt the supply which I have said I have and that I can use that evidence when determining the level of involvement that the prisoner had in a drug supply network and in finding that the supply on 10 April 2013 was not an isolated incident.[18]

[57] In seeking leave to appeal, it was argued that the trial judge had used her finding with regard to the drug supply transaction on 30 January 2013 as a circumstance of aggravation in sentencing for the charged offence, and that this was contrary to the principal expressed in *De Simoni*. In rejecting that argument, Gleeson JA, with whom Button and Fagan JJ agreed, said at [41], “The *De Simoni* principle is breached only if the offender is actually

18 At [26].

punished for the conduct constituting the uncharged offence or aggravating circumstance."

[58] Gleeson JA found that the trial judge had not treated her finding in relation to the uncharged transaction on 30 January 2013 as an aggravating factor in sentencing for the charged offence. Gleeson JA went on to say, at [47]-[49]:

> First, her Honour relied upon the earlier conduct to find that the subject offence was not an isolated offence. It is entirely orthodox for the sentencing judge to admit context evidence to displace a submission that the offences were single, isolated events: *Peiris v R* [2014] NSWCCA 58 at [64] (Leeming JA; Button J and R S Hulme AJ agreeing). That is what her Honour expressly said she was doing in the passage in her remarks on sentence extracted at [26] above.
>
> Next and related to the first matter, her Honour relied upon the earlier conduct when rejecting the applicant's assertions recorded in the presentence report and the psychiatrist's report, that he was only delivering the drugs for a mate, and "It was the only time. I didn't mean to do it". Evidence may be used "to assess the veracity and reliability of the applicant ... not ... as a circumstance of aggravation to be taken into account when sentencing the applicant": *Sills v R* [2011] NSWCCA 271 at [57] (Hoeben J; Meagher JA and Rothman J agreeing).
>
> Finally, her Honour also used the earlier conduct as informing the seriousness of the subject offence (in what was not an isolated offence), as the passage in her remarks on sentence extracted at [30] above demonstrates. There is no breach of the *De Simoni* principle when the uncharged conduct is used to inform the seriousness of an offence for which the offender is to be sentenced. As Basten JA explained (Hulme and Latham JJ agreeing) in *Einfeld v R* [2010] NSWCCA 87; 200 A Crim R 1 at [146]:
>
> > a course of unlawful conduct may well give rise to a number of possible charges. If the prosecution proceeds on one count only, it does not follow that the surrounding conduct cannot be taken into account in sentencing. The surrounding conduct cannot give rise to a more serious offence, but it can demonstrate the degree of seriousness with which the charged offence should be viewed.

Baines v R

[59] The penultimate case referred to by the Crown was *Baines*. The offender in that case was convicted after trial of 11 offences of indecent assault involving seven different women. He also entered pleas of guilty to two further charges on a separate indictment. The offences occurred in the context of the offender's employment as a masseur at a gymnasium. In sentencing the offender the trial judge held that the sentence on each charge had to take into account that each was part of a whole course of conduct.

[60] The offender sought leave to appeal against the sentences imposed by the trial judge, alleging, inter alia, that the trial judge had erred in taking into account uncharged acts. Basten JA, with whom Rothman J agreed, said on that issue, at [5]-[7]:

> The first ground of appeal alleged that the sentencing judge had taken into account "uncharged acts" as a factor increasing the objective seriousness of the offences. That was simply not so: what the judge said was that the applicant had embarked on a course of conduct, by reference to the 13 offences which were before her for sentence, involving conduct extending over some four years. It would, of course, be wrong in sentencing an offender for a specific offence to increase the penalty on account of other misconduct, whether separately charged or not. However, it is not an error to assess the seriousness of the specific offence by reference to surrounding circumstances, including other offending which is established beyond reasonable doubt.
>
> There is a sense in which it is possible to characterise that use of other misconduct as denying leniency for an isolated instance of offending. However, it is not correct to say, as the applicant submitted, that other offending "cannot be taken into account on sentence unless the offender admits them or in order to rebut the offender's submission that the offence was an isolated incident". Nor are the statements of Spigelman CJ in *R v JCW* inconsistent with that proposition. The contrary suggestion depends on reading a statement in the judgment out of context. Thus, at [55], Spigelman CJ stated:

> "The effect of the judgment of the Court of Appeal is that, absent an admission, the Court should not take into account commission of other offences when sentencing for particular offences charged. The position is otherwise, it appears, in the case of an admission."

To suggest that this proposition is inconsistent with taking into account matters proved beyond reasonable doubt at a trial involves reading a statement made in a particular factual context as if it contained a general principle applicable in other contexts when, as a matter of principle, that could not be right.

[61] In a separate judgment, Fagan J (dissenting in the result but not on this issue) said, at [127]-129]:

> In *Einfeld v Regina* [2010] NSWCCA 87; (2010) 200 A Crim R 1 Basten JA (with whom Hulme and Latham JJ agreed) said at [146]:
>
> > "... a course of unlawful conduct may well give rise to a number of possible charges. If the prosecution proceeds on one count only, it does not follow that the surrounding conduct cannot be taken into account in sentencing. The surrounding conduct cannot give rise to a more serious offence, but it can demonstrate the degree of seriousness with which the charged offence should be viewed."
>
> See also *Lago v R* [2015] NSWCCA 296 at [49].
>
> In *R v J.R.D.* [2007] NSWCCA 55 Howie J explained the significance of taking into account other charged offences as bearing upon the relative seriousness of any individual count, as follows:
>
> > "[29] ... Clearly it may be a fact or circumstance relevant to the commission of a particular offence that, at or about the time when that offence was committed, the offender committed other offences. It would be relevant, for example, to a finding whether the particular offence was an isolated 'fall from grace' or whether it was merely an instance of a course of criminal conduct in which the offender was involved at the relevant time.
> >
> > [30] So in sentencing the respondent for any one offence it was highly relevant that all of the offences and the matters on the Form 1 were committed in a period of about four months and that each offence represented a different aspect of the respondent's overall criminality in that period."
>
> That consideration has some bearing in this case although the multiple counts were all individually opportunistic and reflective of a tendency on the part of the applicant rather than any concerted criminal enterprise or system. A course of offending may also make it

> appropriate to impose higher penalties for offences later in time, where there appears a persistent repetition of the commission of like offences with a mounting and/or accelerating level of criminality*: Regina v Swadling* [2004] NSWCCA 421 at [61] – [68]; *R v Bavadra* [2000] NSWCCA 292 at [37]; *Qing An v Regina* at [75].

Ross v R

[62] The final case referred to by the Crown was *Ross*. The applicant in *Ross* sought leave to appeal against a sentence imposed on him for an offence of murder. Ross entered a plea of not guilty to the charge but was convicted after trial. The grounds of appeal included grounds that the trial judge erred in finding that the offence was well above the mid-range of offences of murder and that the sentence imposed was manifestly excessive. The leading judgment was delivered by Hall J, with whom Hoeben CJ at CL and Bellew J agreed. The particular passage relied upon by the Crown is found in the judgment of Hall J at [90]:

> An examination of the comparator cases, including in particular the cases of *PJS v R* and *Hill v R*, I confirm (sic) the Crown's written submissions at [27] and [28] which were as follows:
>
> > Comparison of the acts of violence inflicted on children in two other murders does not support a conclusion that the sentencing judge's classification of the objective seriousness of this offence was not reasonably open. As is often the case when comparing individual offences, there are varying differences between this case and *PJS* and *Hill*. The assault in *PJS* was a spontaneous outburst of uncharacteristic violence, unlike this offence, which was a brutal response to (the victim) wetting her pants, and occurred against a background of violence. The offence in *Hill* involved two discrete injuries, unlike this case which involved at least five blows to the victim's head. An unlike the offenders in *PJS* and *Hill*, the applicant's continuing failure to obtain any help for the deceased (over a period of about 36 hours) was causally connected to her death.

> As his Honour noted, the violence inflicted on (the victim) by the applicant was the culmination of weeks of beatings and abuse. This was a matter that properly bore on the assessment of the objective seriousness of the assaults that finally led to her death: *Giles v DPP* [2009] NSWCCA 308 at [46]-[68] per Basten JA (see also the comments of Johnson J at [102]-[104]; *Einfeld* [2010] NSWCCA 87 at [146]; *Baines v R* [2016] NSWCCA 132 at [6] per Basten JA and [127] per Fagan J.

[63] In the above passage, Hall J quotes with apparent approval from the written submissions provided by the Crown. Whilst it is of no particular importance in the present matter, I note that to the extent that those submissions were intended to convey the proposition that the decision in *Giles* was authority for the broad proposition that uncharged conduct which would constitute criminal offences could be used in sentencing after conviction following trial and without the agreement of the offender, they do not accurately describe the effect of the decision.[19]

[64] I will now turn to the cases cited by the present offender in support of his submission that evidence of the uncharged alleged act of non-consensual penile/vaginal sexual intercourse cannot be used for any purpose in sentencing him on the charges upon which he was convicted by the jury.

R v D

[65] The first case in point of time was *R v D*.[20] The offender, D, was convicted after trial on one count of indecent dealing with a girl under the age of 16 years. The offender was the complainant's grandfather. The offender had

19 See [41]-[49] above.

20 [1996] 1 Qd R 363 ('*RvD*').

also been indicted on three counts of incest and one count of attempted incest. During the trial the Crown withdrew one of the incest counts and the judge directed an acquittal with respect to another, but left attempted incest on the same facts to be considered by the jury. The jury acquitted on that count. The jury were unable to reach a verdict with respect to the remaining counts of incest and attempted incest. At the conclusion of the trial the Crown indicated that it would proceed no further with the charges in respect of which no verdict was returned. The offender was sentenced to a lengthy period of imprisonment. He sought leave to appeal against that sentence.

[66] The particulars of the incident constituting the count on which the offender was convicted occurred in 1990, when the complainant was aged 15 years. In her evidence, the complainant said that the offender had behaved in the same way towards her nearly every weekend when he was home. In sentencing the offender, the trial judge said that he had regard to the offender's sexual abuse of the complainant over a lengthy period, according to the evidence of the complainant, "Not for the purpose of imposing any heavier sentence…for the commission of this offence… But I have regard to it in order to discover or to reveal the real nature of the relationship between yourself and your granddaughter, so as to properly assess the appropriate sentence for that offence."[21]

21 At 366.

[67] The Queensland Court of Appeal (Fitzgerald P, Byrne and White JJ) held that it was wrong for the trial judge to have taken the complainant's evidence that the offender had committed other offences against her into account when sentencing him for the offence on which the jury had convicted him. It is necessary to set out in some detail the process by which the court came to that conclusion.

[68] The court noted that there was continuing uncertainty with respect to the adverse findings which may be made against a convicted person and used by a sentencing judge. In particular, "questions arise with respect to findings which involve offences by the person to be sentenced additional to, or more serious than, the offence of which he or she has been convicted".[22] One of the circumstances in which the issue frequently arose was in prosecution of sexual offences "in which evidence of the sexual relationship between complainant and accused was admitted at trial and revealed offences other than the offences charged".[23] Similar problems could also arise when sentencing after a plea of guilty.

[69] The court conducted a lengthy review of authorities in the High Court, Queensland, New South Wales, Western Australia and England, noting apparent tensions between the approaches taken in different jurisdictions. I will refer to a number of those decisions below. After conducting the review, the Court of Appeal concluded, at 403-404:

---

22 At 367.

23 Ibid.

Sentencing judges ought experience little difficulty in practice if there is unqualified adherence to the fundamental principles which emerge from the decisions of the High Court in *De Simoni* and subsequent cases. We will try to summarise those principles in a manner which should be adequate for most purposes

1. Subject to the qualifications which follow:

   (a) a sentencing judge should take account of all the circumstances of the offence of which the person to be sentenced has been convicted, either on a plea of guilty or after a trial, whether those circumstances increase or decrease the culpability of the offender;

   (b) common sense and fairness determine what acts, omissions and matters constitute the offence and the attendant circumstances for sentencing purposes (cp *Merriman* at 593, *R.v. T.* at 455); and

   (c) an act, omission, matter or circumstance within (b) which might itself technically constitute a separate offence is not, for that reason, necessarily excluded from consideration.

2. An act, omission, matter or circumstance which it would be permissible otherwise to take into account may not be taken into account if the circumstances would then establish:

   (a) a separate offence which consisted of, or included, conduct which did not form part of the offence of which the person to be sentenced has been convicted;

   (b) a more serious offence and the offence of which the person to be sentenced has been convicted; or

   (c) a “circumstance of aggravation” (Code, s.1) of which the person to be sentenced has not been convicted; i.e., a circumstance which increases the maximum penalty to which that person is exposed.

3. An act, omission, matter or circumstance which may not be taken into account may not be considered for any purpose, either to increase the penalty or deny leniency; and this restriction is not to be circumvented by reference to considerations which are immaterial unless used to increase penalty or deny leniency, e.g., “context” or the “relationship” between the victim and offender, or to establish, for example, the offenders “past conduct”, “character”, “reputation”, or that the offence was not an “isolated incident”, etc.

To withhold leniency by reference to offences of which a person being sentenced has not been convicted is, in our opinion, to punish that

> person for those offences as surely as if additional punishment were imposed by reference to those offences. A person who has only been convicted of an isolated offence is entitled to be punished as for an isolated offence, not on the basis that the only offence of which he or she has been convicted was not isolated but part of a pattern of conduct with which he or she has not been charged and of which he or she has not been convicted.

[70] Later, at 404, the Court of Appeal continued:

> We should add that, in our view, it would be intrinsically unfair to charge a person with a single offence and then adduce evidence of other offences in a proceeding in which his or her primary concern to defend the offence charged before the jury might conflict with his or her need to meet the possibility that, if he or she is convicted of the offence charged, the judge may "convict" him or her of the other offences and treat him or her more harshly, or less leniently.

[71] The Court in *R v D* referred at length to its earlier decisions in *R v Cooksley*[24] and *R v Boney*.[25] I will consider both of those decisions. The offender in *Cooksley* was tried on a single charge of incest with his daughter. At trial, evidence was admitted bearing upon the previous history of the relationship between the offender and his daughter demonstrating that the offender had a "guilty passion" towards the complainant. In the course of sentencing the offender, the trial judge referred, inter alia, to the previous relationship. He was sentenced to a lengthy term of imprisonment. The offender sought leave to appeal against sentence.

[72] Andrews S.P.J., with whom Kelly J agreed, referred, at 407, to the reception of evidence of prior misconduct at the trial:

---

24 [1982] Qd R 405 ('*Cooksley*').

25 *Ex parte Attorney-General* [1986] 1 Qd R 190 ('*Boney*').

> Evidence as to prior misconduct was properly placed before the jury in order that it might have a logical background consisting of history of the behaviour of the accused towards his daughter against which it might better form a judgment upon allegations against him bearing more directly upon his conduct on the occasion in issue.

[73] His Honour noted that s 650 of the *Criminal Code* (Qld) provided that a court, before passing sentence, may receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. His Honour then said:

> In my view in such circumstances the Court may hear evidence of the development of a passionate relationship of an accused towards the victim of his (or her) passion without involving the establishment of other offences and certainly not for the purpose of adding to the severity of punishment attracted by a single subject defence, thus seen in proper perspective.[26]

[74] Andrews S.P.J. Then referred to the decision of the Court of Criminal Appeal in *R v H*,[27] a case which was a Crown appeal against inadequacy of sentence. It is useful to consider the circumstances in *H.* The offender entered a plea of guilty to a single charge of incest on a specified date. A statement by the victim alleged that incestuous conduct had taken place for some four years, and that more recently it was repeated with a frequency of once every two or three months. The offender conceded that there had been earlier incestuous conduct but did not admit its frequency. Counsel for the offender submitted that regard should only be had to the single incident charged and admitted, and the trial judge acceded to that submission without

---

26 At 409.

27 (1980) 3 A Crim R 53 (*'H'*).

objection from the Crown. Several witnesses gave evidence at trial of the offender's good reputation. This evidence was not challenged by the Crown at trial.

[75] Moffitt P said, at 61:

> Having regard to the form in which the Crown elected to charge the respondent is clear that the sentence which (the trial judge) was called on to pass was that appropriate for the single act of incest charged and not for any earlier acts of incest or of sexual interference with the girl. However, it is also clear that the earlier conduct of the respondent in relation to his daughter was relevant to and ought to have been considered in the evaluation of the criminality of the offence charged, particularly having regard to the claims made by and on behalf of the respondent as to the circumstances in which he committed the particular crime which he admitted.

[76] Some assistance in understanding the intended meaning of the last sentence in the above extract may be found by considering what Moffitt P went on to say at 62:

> However, the consequence of charging the respondent with the one act of incest did not require or justify his past relationship with his daughter and in particular his sexual molestation of her being ignored. What counsel for the respondent sought to do, and it seems did with some success, was to have his past conduct ignored and have the single act of incest evaluated as though it was an isolated act. There was made an artificial case quite contrary to the truth. By ignoring the true position, the single act became the one mistake of a man who succumbed to a sudden temptation put before him by a daughter who, so it was put, may have offered the temptation deliberately to entrap him.

[77] In a separate judgment, Begg J said at 71:

> It is trite law that when an indictment alleges one offence only, the accused pleads guilty to that offence only and can only be sentenced in respect of that offence. That is the position here: on this indictment he

> can only be sentenced for the act of incest therein charged. But when the court is considering what are commonly called the subjective elements of the case, namely the antecedents and a good character of the accused, the effect of the crime upon other members of the family and of the disgrace visited upon the accused when he is found out, the extent to which leniency has to be applied, can only be gauged by seeing the real relationship between the respondent and the victim.

[78] Street CJ, while dissenting in the final result, also considered it to have been open to the trial judge to take into account evidence of the earlier relationship between the offender and the complainant for particular purposes in sentencing, saying, at 59:

> It has been contended by the Crown on this appeal that the evidence indicated that the actual offence charged was not a single isolated individual offence but was the culmination of a series of similar offences. In the view which I take this submission is not open to the Crown. The case was presented, the plea of guilty was proffered and maintained and the judge invited to and did deal with the case as one involving a single episode of incest. There is no evidence of any earlier offence of incest and it would have been wrong for his Honour, equally as it would in my opinion have been wrong for this Court, to determine the matter of sentence upon an unproved assumption that there had been earlier acts of incest (*Huchison* [1972] 1 W.L.R. 398; Archbold's *Criminal Pleading Evidence and Practice* (40th edition) par. 634).
>
> It does not necessarily follow that the exclusion of any suggestion of an earlier offence of incest should lead to a disregard of the context in which the present offence was committed. The respondent, although asserting to the police that he had "done a stupid thing" and that "it just happened" gave answers in questions 19 and 20 of the record of interview suggestive of prior sexual misconduct towards his daughter. The Crown is entitled to point to this as negativing such benefit as the respondent might otherwise have sought to obtain from the assertion that this was a wholly spur of the moment lapse, unprecedented by anything in any way irregular in his earlier conduct towards his daughter. But, in the light of the specific charge against him and the course of proceedings at the sentencing hearing, it is not correct to assert, as the Crown seeks to do on this appeal, that the respondent is to be sentenced on the basis that this act of incest is the culmination of a series of similar offences and that the sentence should accordingly reflect what is said to be the criminality involved in prior acts of incest.

[79] Returning to *Cooksley*, McPherson J, after referring to a Crown submission that the trial judge had acted in accordance with a long-standing practice in cases of this kind, said at 417:

> But the principal that a person may be sentenced only for offences in respect of which he has been arraigned, tried, and found guilty by the verdict of the jury, is plainly so fundamental to the legal system that considerations of convenience and established practice cannot properly be permitted to prevail against it. The conclusion of law that follows from the foregoing is that, on the authority of *R. v. Huchison* and *H.* as well as the other authorities referred to, the sentencing judge may not properly take into account for the purpose of punishing the accused, other offences, whether similar or not, in respect of which the accused has not been convicted, unless perhaps the accused explicitly admits the offences in question; and that this is so even where the evidence at trial or on sentence discloses the existence of such offences.

[80] The second case referred to in *R v D*, the case of *Boney*, was a Crown appeal against sentence imposed on a plea of guilty to manslaughter accepted by the Crown on a charge of murder. The victim was an 85-year-old woman and the offender was an 18-year-old male. The offender disputed the facts of the offence as asserted by the Crown. The sentencing judge, sitting alone and without a jury, heard evidence and made findings of fact before passing sentence. A post-mortem examination determined that the cause of death was asphyxiation consistent with being smothered by a hand or a pillow. The deceased's body showed signs of sexual activity and the Crown case was that the offender had engaged in non-consensual sexual intercourse with the deceased, either before or after her death, and had made admissions to police of having sexual intercourse with her.

[81] The sentencing judge found that the deceased died by asphyxiation caused by acts of the offender. The sentencing judge also found that the offender had sexual intercourse with the offender "just prior" to his killing her.

[82] In separate judgments, Macrossan J and McPherson J agreed (Andrews CJ dissenting) that the appeal should be dismissed. McPherson J noted that on appeal, the Crown relied on two circumstances attending the offence that, it submitted, required a sentence to be imposed longer than that imposed by the sentencing judge. One was that the victim was killed by asphyxiation most likely caused by a pillow or a hand; and the other that sexual intercourse had taken place, on the sentencing judge's findings, shortly before her death. There was a compelling inference, his Honour said, that the victim was killed by asphyxiation in the course of preventing her from struggling or crying out while she was being raped. It was not credible that the victim would have consented to sexual intercourse with the offender.

[83] The question to be resolved, his Honour said, was whether regard may properly be had to those circumstances as part of the sentencing process.

[84] McPherson J determined that the case fell to be determined by the principles in *De Simoni*. After discussing the various judgments delivered in that case, and in the case of *R v Harrison,*[28] his Honour said, at 208-209:

> If the foregoing propositions or principles are applied to the evidence presented and the facts found in this case, it becomes clear that the circumstance that the applicant may have raped his victim is not a

28 (1909) 2 Cr. App. Rep. 94 ('*Harrison*').

matter to which consideration may be given in imposing sentence in this case. It is true that the sentencing judge made findings that were consistent with the conclusion that an act of rape had been committed by the applicant. It does not follow that a jury would have arrived at the same result. Other considerations apart, the standard of proof of facts for sentencing purposes has in Queensland been held to be the balance of probability and not beyond reasonable doubt: *R v Welsh* [1983] 1 Qd R. 592. More "fundamental and important" than this is the fact that the applicant was neither charged nor convicted of rape. He cannot therefore be punished for that offence: *R v de Simoni, supra* at 472 col.1B - per Gibbs C.J.; at 474 col.2C *per* Wilson J. Nor is it permissible to attempt to escape or diminish the impact of the rule by describing the applicant's conduct in less heinous terms, such as a non-consensual sexual intercourse or a forceful invasion of bodily integrity or privacy. Having accepted a plea of guilty to an offence less serious than the facts might warrant, it was not open to the Crown to ask the judge to rely on facts that would have rendered the offender liable to a more serious penalty: *R v de Simoni*, supra, at 473 col.1D, *per* Gibbs CJ.

[85] Macrossan J addressed this issue at 205-206:

The High Court has dealt recently with the principles which should be applied when a prisoner has to be sentenced in circumstances disclosing the commission of other serious offences which have not been charged and which accordingly, are not admitted under any plea which has been entered. The two cases are *R. v. De Simoni* (1981) 147 C.L.R. 383 and *Kingswell v. The Queen* (1986) 60 A.L.J.R. 17 in which the decision was handed down on November 18, 1985. Although the High Court was largely occupied in these cases with circumstances where it might be necessary to state matters of aggravation in an indictment and with the effect of not stating in an indictment matters which are defined as circumstances of aggravation, it didn't make a number of relevant pronouncements of general principle. The reasons of the Chief Justice became the reasons of the majority in *De Simoni*. At p. 389 the Chief Justice there stated "The general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no-one should be punished for an offence of which he has not been convicted." The statement of Darling J in *R v Bright* [1916] 2 K.B 441 at 444 was accepted. At that page His Lordship said that a judge "must not attribute to the prisoner that he is guilty of an offence with which he has not been charged." It was accepted by the Chief Justice at p. 392 in *De Simoni* that in cases where the offence has been accompanied by circumstances of aggravation which are not charged, the "trial judge

> may be required, in sentencing, to take an artificially restricted view of the facts".

[86] I will very briefly note that *Harrison* was a case in which the offender was indicted for rape but convicted only of indecent assault. The trial judge imposed the maximum sentence, which was reduced on appeal. In upholding the appeal, Jelf J said that the trial judge had not been at liberty to take into consideration that the prisoner might have been guilty of rape.

[87] The Court in *R v D* reviewed the English decisions in *Huchison, R v Anderson*[29] and *R v Courtie*,[30] which, the Court said, demonstrated in England a strict adherence to excising uncharged criminal activity from consideration when sentencing.

[88] The Court in *R v D* also referred to the decision of the Victorian Court of Criminal Appeal in *R v Medcraft*.[31] The offender in *Medcraft* entered a plea of guilty to one count of theft in the County Court and was sentenced to a term of imprisonment. He applied for leave to appeal on the ground, inter alia, that the sentencing judge had erred in finding as an aggravating circumstance that the victim was drugged. After referring to the decision in *De Simoni*, the Court (Phillips CJ, Crockett and Southwell JJ) said, at 185:

> The sentencing judge appears to have treated the reference to "a more serious offence" [in *De Simoni*] as being a reference to an offence to be judged as being more serious than that for which sentence is to be imposed by reference only to maximum penalty prescribed by law with

29 [1978] A.C.964.

30 [1984] A.C. 463.

31 (1992) 60 A Crim R 181 ('*Medcraft*').

> respect to each of the offences… We think that if this was his view his Honour was in error in so interpreting the learned Chief Justice's remarks. We think that the Chief Justice meant "a more serious offence than the offences for which the prisoner is being sentenced".
>
> In one sense any circumstance of aggravation renders the offence charged "more serious", just as any circumstance of mitigation renders it "less serious". It is plain that a judge can, indeed must, take into account those circumstances which make the offence more or less serious, as the case may be.
>
> ….
>
> The matter may be looked at this way: suppose that the applicant had also been charged with a count of administering a substance contrary to s 19 [of the *Crimes Act 1958* (Vic)] and had been acquitted of that charge (whilst still admitting his guilt on the count of theft), could this circumstance of the substance having allegedly been administered be taken into account with regard to the sentence for theft? Clearly not as the judge cannot form a view of the facts which conflicts with the jury's verdict.
>
> On the other hand, if the Director of Public Prosecutions wished to establish that administration of the drug should be proved so that the circumstances of the theft can be shown to be more serious than would otherwise be the case, one would have expected the applicant to have been charged with an offence under s 19. What has in effect occurred is that the applicant has been given a sentence that included a component referable to a different indictable offence the proof of which in the circumstances has been transferred from a jury to a judge. Criticism of the adoption of such a course will lessen as the uncharged offence diminishes in seriousness. But the offence created by s 19 is undoubtedly a most serious crime. Just when circumstances that amount to an offence might properly be looked at as circumstances of aggravation will not always be easy to determine.

[89] The offence under s 19 of the *Crimes Act 1958* (Vic) was one of administering a drug to another without their consent and carried a maximum penalty of 7 years imprisonment. The offence of theft to which the offender had pleaded guilty carried a maximum penalty of 10 years imprisonment. In that context, the Court said, at 188:

> In our opinion, while the offence under s 19 is prima facie of lesser gravity than theft, it remains true that it is a serious offence and it was not, in our opinion, "fair" to take the commission of that offence into account. As a matter of degree, that offence should be regarded as more serious than, for example, the "relatively minor indecencies that are directly associated with an act of rape" referred to by Cox J. An act of indecency committed during the act of rape may be of little consequence, having regard to the gravely serious nature of the principal offence. The drugging into unconsciousness of a proposed victim of theft is not, we think, an act of minor importance relative to the theft.

[90] The quotation attributed to Cox J in the above passage is a reference to the decision of the Supreme Court of South Australia sitting In Banco (Jacobs, Cox and Matherson JJ) in the case of *R v Teremoana*.[32] The offender in *Teremoana* was originally charged with three counts of attempted murder and another count of doing an act that was likely to endanger the life of another. The Crown did not proceed with those charges but presented an indictment that charged only attempted arson. The offender pleaded not guilty and was convicted after trial. The question which arose in *Teremoana* was the extent to which the sentencing judge could take into account, in sentencing for the single offence of attempted arson, the sentencing judge's finding that the offender must have realised that starting a fire in the victim's house was likely, in the circumstances, to create physical danger to the victim.

[91] The majority of the Supreme Court (Matherson J dissenting) held that the sentencing judge had been entitled to take the finding into account in sentencing the offender. In coming to that conclusion, Cox J said, at 38:

---

32 (1990) 54 SASR 30 ('*Teremoana*').

> Plainly if the defendant has already been acquitted by the jury on one particular count the judge may not have regard to allegations distinctive to that count when sentencing the defendant on other counts on which he has been found guilty. The situation will be essentially the same when he pleads guilty to one count and the Crown decides not to press a related charge of a serious offence on the same information, or indeed where a related charge could have been laid but in fact was not. See, for example, *R v King* (1925) 25 SR (NSW) to 18; *Lovegrove v The Queen* [1961] Tas SR 106; *R v Toomey* [1964] Crim LR 419 and *R v Boney*; *Ex parte Attorney-General* [1986] 1 Qd R 190.
>
> .....
>
> However, it is certainly not a universal rule that the judge, when sentencing for the offence specifically charge in the information, may never have regard to relevant actions of the defendant that, strictly speaking, constituted separate offences. If they were offences of lesser gravity than the offence of which the defendant has been convicted, then it will be a matter of degree and fairness whether they may properly be taken into account as part of the circumstances surrounding the offence charged. If a burglar is disturbed in the course of ransacking a house, and seriously assaults the victim, the assault should be separately charged and not regarded as a mere matter of aggravation of the burglary. *R v Parsell* (1980) 28 SASR 369. On the other hand, relatively minor indecencies that are directly associated with an act of rape, though serious enough in themselves, are often not separately charged but are nevertheless taken into account by the sentencing judge as circumstances of aggravation.

R v JCW

[92] The next case in chronological order referred to by the present offender in support of his submission was *R v JCW*.[33] The appellant, JCW, was sentenced in the District Court of New South Wales on four counts of historical sexual offending towards his daughters. With the consent of JCW, he was sentenced on the basis that these charges were representative of a systematic course of abuse towards one of the victims. On appeal after sentence, it was conceded by the Crown that the convictions recorded by the

33 [2000] NSWCCA 209 (‘*JCW*’).

sentencing judge on two of the charges should be quashed, as prosecution for those charges was statute barred. The Court of Criminal Appeal received submissions for the purpose of resentencing JCW on the remaining two charges. As part of those submissions, JCW submitted that he could not be sentenced on the basis that the remaining charges were "representative" of other conduct, as to sentence on that basis would be contrary to the principle that no one is to be punished for offences of which they have not been convicted.

[93] The particular passage cited by the offender is found at [54] in the judgment of Spigelman CJ, where his Honour said:

> In England the Court of Appeal considered the practice of specimen counts in *R v Kidd* [1998] 1 WLR 604 (reported sub nom *R v Canavan* [1998] 1 Cr App R 79). Lord Bingham CJ said (at 607; 44-45; 81-82):
>
> > "A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence: see *R v Anderson* (Keith) [1978] AC 964. If, as we think, these are basic principles underlying the administration of the criminal law, it is not easy to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to admit.
> >
> > It is said that the trial judge, in the light of the jury's verdict can form his own judgment of the evidence he has heard on the extent of the offending conduct beyond the instances specified in individual counts. But this, as it was put in *R v Huchison* [1972] 1 WLR 398 at 400 is to 'deprive the appellant of his right to trial by jury in respect of the other alleged offences'."

[94] The decision of *Fisher* referred to by the present offender simply reinforced that the approach taken by the Court of Criminal Appeal in *JCW* remained the law in New South Wales. It is not necessary to refer to *Fisher* any further.

R v Mailes

[95] The offender in *Mailes* was found by a jury, after a special hearing pursuant to s 19 of the *Mental Health (Criminal Procedure) Act 1990* (NSW), to have committed the murder of a young woman. He had earlier been found unfit to plead to the charge. Wood CJ at CL was required in accordance with s 23 of that *Act* to set a limiting term, being a term which reflected the best estimate of the sentence that would have been appropriate had the offender been convicted of murder.

[96] Statements were presented to the Court which referred to incidents in which the offender was alleged to have behaved in a threatening or aggressive manner, but which had not led to charges being laid against the offender. Wood CJ at CL said with regard to that material at [51]:

> Objection was not taken to their tender, but as they did not lead to convictions, and as there was no opportunity for the truth to be investigated, or, indeed, for meaningful instructions to be obtained from the defendant, I do not place any weight on them, other than to note that if true, they disclose a consistent pattern of antisocial and aggressive conduct of the kind which is otherwise well documented in the court and institutional records. I specifically do not regard them as matters which would aggravate the sentence in a way that might be seen to have included a component for uncharged offences. In this regard see *Weininger v The Queen* [2003] HCA 14.

R v Nona

[97] The final case cited by the offender was *Nona*. The offender in *Nona* stood trial on a two-count indictment alleging sexual offending against the same victim. Count 1 was a charge of rape and Count 2 was a charge of attempted indecent treatment of a child under 16 under his care. The prosecution case on Count 1 was that the offender penetrated the victim's vagina with his fingers and, on Count 2, that he tried to kiss her. The jury acquitted the offender on Count 1 and convicted on Count 2. He was sentenced to a wholly suspended term of imprisonment.

[98] The offender appealed against his conviction, and sought leave to appeal against sentence. The appeal against conviction was dismissed and the application for leave to appeal against sentence was refused. In the leading judgment, Henry J, with whom Bond JA agreed, said in the context of the application for leave to appeal against sentence, at [59]:

> The applicant was entitled to the full force of the acquittal on count 1. True it is that acquittal did not necessarily mean there had not been a non-penetrative touching of the vagina. However, the rule in *R v D* precludes a sentencing court from considering conduct of which the offender has not been convicted, which constitutes a separate offence from and is not part of the conduct constituting the offence being sentenced. This meant the learned sentencing judge could not sentence the applicant on the basis the attempted kiss had been preceded by a non-penetrative touching of the complainant's vagina.

Consideration

[99] There are two issues to be considered with regard to the Crown's submissions:

a) should I take into account the evidence by the complainant of uncharged non-consensual penile/vaginal sexual intercourse for the purpose of imposing greater punishment on the offender on either of the offences upon which he was convicted by the jury than would otherwise be the case?

b) should I take into account the evidence of the complainant of uncharged non-consensual penile/vaginal sexual intercourse for the purpose of determining the extent that leniency should be extended to the offender on either of the offences upon which he was convicted by the jury?

[100] There can be no doubt that a Court in the Northern Territory is entitled to receive such information as it thinks fit before passing sentence to enable it to impose the proper sentence.[34] As was stated by Gibbs CJ in *De Simoni*, there are two fundamental legal principles which, in cases such as the present, may come into conflict in determining whether evidence of uncharged apparently criminal conduct should be taken into account in sentencing an offender for charged criminal conduct.

[101] The first principle is that the sentence imposed on an offender should take account of all of the circumstances of the offence. It is a corollary of that proposition that a sentencing court should have before it, and take into account, material establishing all of the circumstances of the offence.

---

34 s 104(1) *Sentencing Act 1995* (NT).

[102] The second principle, described by Gibbs CJ as “more fundamental and important” than the first, is that no-one should be punished for an offence of which they have not been convicted.

[103] While the second principle enunciated by Gibbs CJ may be said to take precedence over the first, this is not without exceptions. One of the most frequently occurring exceptions is found in the use of representative charges in sentencing. It has long been recognised that there are significant benefits to an offender in pleading guilty to a representative charge rather than to a multitude of individual charges, not the least of which is that the maximum penalty that can be imposed is that which applies to the single, representative charge. Sometimes, the offending which is encompassed by the representative charge can be identified by the prosecutor with precision. This often occurs, for example, where there have be multiple thefts over time by an employee from the accounts of their employer. In such circumstances, the facts upon which the Court is called to pass sentence will usually be agreed, or at least readily ascertainable.

[104] There will always be cases, however, where the extent of offending encompassed by the representative charge cannot be particularised with precision. In such cases, a sentencing judge may be called upon to determine, as well as they can on the material available, the extent of the offending encompassed by the charge. This is often the case with repeated sexual abuse of a child. The child may express their memory that the abuse occurred regularly, but may be unable to give evidence of specific instances

of offending. It has traditionally been difficult for prosecuting authorities to prosecute accused persons in such circumstances, at least where the accused was denying the allegations. This position has, to some extent, been addressed in recent years by the creation by the legislature of specific offences of maintaining a sexual relationship.[35]

[105] An offender who admits to having engaged in a course of offending conduct which cannot be particularised with precision may plead guilty to a representative charge or charges and admit the course of offending. In taking into account the admitted course of conduct in sentencing such an offender, there is no breach of the fundamental principal referred to by the majority in *De Simoni*. There can be no injustice in taking into account in sentencing an offender pleading guilty on a representative count an admitted course of similar offending. The extent of the admitted course of conduct may, in rare cases, become an issue for the sentencing court, but I see no reason why that should not be determined by the sentencing court in the same way that other sentencing facts are determined. It would seem implicit, however, that a sentencing court could not take into account a disputed allegation of specific offending which could be sufficiently particularised to be prosecuted as a separate charge.

[106] By entering a plea of guilty to a representative charge, an offender consents to the sentencing judge determining the seriousness of the admitted course

---

35 See, for example, s 131 of the *Criminal Code* (NT).

of conduct. It is important to recollect that the prosecution cannot proceed on a representative charge unless the offender consents to the prosecution proceeding in that way. If there is any serious disagreement between the prosecution and the offender about the extent or frequency of the offending encompassed by the representative charge, it may be inappropriate to proceed on such a charge. If an offender pleads guilty to a representative charge in circumstances where there remained a dispute about the extent or frequency of offending, the offender implicitly consents to the sentencing judge making necessary findings of fact and waives any reliance on the fundamental principle identified by the majority in *De Simoni*.

[107] The review of the cases which I have undertaken does not identify criteria, the utilisation of which can ascertain in all cases where the line is to be drawn between the application of the two principles referred to in *De Simoni*. At a high level of generality, the Court should be guided by what is "fair" to an offender, as was alluded to by the Queensland Court of Appeal in *R v D*.[36] A non-exhaustive list of circumstances which may be relevant to determining where the line is to be drawn in a particular case includes:

a) whether the offender will be unfairly deprived of their right to trial by jury on allegations of uncharged wrongdoing before such allegations are found proven against them;

36 See [69] above.

b) whether it would have been possible to include an allegation of uncharged wrongdoing on the indictment;

c) whether the offender has effectively waived their right to have allegations of uncharged wrongdoing determined by trial by jury;

d) the extent of any temporal connection between the charged conduct and the uncharged conduct;

e) whether the uncharged conduct occurred in the course of committing a charged offence;

f) the seriousness of the uncharged conduct;

g) the comparative seriousness of the uncharged and charged conduct;

h) the extent to which evidence of the uncharged conduct is necessary to understand the true criminality of the charged conduct;

i) whether the uncharged conduct is admitted by the offender;

j) whether the offender is to be sentenced on a representative charge;

k) the extent to which a requirement that all offending conduct alleged to have occurred in the course of an instance of criminal offending be made the subject of a separate charge would be oppressive; and

l) the purpose for which evidence of uncharged conduct was led by the Crown.

[108] With regard to the last of the above listed considerations, in specific cases it may be unfair after trial to impose a sentence on an offender containing a component based upon evidence of uncharged alleged wrongdoing where such evidence has been led by the prosecution for the purpose, for example, of providing context to a charged event or as tendency evidence. The secondary nature of such evidence will often lead to legitimate forensic decisions by an accused not to focus on that evidence. The mere fact that the Crown is entitled to lead such evidence at the trial of an accused, and the accused has had an opportunity to cross-examine witnesses on that evidence, does not, by itself, justify use of evidence of the uncharged conduct in order to impose a greater penalty on the offender. Whether it is proper to use evidence introduced for such a purpose to justify the imposition of a harsher sentence for charged conduct will depend on the particular circumstances of each case.

[109] In the present case, I am satisfied that it would be unfair to take into account, adverse to the offender, the allegation that he engaged in non-consensual penile/vaginal sexual intercourse with CB after the charged act of digital penetration of her vagina. I have come to that conclusion for the following reasons:

a) it would have been a simple matter for the Crown to have charged the uncharged conduct in the same indictment as that which proceeded to trial;

b) the Crown did not provide any explanation for the decision not to charge the offender with the second act of sexual intercourse;

c) the uncharged act of sexual intercourse was a serious charge, carrying the same maximum penalty of life imprisonment as the charged act upon which the offender was convicted;

d) the uncharged act of sexual intercourse was arguably a more serious example of the offence of sexual intercourse without consent than that upon which the offender was convicted, as it was of longer duration, and involved penile/vaginal intercourse without a condom, thus exposing CB to the risk of pregnancy;

e) the uncharged act of sexual intercourse was a distinctly separate act to the charged act of sexual intercourse;

f) evidence of the uncharged act of intercourse was admitted for a secondary purpose, being to provide the jury with context to the charged conduct; and

g) to find that the offender knowingly engaged in non-consensual sexual intercourse with CB would be to deprive him of his right to trial by jury on that allegation.

[110] If the offender had been charged with the second act of sexual intercourse, and had been convicted of that charge, the fact that the victim was subjected to this serious assault, and the attendant degradation and indignity, would have increased the objective seriousness of the offence of unlawful confinement. It would have been relevant to the circumstances in which CB was detained. Of course, care would need to be taken to avoid double punishment in sentencing for the two offences.

[111] The different ways in which the Crown submitted that I should take into account the uncharged conduct (see [20] above) invited me to find that the offender had engaged in that conduct and that it was criminal conduct; and to use that finding adversely to the offender when sentencing on Counts 1 and 2. For the reasons I have given, I decline to do so. This deals with the first question posed at [99] above.

[112] If it be suggested that by proceeding in this manner, the offender has not received sentences which fully reflect the circumstances of the offending, this is the consequence of the decision of the Crown not to charge the offender with the second act of sexual intercourse.

[113] I will now turn to the offender's submission that I should not take evidence of the uncharged act of sexual intercourse into account in determining whether leniency should be extended to him on the basis that the act of sexual intercourse in Count 2 was an isolated incident of short duration.

[114] The Queensland decision of *R v D*, upon which the offender principally relied in submitting that I should not take into account the evidence of the second act of sexual intercourse for the purpose of denying him leniency on the basis that the charged act was isolated, was decided before the High Court decision in *Olbrich*. In the context of fact finding in sentencing, the majority of the Court (Gleeson CJ, Gaudron, Hayne, and Callinan JJ) said, at [25] to [28]:

> Much of the discussion of fact finding for the purposes of sentencing addresses questions of onus and standard of proof. References to onus of proof in the context of sentencing would mislead if they were understood as suggesting that some general issue is joined between prosecution and offender in sentencing proceedings; there is no such joinder of issue. Nonetheless, it may be accepted that if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it. Similarly, it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it. (We say "if necessary" because the calling of evidence would be required only if the asserted fact was controverted or if the judge was not prepared to act on the assertion.)
>
> In the proceedings before the primary judge in this case, the prosecution did not submit that the sentence to be imposed on the respondent (a 58 year old first offender who pleaded guilty to importing more than 1.1kg of heroin) should be increased beyond what otherwise would be called for by those facts because the appellation "principal" could be attached to him. Rather, the respondent submitted that the sentence otherwise to be imposed on him should be mitigated because he was "a courier". The respondent bore the burden of proving this fact. The judge was not persuaded of it.
>
> As to the standard of proof that should be applied, we would adopt what was said by the majority in *R v Storey* - that a sentencing judge
>
> > "may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in*

> *favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities."
>
> As we have said, the primary judge did not take facts into account in a way that was adverse to the accused (other than those established by the plea and the Statement of Facts). He was not persuaded of circumstances which the respondent contends should have been taken into account in his favour.

(Footnotes omitted)

[115] To an offender, the distinction between increasing a sentence based on a circumstance of aggravation and not reducing a sentence by refusing to extend leniency may seem nebulous, as in each case the offender is to serve a lengthier sentence than would otherwise be the case; it is, however, a distinction based on longstanding principles regarding fact-finding in sentencing for criminal offending. Where evidence of alleged uncharged offending is utilised in determining whether the sentencing Court is satisfied to the required standard of a matter favourable to an offender, there is no finding that the offender is guilty of the uncharged offending. The sentencing Court need only find that it is not satisfied that the circumstance favourable to the offender has been made out.

[116] I also note that there is a long line of authority in New South Wales, going back at least as far as the decision in *H*, to the effect that evidence of uncharged conduct may be taken into account by a sentencing judge to displace any suggestion that an offender is entitled to leniency on the basis that charged conduct is isolated offending. In the light of the High Court's approach to fact-finding set out in the decision of *Olbrich*, the New South

Wales line of authority is to be preferred. I further note that this approach was recently adopted by the Australian Capital Territory Court of Appeal in *Henderson v The King*.[37]

[117] In the present case, I was not satisfied that the offender was entitled to leniency on the basis that the proven conduct was isolated.

---

37 [2024] ACTCA 3.