

AUSTRALIA / JUDGMENT

CR v R

[2026] NSWCCA 150**COURT**

Court of Criminal Appeal

DECIDED

25 September 2026

BEFORE

Stern JA at [1]

Fagan J at [2]

Chen J at [51]

CASE / FILE NUMBER

2024/18055

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Court of Criminal Appeal

Supreme Court

New South Wales

Medium Neutral Citation: CR v R [2026] NSWCCA 150**Hearing dates:** 9 September 2026**Date of orders:** 25 September 2026**Decision date:** 25 September 2026**Before:** Stern JA at [1]
Fagan J at [2]
Chen J at [51]**Decision:** (1) Grant leave to appeal.
(2) Dismiss the appeal.**Catchwords:** CRIME — Appeals — Appeal against sentence — Aggravating factors in s 21A(2) of the Crimes (Sentencing Procedure) Act 1999 (NSW) — Attribution of aggravating factors generally to all offending — Double counting of aggravating factor that is an element of an offence — No lesser sentence warranted**Legislation Cited:** Crimes (Domestic and Personal Violence) Act 2007 (NSW)
Criminal Procedure Act 1986 (NSW)
Crimes Act 1900 (NSW)
Crimes (Sentencing Procedure) Act 1999 (NSW)**Cases Cited:** Holten v R [2005] NSWCCA 408**Texts Cited:** Nil**Category:** Principal judgment

Parties:	CR (Applicant) Rex (Respondent)
Representation:	
Counsel:	R Pettit (Applicant) F Gray (Respondent)
Solicitors:	Legal Aid NSW (Applicant) Solicitor for Public Prosecutions (NSW) (Respondent)
File Number(s):	2024/18055
Publication restriction:	Pursuant to s15A of the Children (Criminal Proceedings) Act 1987 (NSW) publication of any information that identifies or is likely to lead to the identification of any child connected with these proceedings is prohibited. Decision under appeal
Court or tribunal:	District Court New South Wales (Coffs Harbour)
Jurisdiction:	Criminal
Date of Decision:	26 June 2025
Before:	Judge M McHugh SC
File Number(s):	2024/18055 HEADNOTE [This headnote is not to be read as part of the judgment] The applicant pleaded guilty in the Local Court and was sentenced in the District Court to an aggregate term of 7 years imprisonment with a non-parole period of 4 years and 6 months for one count of intentional choking without consent (seq 7), two counts of assault occasioning actual bodily harm (seqs 20 and 22), and three other matters, all committed in a domestic violence context. The offending occurred between 7 and 11 January 2024. The complainant and the applicant were in an intimate relationship from about 2015 until 2022. The applicant had perpetrated domestic violence against the complainant from about 2018. The applicant sought leave to appeal his sentence on grounds that the sentencing judge erred (1) by taking into account actual or threatened use of violence as an aggravating factor provided for in s 21A(2)(b) of the Crimes (Sentencing Procedure) Act 1999 (NSW) in respect of all offences to which the applicant had pleaded guilty, without distinction, including seqs 7, 20 and 22 for which the use of violence was an element and (2) in the alternative, by failing to give adequate reasons for applying statutory aggravating factors collectively, without considering their application to individual offences. The Court (Stern JA, Fagan and Chen JJ agreeing) held, granting leave to appeal and dismissing the appeal:
As to Ground 1:	In the absence of further qualifying words, the impugned passage from the sentencing judge's remarks on sentence conveyed that s 21A(2)(b) "actual or threatened use of violence" had been treated as an aggravating feature of, inter alia, seqs 7, 20 and 22, for each of which violence is an integral element. Holten v R [2005] NSWCCA 408 at [37]-[42] Hidden J (Hulme and Latham JJ agreeing), applied.

As to Ground 2:	The sentencing judge's reasons were adequate, albeit that those reasons disclosed error: Stern JA at [1], Chen J at [52]. In the absence of any express qualification to the literal meaning of the challenged part of the remarks, at the least the reasons for the sentencing decision are not adequate to dispel the impression of double counting of the violence involved in seqs 7, 20 and 22: Fagan J at [34].
As to resentencing:	No substantive argument was presented on appeal as to why a lesser sentence should be fixed, upon resentencing with statutory aggravating factors being taken into account only in relation to individual offences to which they properly applied. Taking proper account of all objective and subjective features, no lesser sentence is warranted in law.

JUDGMENT

STERN JA: I agree with Fagan J's analysis of ground 1, as set out at [4] below. On that basis, like Fagan J, I would grant leave to appeal and uphold ground 1. I do not agree with his Honour's analysis of ground 2, also at [4] below, as I consider that it is tolerably clear from the reasons of the sentencing judge, in particular the passage set out in the judgment of Fagan J at [29] below, that his Honour took s 21A(2)(b) of the Crimes (Sentencing Procedure) Act 1999 (NSW) into account as regards all of the offences for which the applicant was being sentenced (which is the basis of my agreement with the analysis of Fagan J as to ground 1). In that regard, I consider that his Honour's reasons are adequate, albeit that those reasons disclose error. I agree, for the reasons given by Fagan J, that no lesser sentence is warranted than that which the sentencing judge ordered. I thus agree with the orders proposed by Fagan J.

FAGAN J: The applicant seeks leave to appeal against an aggregate sentence imposed by Judge M McHugh SC in the District Court at Coffs Harbour on 26 June 2025. The applicant pleaded guilty in the Local Court to the following six offences, for which the respective maximum penalties and the indicative sentences nominated by his Honour are indicated. They are listed in chronological order of the offending conduct:

Seq 3: on 7 January 2024 – contravene apprehended domestic violence order, contrary to s 14 of the Crimes (Domestic and Personal Violence) Act 2007 (NSW). Maximum 2 years imprisonment; indicative sentence 1 year, 1 month and 14 days. This was dealt with as a related offence pursuant to s 166 of the Criminal Procedure Act 1986 (NSW).

Seq 4: on 8 January 2024 – intimidate with intent to cause fear of physical harm contrary to s 13(1) of the Crimes (Domestic and Personal Violence) Act. Maximum 5 years imprisonment; indicative sentence 1 year, 10 months and 15 days.

Seq 20: on 8 January 2024 – assault occasioning actual bodily harm, contrary to s 59(1) of the Crimes Act 1900 (NSW). Maximum 5 years imprisonment, indicative sentence 2 years and 3 months.

Seq 7: on 8 January 2024 – intentionally choke person without consent, contrary to s 37(1A) of the Crimes Act. Maximum 5 years imprisonment, indicative sentence 3 years.

Seq 24: on 9 January 2024 – pervert the course of justice, contrary to s 319 of the Crimes Act. Maximum 14 years imprisonment, indicative sentence 4 years and 6 months.

Seq 22: on 11 January 2024 – assault occasioning actual bodily harm, contrary to s 59(1) of the Crimes Act. Maximum 5 years imprisonment, indicative sentence 3 years.

The indicative sentences took into account a 25% discount for the early pleas of guilty. The aggregate sentence imposed was 7 years imprisonment with a non-parole period of 4 years and 6 months. His Honour ordered that the sentence commence on 25 June 2024. The effect of the backdating was to allow concurrence, by 4 months and 5 days, with the balance of a sentence that the applicant was serving for earlier offences.

There are two grounds of appeal, as follows:

1 The sentencing judge erred in taking into account in aggravation the actual or threatened use of violence pursuant to s 21A(2)(b) of the Crimes (Sentencing Procedure) Act 1999 (NSW) in respect of offences for which the use of violence was an element, being seqs 7, 20 and 22.

2 In the alternative, the sentencing judge failed to give adequate reasons by applying the aggravating factors under s 21A(2)(b) of the Crimes (Sentencing Procedure) Act collectively, without considering their application to each individual offence.

For reasons that follow, leave to appeal should be granted and the two appeal grounds should be upheld. It follows that the Court must consider whether any lesser sentence is warranted in law. The objective circumstances of the offending and the applicant's subjective case therefore have to be considered fully.

Background to the offending

The complainant and the applicant were in an intimate relationship from about 2015 until 2022. The applicant was born in October 1999 and would have been about 16 years old at the commencement of the relationship. He was 24 years old at the time of the offending. The complainant is approximately two years older. She gave birth to their first child in May 2016. Their second child was born in May 2022. The applicant committed acts of domestic violence against the complainant from about 2018.

On 21 June 2022 an Apprehended Domestic Violence Order (ADVO) was made against the applicant for the protection of the complainant. The order prohibited the applicant from assaulting, threatening, stalking, harassing or intimidating the complainant or intentionally or recklessly destroying any property in her possession. The ADVO also forbade the applicant from going within 100 m of the complainant's residence or place of work.

About 14 months prior to the offending with which this application is concerned, on 14 November 2022 the applicant was recorded on CCTV in company with the complainant near her residence. Police attempted to apprehend him the next day for breach of the ADVO but he fled on foot. From shortly after midnight on 18 November 2022 the applicant stayed at the complainant's unit overnight. Between 1:00 pm and 2:00 pm on 18 November 2022 he took the complainant's phone from her and refused to hand it back, resulting in a verbal argument. The complainant was able to arrange for a relative to call the police. The applicant ran from the house when they arrived. On 20 November 2022 the complainant reported to police that the applicant had taken her motor vehicle. Police arrested him two days later.

While on remand for those contraventions of the ADVO and for a number of earlier offences committed against the complainant, the applicant repeatedly breached the ADVO by way of gaol calls to associates who connected the complainant on the line. The following are examples of the threats he made to her:

I'm going to hunt your fucking family down when I get out (1 December 2022).

You're fucking gone cunt (1 December 2022).

You are a cheeky little slut. I am going to kill you when I get out. Wait til I get out you skank, you are mad you cunt (8 December 2022).

You done it [rang the police to complain of domestic violence] because you didn't want me to bash you over sleeping with someone, I know. [...] And there is proof of you physically deserving it [ie, a bashing]. Me hitting you is when you deserved it. [...] I could have killed you. You are a dog cunt, shut up. I was scattered on ice (8 December 2022).

You're getting got when I get out. I am going to do my 5 years and I am going to turn into a weapon, a bad killing machine (13 December 2022).

You know I am coming to Kempsey when I get out and I am going to kill cunts. [...] I am coming when I get out to burn the mother fucker down [referring to the complainant's house]. I don't care I am going to hunt you down, you keep stressing me out (13 December 2022).

[When the complainant informed the applicant she had slept with someone else:] I am going to shoot the dog when I get out (13 December 2022).

On 3 March 2023 and 5 April 2023, the applicant made further three-way calls to the complainant from gaol, conveying more threats to commit violence against her on his release.

On 8 August 2023 the applicant was sentenced to an aggregate term of imprisonment for a common assault on 19 September 2021, an assault occasioning actual bodily harm and wilful damage to property on 7 June 2022, another common assault and a contravention of the ADVO committed on about 31 July 2022, a contravention of the ADVO on 16 October 2022, the contraventions of 14-15 November 2022 (described above) and the contraventions of the ADVO and offences of intimidation committed by way of gaol calls in December 2022, March 2023 and April 2023. All those offences were committed against the complainant. An aggregate sentence of

1 year and 11 months imprisonment was imposed, commencing on 30 November 2022, with a non-parole period of 12 months expiring on 29 November 2023.

The complainant gave birth to another child during October 2023. The father was not the applicant. After his release on 29 November 2023 pursuant to a statutory parole order, the applicant worked in Brisbane for some time but he had returned to Coffs Harbour by early January 2024.

Facts of the six offences

On 7 January 2024 the applicant visited the complainant at her home unit in Coffs Harbour, where she was present with her mother and her three children, aged 7 years, 20 months and 3 months. He questioned her suspiciously, alleging that she had some connection with a man who had followed her from the bank towards her home earlier in the afternoon. That visit constituted the particulars of seq 3.

The facts of seq 4 (intimidation with intent to cause fear of physical harm) are that on the next day, 8 January 2024, the applicant took the complainant's phone, searched through its history to see whom she had been speaking to and later in the afternoon threatened her when she attempted to leave the unit. He said:

If you leave, you're going to get it. I will knock you out.

The facts of seq 20 (assault occasioning actual bodily harm) are that shortly after midnight the complainant escaped from the unit with her baby in a pram. She left through the front door while the applicant was distracted in another room. She ran along the street pushing the pram. The applicant heard her, gave chase, seized her from behind and lifted her off the ground. When the complainant tried to free herself and screamed for help, the applicant threw her to the ground. She landed heavily on a paved surface.

The complainant continued to scream for help while on the ground. The applicant climbed on top of her, put his hands around her neck and choked her (seq 7). The pressure he applied prevented the complainant's intake of air. She experienced light headedness and blurred vision as she came close to loss of consciousness. The baby was in the pram nearby crying. The applicant said:

If you don't stop screaming, I will kill you and the baby.

The applicant forcibly marched the complainant back to her unit, leaving the pram and the baby unattended in the street. A witness called police. When they arrived the applicant fled through a bedroom window, taking the complainant's phone. The complainant and her two youngest children moved to her grandparents' address, leaving the eldest child in the care of her mother at the unit.

During the afternoon of 9 January 2024 the complainant was contacted by Benjamin Bonser, whom she believed to be the father of her three-month-old baby. Bonser invited the complainant to attend his parents' address to discuss the result of a paternity test. When the complainant arrived at about 10:00 pm the applicant was already at the address. The agreed facts on sentence do not state whether the applicant had orchestrated this encounter. The applicant demanded to know what the complainant had told police on the preceding evening when they attended her unit after the assault and choking episode in the street. He was agitated about whether his parole would be revoked.

The offence of pervert the course of justice (seq 24) was committed when the applicant demanded that the complainant call police and tell them that it was Bonser who had assaulted her, not himself. The applicant stood over the complainant and said:

I'm going to stand here while you make the call, so I know exactly what is said.

The applicant handed the complainant's phone to her. He stood near her and listened while she called police and told them that Bonser, not the applicant, had assaulted her the previous evening.

The complainant returned to her grandparents' home, where she was temporarily residing. The applicant arrived there the next day, 10 January 2024, and stayed overnight. On the morning of 11 January 2024 he directed the complainant to go to the police station to give her false statement implicating Bonser. However, when she had gone a short way towards the police station on foot the applicant came after her and directed her to return to the house, apparently fearing arrest.

Sequence 22 (assault occasioning actual bodily harm) consisted of a savage attack by the applicant upon the complainant in her grandparents' home. This occurred shortly after the aborted visit to the police station and when the grandparents were absent with the children. The applicant was irrational and enraged because the complainant had not gone to the police station to make a false statement against Bonser. He delivered multiple punches to the complainant's head and body, then directed her to lie on the floor, face down with her hands above her head. He told her not to move "until Benji [Bonser] gets here".

Bonser arrived a short time later. The applicant directed him to "bash her". Bonser punched the complainant who by that time was curled up in a ball on the floor. The applicant then struck the complainant with a blunt object four times to her back and arms and the front of her body. Sometime later Bonser left the house and the complainant's grandparents returned. Then, over about one hour, the applicant shouted at the complainant and objects were thrown around a room in the course of an altercation. Eventually the complainant was able to escape from the house through a window. She called police from a neighbour's residence. Once again, the applicant fled the scene.

On 25 January 2024 the applicant was arrested, in an acutely drug affected state. He was remanded in custody. The applicant's parole was revoked with effect from 8 January 2024. Accordingly, from 26 January 2024 to 16 November 2024, a total of 9 months and 22 days, the applicant served out the balance of the sentence that had been imposed on 8 August 2023.

The degree of seriousness of each of the offences can be seen from the particulars recounted above. It is not necessary to attempt to place them on a notional scale of relative objective gravity. As the learned trial judge said, "these offences are all serious examples" of their respective kinds.

The sentence proceedings and the remarks on sentence

In written submissions on sentence, the Crown identified aggravating circumstances from the list in s 21A(2) of the Crimes (Sentencing Procedure) Act, which it said were applicable to certain of the offences. The Crown submitted that the aggravating factor in par (b) of s 21A(2), namely "the offence involved the actual or threatened use of violence", was relevant to seq 24 (pervert the course of justice). It was submitted that the applicant deployed actual violence and multiple threats of violence against the complainant to induce her to tell police that Bonser, not himself, was the perpetrator of the violence in the street outside her unit shortly after midnight on 9 January 2024 (seq 20 and seq 7).

The Crown's submission implicitly recognised that the aggravating circumstance in s 21A(2)(b) could not apply to seq 3 (contravene the ADVO by attending at the complainant's residence on 7 January 2024) because there was no violence or threat of violence on that occasion. Section 21A(2)(b) could not apply to any of seq 4, 7, 20 or 22 because violence or threat of violence was inherent in the elements of those offences. To treat those matters as aggravated under par (b) would be double counting.

The Crown submitted that all the offending for which the applicant was to be sentenced was aggravated by the factors in par (d) of s 21A(2) ("the offender has a record of previous convictions") and par (j) ("the offence was committed while the offender was on conditional liberty" – parole). The Crown identified individual offences that it said were aggravated by the factors in pars (eb) ("the offence was committed in the home of the victim or any other person"), (m) ("the offence involved multiple victims or a series of criminal acts") and (n) ("the offence was part of a planned or organised criminal activity").

The passage of the learned judge's sentencing remarks that has given rise to the two grounds of appeal is as follows:

There are a number of other factors which I have taken into account. Aggravating factors under s 21A subs 2(b) actual or threatened use of violence; (d) previous convictions. Here, it is noted particularly the offender is being sentenced for serious personal violence offences and I have taken those matters into account, indeed the seven times he has been charged with domestic violence offences against his former partner. (eb) the victim [scil, the offence] was committed in the home; (j) [...] the offender was on conditional liberty; (m) there were multiple victims or series of criminal acts. Here, there were a number of multiple criminal acts other than a choking

offence. I do not find that this was part of a planned or organised criminal activity.

In *Holten v R* [2005] NSWCCA 408 the offender committed multiple armed robberies, an assault with intent to rob, a kidnapping and some offences of obtaining money by deception that were taken into account on a Form 1. In passing sentence the primary judge applied various aggravating factors from the list in s 21A(2) in a collective way. The relevant passage of his remarks on sentence is as follows:

The amounts of money that the offender has obtained have not been great. But the manner in which he carried them out in relation to the aggravating factors show that the aggravating factors (b), (c), (d), (e), (f), (g), (i), (j), (l), (m) and to a degree (n) all apply.

At [37]-[42] Hidden J (Hulme and Latham JJ agreeing) gave the following reasons for upholding a ground of appeal that the sentencing judge had erred in his treatment of the statutory aggravating circumstances:

- [37] The Crown prosecutor in this Court submitted that his Honour's reference to the various aggravating factors in the passage from the remarks quoted above should be understood distributively, that is, as a compendious list of the aggravating factors to be found in the various offences. She argued that his Honour did not intend to convey that those aggravating factors were present in all of the offences, relying upon his earlier observation that the aggravating and mitigating factors in the case as a whole were "extensive and different for each offence". This I cannot accept.
- [38] As I have said, the actual or threatened use of violence is an element of all the offences except those of obtaining money by deception. Accordingly, by virtue of s21A(2), that aggravating feature was capable of being taken into account only in relation to those three Form 1 offences. If that had been his Honour's intention, it is inconceivable that he would not have said so. (I would add that, even though the opportunity to commit those fraudulent offences arose through the threat of violence, it could not fairly be said that they were aggravated by that antecedent threat.) It appears to me that his Honour saw the whole of the applicant's criminality as aggravated by the factors in pars (b), (c) and (e), without considering whether each of those factors was applicable to each of the offences.
- [39] Accordingly, I am satisfied that his Honour did fall into error by characterising almost all of the offences as aggravated by features which were elements of them. As to s21A(c), the actual or threatened use of a weapon, that, of course, is an element of the offences of armed robbery and armed assault with intent to rob. As to par (e), the commission of an offence in company, that is an element of the offences of specially aggravated kidnapping and aggravated car-jacking.
- [40] Different considerations arise from his Honour's reference to par (d), that the offender has a record of previous convictions. Section 21A(4) provides that a court "is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so". It is now established that that provision applies to subs (2)(d), so that a

sentencing court must still approach an offender's criminal record in accordance with the common law principles enunciated in the well known passage from the joint judgment in *Veen v The Queen* [No 2] (1988) 164 CLR 465 at 477: see *R v Johnson* [2004] NSWCCA 76 at [31]-[35].

- [41] That said, it is not clear that his Honour did treat the applicant's criminal record as a factor aggravating the objective seriousness of his offences, because he referred to that passage from *Veen* [No 2] earlier in his remarks. Given that I have already found error in his approach and that it is open to this Court to re-sentence, it is not necessary to consider this aspect of the matter further.
- [42] Generally, it is important that sentencing courts give careful consideration to the factors of aggravation in s21A(2) to determine not only whether they are available as a matter of law but also whether they do fairly arise on the facts of the case. With respect, one might question whether some of the other aggravating factors referred to by his Honour in the present case were available on the evidence. However, as I have said, Mr Pearsall's argument was directed to four of those factors only. His Honour did not have the benefit of Howie J's examination of s 21A in *R v Wickham* [2004] NSWCCA 193 at [22]-[27], a reserved judgment which was handed down on the same day that the applicant was sentenced.

In the present leave application the respondent argued that the impugned part of the remarks on sentence should be read distributively because that passage was evidently based on the Crown's written submissions on sentence, wherein the various paragraphs of s 21A(2) were expressly invoked according to their differential application to the respective offences. The respondent argued that the Crown's contentions about aggravating factors were not the subject of any dispute in the sentence proceedings and that his Honour can be taken to have applied those factors in the same discriminating fashion as the Crown's written submissions.

There is some force in that argument. However, where the remarks do not clearly differentiate which aggravating features his Honour ascribed to which offences, the respondent's argument about how the passage in question should be understood is speculative. Making all due allowance for the fact that the remarks were delivered extempore, under the pressure of listings in the District Court at Coffs Harbour, the remarks on their face convey that at least one aggravating feature has been misallocated to offences to which it was not applicable. In the absence of further qualifying words, the impugned passage conveys that "s 21A subs 2(b) actual or threatened use of violence" has been treated as an aggravating feature of, inter alia, seqs 7, 20 and 22, for each of which violence is an integral element. Ground 1 is therefore made good.

For the purpose of assessing the impact upon sentence of the objective gravity of the choking (seq 7) and the assaults occasioning actual bodily harm (seqs 20 and 22), his Honour expressly set out and considered the level of violence involved in each matter. Despite the wording of the passage in question, I cannot envisage a mental process by which his Honour would then have taken into account additionally – or, a second time – the "actual or threatened use of violence" (s 21A subs 2(b)) in those offences. I would not readily conclude that Judge M McHugh SC actually

engaged in such obvious double counting. However, if he did not, in the absence of any express qualification to the literal meaning of the challenged part of the remarks, at the least the reasons for the sentencing decision are not adequate to dispel the impression of double counting, which would lead to ground 2 being upheld.

Lack of remorse or insight – post-offence threats

In the consideration of whether any lesser sentence is warranted in law, the learned sentencing judge's findings of fact may be relied upon. Those findings are not disputed by either party to the present application and there is no reason for this Court to depart from them. One relevant finding is that "the offender showed a continuing lack of remorse or insight". That subject warrants elaboration by reference to intercepted gaol calls made by the applicant between January and August 2024, while he was on remand for the subject charges. Those calls revealed the applicant's ongoing violent intent towards the complainant and his continuing desire to pervert the course of justice with respect to the charges.

The applicant told family members that the complainant was "going to need to go in and retract everything". He spoke of paying her to "drop all the charges". The applicant told family members that he should have inflicted more severe violence on the complainant. He also said that he was going to get Bonser to "take all these charges" and that "some of the boys" would inflict violence on him unless he would "say he never saw me hit her". In one call on 30 June 2024 the applicant instructed an associate to convey the following message to Bonser:

Tell him and message him and say, [the applicant] is not happy because you are not sticking to your word. He said straight out that he will come and get all the boys that he can and he is going to run amok on your word. [...] He is going to get all the boys that he knows to come into town. They are going to kick them, they are going to fall fucking break him and [the complainant's] backs ... I am actually serious. I swear to God. I don't give a fuck if the kids are there or not. I'm going to make sure they get fucked up good.

In a number of gaol calls the applicant told family members that he would kill the complainant when he was released. The calls are not the subject of any additional charge. They do not expose the applicant to additional punishment but they demonstrate his lack of remorse and they bear upon other subjective considerations.

Reduced moral culpability

The learned trial judge accepted that the applicant had suffered profound childhood deprivation and was under significant social disadvantage. His mother is of indigenous family background. The learned judge relied upon a report of Dr Sidhu, psychologist, who noted that the applicant's childhood was marred by domestic violence between his mother and stepfather, both of whom were heavy users of drugs. The parents neglected the applicant and his siblings. The stepfather physically abused them. When the applicant was 10 years old he and a half brother left home and stayed sometimes with his grandmother, sometimes with friends and otherwise slept rough.

Instability of accommodation, parental neglect, trauma caused by the stepfather's violence and other deficiencies of the applicant's early life led to behavioural problems that compromised his school experience and his capacity to acquire an education. The applicant resorted to illicit drugs from the age of 13. He was exposed to sexual abuse in juvenile detention. The applicant left school in Year 7 and has had very limited work, of an unskilled nature, since then.

The sentencing judge also accepted the conclusions of Associate Professor Michael Robertson, a consultant psychiatrist. The doctor diagnosed the applicant in December 2022 with chronic PTSD, a personality disorder "with Cluster B traits" and an underlying substance use disorder. His psychiatric report noted a traumatic brain injury sustained in 2019 "that may have contributed to psychopathological disturbance including executive function and mild worsening of cognitive function".

His Honour accepted that the applicant's profoundly deprived childhood reduced his moral culpability for the offending, in accordance with the reasoning applied in *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37. The learned judge assessed that the applicant was therefore not "a suitable vehicle for the application of general deterrence". His Honour did not view the applicant's diagnosed mental disorders as an additional basis for recognising reduced moral culpability but he was satisfied that the state of the applicant's mental health would cause his time in custody to "weigh more heavily upon him" than would otherwise be the case.

Likelihood of reoffending, prospects of rehabilitation, specific deterrence

The sentencing judge found that the applicant had "some prospects of rehabilitation, guarded as they may be". His Honour said this:

Given his attitude, there is also cause for a real element of specific deterrence.

The reference to "his attitude" no doubt took account of the post-offence gaol calls and the applicant's recidivism with respect to domestic violence offending against the complainant. The threats and thoughts expressed in the gaol calls suggest that the applicant poses a significant risk of committing further offences of violence, warranting a level of penalty that might deter him, in the interests of protecting the complainant and the community generally.

Prior record, further offending while on parole

The applicant's prior criminal record plainly disentitles him from leniency. The circumstance that the offences for which he was sentenced were committed only 5 weeks into a parole period of 11 months is significantly aggravating. The offences were all committed with respect to the same complainant against whom the applicant had committed multiple offences over the period from September 2021 to April 2023, for which he had been in prison for 1 year up to 29 November 2023 and for which he was on parole in early January 2024.

No lesser sentence is warranted in law

It would have been open to the learned judge to have backdated the commencement of the sentence only by the length of time for which the applicant had been on remand in relation to the index matters. Had that been done, the applicant's sentence would have commenced on 17 November 2024, rather than on 25 June 2024. His Honour exercised the discretion that was available to him to allow a degree of concurrency between the sentence imposed and the sentence that the applicant was already serving for prior matters. The extent of the concurrence, favourable to the applicant, was 4 months and 22 days.

The learned judge also found special circumstances, taking into account particularly what he perceived as the utility of a longer period on parole than would be the case if the statutory default ratio were to be applied. The ratio in the sentence fixed by his Honour is 64%.

I have taken into account an affidavit of the applicant affirmed on 12 August 2026, deposing to his conduct in custody, his desire to have access to his children and his intention to seek work upon his release. The affidavit does not materially alter the circumstances from those that were under consideration when the sentence under appeal was passed.

In my view, no lesser sentence is warranted than that which his Honour ordered. No argument was advanced on the hearing of the appeal to suggest that the sentence was disproportionate, taking proper account of all objective and subjective features. No substantive argument was presented as to why a lesser sentence should be fixed, upon this Court exercising its power to resentence, with statutory aggravating factors being taken into account only in relation to individual offences to which they properly applied. Nor was it suggested that there has been any development since the passing of sentence in the District Court that might support a more favourable result on resentence by reference to current circumstances.

There is no utility in an appeal such as this, where error is identified but no cogent argument can be made to suggest that any lesser sentence would be warranted absent the error.

I propose the following orders:

Grant leave to appeal.

Dismiss the appeal.

CHEN J: I agree with the reasons of Fagan J on ground 1.

In relation to ground 2, I would not uphold this ground of appeal. In my view, the sentencing judge's reasons, in the challenged passage set out at [29], above, were sufficient but contained the error covered by ground 1.

I agree with Fagan J, for the reasons his Honour gives, that no lesser sentence is warranted and with the orders proposed.

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Decision last updated:

25 September 2026

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