

Indecent Assault & Agg Indecent Assault

s 323 & s 324 Criminal Code

From 1 January 2021

Transitional Sentencing Provisions: This table is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

Glossary:

AOBH	assault occasioning bodily harm
agg	aggravated
att	attempted
burg	burglary
circ	circumstances
con	concurrent
cum	cumulative
ct	count
dep lib	deprivation of liberty
imp	imprisonment
indec	indecent
ISO	intensive supervision order
PG	plead guilty
PNG	plead not guilty
sex pen	sexual penetration without consent
susp	suspended
TES	total effective sentence
TIC	time in custody

No.	Case	Antecedents	Summary/Facts	Sentence	Appeal
7.	<i>SYO v The State of Western Australia</i> [2024] WASCA 31 Delivered 28/03/2024	<p>38 yrs at time sentencing.</p> <p>Convicted after PG (25% for cts 1–3, 10% for ct 4).</p> <p>Minor criminal history; unlawful damage; breach of restraining order; agg burg; minor drug related offences; breach of violence restraining order.</p> <p>Raised by his mother; minimal involvement with his father; mother was physically abusive at times; often left home alone for days as a child; lived with grandmother from 13 yrs; unstable home; frequently saw violence perpetrated by uncles and aunts.</p> <p>Left high school at start of yr 9; completed TAFE course at 15 yrs.</p> <p>Worked in mining and construction since 14 yrs; FIFO work until voluntary separation in 2012.</p> <p>Several relationships of significance; one young daughter; most relationships marred by violence and drug use.</p> <p>No major history of illness or injury; testing indicated presence of antisocial personality traits.</p> <p>Used alcohol to excess from teenage yrs; cannabis use from 13 yrs; developed a methyl habit from late 20s; drug use escalated after losing his job.</p> <p>Positive personal references.</p>	<p>Ct 1: Agg burg. Ct 2: With intent to harm, did an act which life health or safety of a person was likely to be endangered. Ct 3: Threat with intent to compel. Ct 4: Agg indecent assault. Ct 5: Stealing.</p> <p><u>Ct 1</u></p> <p>The appellant forced his way into the home of DB, a former partner. Once inside, the appellant walked into a bedroom which DB and PC were sleeping.</p> <p><u>Ct 2</u></p> <p>The appellant hit PC several times with a metal bar. The strikes were to PC’s head, body, face, arms and legs. The appellant then ordered PC out of the bed and told him to move into the corner of the bedroom.</p> <p><u>Ct 3</u></p> <p>The appellant then demanded DB take off her pants. The appellant said he wanted to inspect DB’s vagina to find out whether she had engaged in sexual intercourse with PC. When DB refused, the appellant slapped her and raised the bar above his head as if to hit her with it.</p> <p><u>Ct 4</u></p> <p>Fearing for her life, DB complied with the appellant’s demands. The appellant used one of his hands to touch DB’s vagina, moving her labia majora for a short time before removing his hand. The appellant again accused DB of having sex with PC and raised the bar in a threatening manner. The appellant again touched her labia majora with his hand.</p>	<p>Ct 1: 3 yrs 6 mths imp (conc). Ct 2: 3 yrs 6 mths imp (cum). Ct 3: 10 mths imp (conc). Ct 4: 5 yrs 6 mths imp (HS). Ct 5: No penalty.</p> <p>TES: 9 yrs imp.</p> <p>EFP.</p> <p>The sentencing judge found the appellant had accepted responsibility for his offending, had shown some insight into its impact on his victims, and had taken positive steps to rehabilitation.</p> <p>Offending had severe impact on DB; anxiety, panic attacks, depression and PTSD; sleeplessness; felt angry, helpless, degraded and fearful from appellant’s conduct.</p> <p>The sentencing judge found the offending was principally related to the appellant’s illicit drug use.</p> <p>The sentencing judge found that the appellant had suffered from some dysfunction and disadvantages during childhood; however, such experienced were not to be characterised as profound childhood deprivation.</p>	<p>Appeal dismissed (leave refused on grounds 2 and 3).</p> <p>Appeal concerned <i>Bugmy</i> principles, insufficient weight given to delay, and totality of sentence.</p> <p>At [66]–[72] discussion of <i>Bugmy</i> principles.</p> <p>At [70] ‘it may be appropriate to distinguish between two different classes of case. The first is where profound childhood deprivation has in some way impaired the capacity of an offender to behave lawfully... The second class of case is where the offender retains full capacity to make choices about unlawful behaviour, although the poor choices which the offender makes may be influenced by childhood experience.’</p> <p>At [105] ‘having reviewed the material before the sentencing judge, we agree with his Honour’s conclusion that the material did not establish, on the balance of probabilities, that any relevant capacity of the appellant was impaired by profound childhood deprivation which reduced his moral culpability for the offending or diminished the significance of personal and general deterrence as sentencing considerations.’</p> <p>At [106] ‘the procedural history of this matter shows the appellant experienced some delay before he was finally sentenced.’</p> <p>At [125] ‘there is nothing to suggest that his Honour...did anything other than sentence the appellant according to the rules of reason and justice...and within those limits which an honest person competent to discharge the duties of his office ought to confine himself. When that is appreciated, all that is left of the appellant’s submission is a contention that the sentencing judge should have given more weight to the mitigatory effect of delay. It follows that the appellant’s submissions cannot be accepted.’</p> <p>At [139] ‘the offences committed by the appellant were extremely serious. The appellant entered his former partner’s home without her consent, and in the very early hours of the morning, when she was asleep...The offence charged in ct 2 was particularly serious. In what was a completely unprovoked attack by a physically powerful man, the appellant used a metal bar to repeatedly strike the much younger PC, who was initially asleep and defenceless.’</p> <p>At [143] ‘in relation to ct 1, it was necessary for the sentencing judge to give effect to the need for general deterrence in relation to offences of home burglaries, particularly those that involve the use of violence...It is also equally necessary to ensure that the sentences imposed for cts 2,3 and 4 reflect the importance of general deterrence in sentencing for offences involving violence, and in relation to cts 1,3</p>

			<p><u>Ct 5</u></p> <p>The appellant demanded DB’s phone so that he could check her text messages. Before he left, the appellant took her phone with him.</p>		<p>and 4, the use of violence by men on women with whom they are, or have been, in a domestic relationships.’</p> <p>At [151] [in considering the relevant factors] ‘we are of the view that it is not reasonably arguable that the total effective sentence was unreasonable or plainly unjust.’</p>
6.	<p><i>The State of Western Australia v Pereira</i></p> <p>[2023] WASCA 162</p> <p>Delivered 15/11/2023</p>	<p>39 yrs at time sentencing.</p> <p>Convicted at trial.</p> <p>No criminal history.</p> <p>Born in East Timor; moved to Portugal and eventually Australia; move was initially difficult; generally had a positive upbringing.</p> <p>Completed yr 12; had been continuously employed as an adult.</p> <p>Lost his FIFO employment, likely as a result of the publicity of the charges.</p> <p>In a long-term relationship with his partner for seven yrs; relationship was reasonably strong; partner remained in Sydney.</p> <p>No diagnosed mental or physical health issues; had occasionally used illicit drugs.</p> <p>Several character references from the respondent’s family, friends and former colleagues; references suggested the respondent was kind, supportive of others, and a trustworthy person.</p>	<p>Ct 1: Sex pen without consent. Ct 2: Indec assault. Ct 3: Sex pen without consent. Ct 4: Indec assault.</p> <p>Just after midnight, two women (the victims) were walking together on their way to meet a friend. The respondent had been following them in his car, tracking their movements.</p> <p>The respondent parked his car, and after waiting in the shadows of a side street, ran up and grabbed both women from behind.</p> <p>When the respondent grabbed the women, he penetrated both women’s vaginas through their clothes using his fingers, and simultaneously touched their bottoms or anuses.</p>	<p>Ct 1: 14 mths (cum) Ct 2: 6 mths (conc) Ct 3: 14 mths (cum) Ct 4: 6 mths (conc)</p> <p>TES: 2 yrs 4 mths imp.</p> <p>EFP.</p> <p>Sentencing judge found the offending was premeditated: the offender had followed and observed both woman for a period of time leading up to the offending. The offending occurred almost simultaneously.</p> <p>The offender had made admissions in his record of interview, and formal admissions at trial — reducing the length of the trial.</p> <p>Sentencing judge found the respondent as genuinely remorseful.</p> <p>Offending had left the women anxious, traumatised, fearful and withdrawn.</p> <p>One victim said she felt violated; had been unable to eat or sleep properly; struggled to be intimate with her partner and to show affection; struggled to concentrate at work; and did not feel safe in public places.</p> <p>The other victim spoke about becoming extremely scared; anxious, stressed and feeling violated; her academic performance had deteriorated and was unable to qualify for her honours program; had experienced feelings of shame, guilt and self-blame.</p> <p>Sentencing judge erroneously stated the</p>	<p>Appeal allowed.</p> <p>Appeal concerned length of sentenced imposed for cts (1) and (3) and first limb of totality principle.</p> <p>Ct 1: 3 yrs imp Ct 2: 6 mths imp (conc) Ct 3: 3 yrs (reduced to 12 mths for totality served cum) Ct 4: 6 mths (conc)</p> <p>TES: 4 yrs imp.</p> <p>EFP.</p> <p>At [45] ‘it is recognised that there is no tariff for sexual offences. This is because offences of that nature are committed in a very wide range of circumstances ... it is also important to observe that there is no hierarchy of sexual offending.’</p> <p>At [50] ‘in considering [comparable cases] care must be taken to guard against an approach that assume the existence of a hierarchy of sexual penetration offences’.</p> <p>At [51] ‘there are also obvious differences in both the circumstances of the commission of the offences that were the subject of the appeal in <i>Rayapen, Musgrave, and Vartolo</i>, and in the personal circumstances of the respective offenders. An important difference is the fact that in this case the respondent used violence to offend against two women who were in a public place at night, after stalking them in his car for a period of time and then lying in wait for them in a dark side street. Nevertheless ... both the individual sentences for counts 1 and 3, and the aggregate sentence, imposed on the respondent were substantially less than the respective sentences that were ultimately imposed in <i>Rayapen, Musgrave, and Vartolo</i>.’</p> <p>At [53] ‘the fact that the penetrations occurred through clothing, in our view, does not reduce the seriousness of the respondent’s conduct. The respondent’s actions were forceful, demeaning, and amounted to a serious physical violation of two separate women.’</p>

				<p>maximum penalty of sex pen without consent as 10 years' imp; respondent's counsel corrected the judge after the sentence was imposed; his Honour corrected himself but stated it would not increase the sentence because the offending was 'unique factually'.</p>	<p>At [56] 'on occasions, "unique" appeared to be used to suggest that the offending was towards the lower end of the scale of seriousness. While it may be accepted that the offences committed by the respondent were, as a matter of fact, unusual, we do not think that this reduces the seriousness of the offending.</p> <p>At [56] 'the respondent's conduct was shocking, humiliating, and it has had a profound impact on his two victims'.</p> <p>At [67] 'the aggregate sentence must reflect the fact that the respondent offended against two women.'</p>
5.	<p>Moore v The State of Western Australia</p> <p>[2023] WASCA 156</p> <p>Delivered 06/11/2023</p>	<p>Convicted after trial.</p> <p>No physical or mental health issues.</p>	<p>66 x Sex pen without consent. 10 x Indec assault. 7 x Sexual coercion. 2 x Agg indec assault. 1 x Agg sexual coercion. 1 x Agg sex pen without consent.</p> <p>The appellant committed 87 sex offences against 13 women, over a 12 year period. In all but 13 of the offences, the appellant drugged the victims with an unknown substance in order to offend against them.</p> <p>The offences included multiple acts of sexual penetration without consent, the use of bondage, domination, urination, acts intended to demean the complainants and bestiality.</p> <p>The appellant had photographed or videoed the victims whilst the sexual acts were occurring, and retained those images, which were subsequently seized by police.</p>	<p>TES: 30 yrs imp.</p> <p>EFP.</p> <p>The sentencing judge found the offending was in a 'truly exceptional category', falling within the worst category for totality purposes.</p> <p>The sentencing judge found the appellant derived ongoing sexual gratification from watching the extreme violence he had inflicted on his victims.</p> <p>The sentencing judge had explicit regard to the totality principle: only six of the 87 individual sentences were accumulated to arrive at the TES.</p> <p>The offender had made no steps towards rehabilitation at the time of sentencing.</p> <p>At [78] 'no summary of [the victim impact] statements can possibly convey the profound, devastating and enduring effect that the offending has had upon the victims.'</p>	<p>Appeal dismissed (leave granted).</p> <p>Sentence appeal concerned second limb of totality principle.</p> <p>At [88] '... although the total sentence is long, it incorporated very significant allowances for totality. These included reducing individual sentences and making the majority of the sentences wholly concurrent. Cumulative sentences were imposed in respect of only five of the 13 victims. From this perspective it is difficult to see how the sentence could have been further reduced without failing to be an adequate reflection of the overall criminality.'</p> <p>At [89] 'the second limb of the totality principle does not operate at the expense of the first. A total effective sentence must still be proportionate to the overall criminality of the appellant's offending. Moreover, the second limb of the totality principle is not an absolute rule. If a sentence is crushing in the relevant sense, that outcome may permit a reduction in the total sentence, but it does not require one.'</p> <p>At [91] 'there is no reason to believe that the appellant will die before his sentence is complete. For that reason, it could be argued that the sentence in this case is not crushing in the relevant sense.'</p> <p>At [94] '... it cannot be ignored that the appellant continued his offending over a 12-year period and much of that offending was undetected for many years because of the effects of the stupefying drugs that he used on the victims. He enjoyed underserved liberty during those years, and any complaint that any otherwise appropriate sentence will consume much of his remaining life deserves little sympathy.'</p> <p>At [96] '... the number of offences, the nature of the offences, the number of victims and the length of time over which the offending continued places this total offending into a category of extraordinary seriousness. Indeed, the offending in this case was of such seriousness that the appellant has forfeited any right to expect that he will be</p>

					released at an age where he could enjoy any significant life after prison.’
4.	<p><i>The State of Western Australia v Rayapen</i></p> <p>[2023] WASCA 55</p> <p>Delivered 12/04/2023</p>	<p>24 yrs at time offending. 26 yrs at time sentencing.</p> <p>Convicted on late PG (in full satisfaction of the ind) (15% discount).</p> <p>No criminal history.</p> <p>Born Italy; moved to UK aged six yrs; moved to Australia with family aged 17 yrs; raised loving and caring family; not subjected to any severe physical punishment, trauma, abuse or adversity during childhood.</p> <p>Positive and supportive references; offending inconsistent and out of character.</p> <p>Time of offending studying law at university; moved to Melbourne to complete his studies.</p> <p>In a relationship at time sentencing.</p> <p>No history of illicit drug use; commenced drinking alcohol aged 18 yrs; variable drinking pattern, during university would get drunk on a regular basis; taking antidepressant medication since offending.</p>	<p>Ct 2: Agg indec assault. Ct 4: Sex pen without consent.</p> <p>The victim, aged 21 yrs, was celebrating the end of exams on Rottnest Island. During the afternoon the victim, along with a male friend, socialised at a nearby unit.</p> <p>Later, Rayapen arrived at the unit. The victim and Rayapen did not know each other. During the night they interacted with each other.</p> <p>In the early hrs of the morning the victim returned to her unit with her male friend. Rayapen tagged along with them and was told he could stay the night.</p> <p>The victim got into bed, which was made up of two beds pushed together. Rayapen lay in the bed next to her. On the other side of the bed was the victim’s male friend.</p> <p>During the night Rayapen squeezed the victim’s breasts, causing her pain and bruising, and penetrated her vagina with his fingers. She physically resisted him and curled herself up into a foetal position. Six times she told him ‘no’. Rayapen only desisted when she pushed on his throat with her hand.</p> <p>The next day the victim confronted Rayapen and he told her he was sorry for what had happened.</p> <p>Some days later the victim made a pretext call to Rayapen and he made some admissions of wrongdoing.</p>	<p>Ct 2: 12 mths imp (conc). Ct 4: 2 yrs imp (conc).</p> <p>TES 2 yrs imp, susp 2 yrs.</p> <p>The sentencing judge found ‘the inherent exercise of mercy’ in combination with other factors, concluded that it was not appropriate to impose an immediate term of imp.</p> <p>The sentencing judge found that while there was a degree of persistence in the offending, it was opportunistic and overall it lacked any real premeditation; the widespread mainstream and social media reporting had no doubt been a source of humiliation to Rayapen and he had lost the ability to practice law in WA, or anywhere in the Commonwealth.</p> <p>Significant steps taken towards rehabilitation; attending alcohol counselling.</p> <p>Low risk of reoffending; deeply and genuinely remorseful; deep sense he had brought dishonour to his family; attempt at self-harm.</p>	<p>Allowed.</p> <p>Appeal concerned length of sentence and error in sentencing (degree of remorse and plea discount).</p> <p>Resentenced (10% discount):</p> <p>Ct 2: 12 mths imp (conc). Ct 4: 3 yrs 3 mths imp (conc).</p> <p>TES 3 yrs 3 mths imp.</p> <p>EFP.</p> <p>At [164] ... we have concluded that the learned sentencing judge erred in concluding that Mr Rayapen had ‘deep and genuine remorse’ at the ‘highest end or remorse’. ...</p> <p>At [171]-[172] ... we are satisfied that the discount of 15% from the head sentence was such that we should infer error on the part of the sentencing judge. ... Mr Rayapen did not PG, or indicate he would PG, at the earliest reasonable opportunity. On the contrary, ... Mr Rayapen PG at the latest available opportunity.</p> <p>At [186] ... the State case is properly characterised as strong. That was a matter relevant to the discount to be given for Mr Rayapen’s PG.</p> <p>At [228] The sentencing judge was wrong to conclude that there were exceptional circumstances capable of justifying the exercise of mercy ... his Honour was wrong to conclude that, having regard to all relevant sentencing factors, there was a proper basis for imposing a sentence other than immediate imp.</p> <p>At [240] ... The sentence [for the offence of sex pen without consent] was not commensurate with the seriousness of the offence, ...</p> <p>At [241] ... the TES did not bear a proper relationship to the overall criminality involved in all of the offences. ...</p> <p>At [243] As to the objective seriousness of the offence, the offence in the present case, while not in the most serious category, was nevertheless a serious case of its kind. The victim was in a vulnerable position, affected by alcohol and, at least on the verge of sleep, when Mr Rayapen began the offending conduct. Prior to the offence of sex pen, Mr Rayapen had persistently touched the victim without her consent, with sufficient force to cause her bruising. Her repeated attempts to prevent that conduct, by physical resistant Mr Rayapen and saying ‘no’, left no ambiguity as to her wish to be left alone.</p>

					Notwithstanding those attempts, Mr Rayapen persisted, escalating to the offence of unlawful sex pen.
3.	<p>The State of Western Australia v Buscunan Cabrera</p> <p>[2023] WASCA 34</p> <p>Delivered 21/02//2023</p>	<p>35 yrs at time first offending. 44 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>No prior criminal history.</p> <p>Born Chile, moved to Australia with family in 1983.</p> <p>Completed yr 12; Bachelor of Iridology and Advanced Diploma in Natural Medicine.</p> <p>Employed father's naturopath business; eventually took over business with his brother.</p> <p>Married 10 yrs; two children.</p> <p>Good physical and mental health.</p> <p>No issues with drugs and alcohol.</p>	<p>5 x Sen pen without consent. 1 x Indec assault.</p> <p>The offending occurred when the victims visited Buscunan Cabrera in his capacity as a practitioner of natural medicine.</p> <p>The offending extended over a period of about five-yrs on five separate occasions.</p> <p><u>Ct 1</u> The victim, AL, was aged 18 or 19 yrs. In the company of her boyfriend AL consulted Buscunan Cabrera, who performed iridology on her. He told her she had thrush. She was then told to remove her clothes and to lay down on the examination table. She was uncomfortable but did as instructed. He then touched her clitoris. He repeatedly told her that she had thrush. AL told him that she knew what thrush felt like and she did not have it.</p> <p><u>Ct 2</u> The victim, NL, was aged 31 yrs. She consulted Buscunan Cabrera for shoulder and knee pain. During the examination he asked her to remove her pants. She did so, keeping her underwear on. He then manipulated her knee. After performing iridology on NL he told her she might have thrush and that he had to check her vagina. NL agreed because she felt desperate about her pain and thought it somehow might help. During the examination he inserted a finger into her vagina, then informed her he had found inflammation.</p> <p><u>Ct 3</u> The victim, FJ, was aged 33 yrs. She visited Buscunan Cabrera for recurring thrush. After performing iridology on FJ he told her he needed to know what</p>	<p>Ct 1: 2 yrs imp (conc). Ct 2: 2 yrs imp (conc). Ct 3: 18 mths imp (cum). Ct 6: 2 yrs imp (cum). Ct 8: 9 mths imp (conc). Ct 9: 2 yrs imp (cum).</p> <p>TES 5 yrs 6 mths imp.</p> <p>EFP.</p> <p>The trial judge found the respondent's offending very serious; it was opportunistic and carried out for sexual gratification over a considerable, lengthy period of time; the victims were vulnerable and the offending aggravated by his position of trust, which he ultimately breached by conducting examinations that were not medically warranted.</p> <p>No findings of remorse; acceptance of responsibility or demonstrated insight into his offending; low risk of re-offending if employed different role and not as a naturopath.</p> <p>The trial judge found the only appropriate sentencing disposition was a term of imp.</p>	<p>Allowed.</p> <p>Appeal concerned sentenced on mistaken basis ct 3 offence of indec assault; length of individual sentences cts 1, 2, 3, 6 & 9 and totality principle.</p> <p>Resentenced:</p> <p>Ct 1: 3 yrs 9 mths imp (cum). Cts 2 & 6: 3 yrs 9 mths imp (conc). Ct 3: 3 yrs 3 mths imp (conc). Ct 8: 9 mths imp (cum). Ct 9: 3 yrs 6 mths imp (conc).</p> <p>TES 7 yrs 3 mths imp.</p> <p>EFP.</p> <p>At [57] ... it is apparent from his Honour's findings of fact that the pen the subject of ct 3 (while very serious) was less invasive than the penetrations the subject of cts 2, 6 and 9 (all of which involved digital pen of the vaginal canal) and slightly less invasive than the pen the subject of ct 1.</p> <p>At [81] In the present case, the facts and circumstances of the respondent's offending in relation to cts 1, 2, 3, 6 and 9 were very serious. The respondent was in a position of trust in relation to the complainants and he breached that trust. The complainants regarded the respondent as a professional healer and they put their faith in him. The complainants suffered from a variety of ailments and were vulnerable. The impact of the respondent's offending upon the complainants was significant. His offending adversely affected their trust in medical professionals. The relevant examinations carried out by the respondent were not medically warranted. His motivation was sexual gratification. The offending was brazen, especially in relation to the complainant the subject of ct 1 ... whose boyfriend at the time was in the consulting room when the offending occurred. ...</p> <p>At [85] ... each individual sentence imposed on the respondent for cts 1, 2, 3, 6 and 9 was not commensurate with the seriousness of the offence. ... the length of each individual sentence was unreasonable or plainly unjust.</p> <p>At [87] Each individual sentence for cts 1, 2, 3, 6 and 9 was substantially less than the sentence open to his Honour on a proper exercise of the sentencing discretion. ...</p> <p>At [93] ... the TES ... did not bear a proper relationship to the overall</p>

			<p>he was dealing with and asked her to remove her lower clothing. She complied. He used his fingers to press her clitoris and down around her labia for about one minute.</p> <p><u>Ct 6</u> The victim, TC, was aged 29 yrs. She consulted Buscunan Cabrera as she suffered from migraines and had coeliac disease. After he performed iridology on her the conversation turned to sexual intercourse. TC was taken aback. She said intercourse was fine but sometimes painful. He said there could be ulcers on her vaginal walls and asked to examine her. During the examination he circled the entrance to her vaginal canal with his finger, then inserted two fingers about 3 cm into her vagina.</p> <p><u>Cts 8 and 9</u> CM was aged 26 yrs. She had lupus, which caused her fatigue, joint pain and rashes so she consulted Buscunan Cabrera. During the consultation he performed iridology on her. Following a discussion of her symptoms he asked to look at her joints and chest. She removed her top and bra. She was not given anything to cover herself. He examined her breasts by touching them (ct 8).</p> <p>Buscunan Cabrera then spoke to CM about vaginal discharge and asked to check her for it. CM agreed. During the examination he used a torch and inserted a finger into her vagina and moved it around (ct 9).</p>		<p>criminality involved in all of the offences, viewed together, and having regard to all relevant facts and circumstances and all relevant sentencing factors. ... The TES was unreasonable or plainly unjust.</p>
2.	<p><i>The State of Western Australia v Tumata</i></p> <p>[2022] WASCA 161</p> <p>Delivered 06/12/2022</p>	<p><u>Tumata</u> 24 yrs at time offending. 28 yrs at time sentencing.</p> <p>Convicted after PG (cts 1, 6, 34 and 35) (10% discount). Convicted after trial (cts 2-5; 7-22; 25; 28; 29; 31; 32; 36-38)</p> <p>Lengthy criminal history.</p>	<p><u>Tumata</u> 8 x Agg sex pen without consent. 3 x Agg indec assault. 1 x Demanding property with oral threats. 10 x AOBH. 8 x Act with intent to harm. 2 x Threats to harm.</p> <p><u>Sheppard</u></p>	<p><u>Tumata</u> TES 14 yrs imp.</p> <p><u>Sheppard</u> TES 13 yrs 6 mths imp.</p> <p><u>Woods</u> TES 12 yrs imp.</p> <p>The sentencing judge found Tumata and</p>	<p>Allowed.</p> <p>Appeal concerned totality principle (individual sentences not challenged).</p> <p>Resentenced:</p> <p><u>Tumata</u> TES 17 yrs imp. EFP.</p>

		<p>Parents separated when aged 4 yrs; raised by mother; sent to live with a relative in NZ aged 12 yrs due to his behaviour; returned to live with his father, now estranged.</p> <p>Limited literacy and numeracy skills.</p> <p>No history of paid employment; other than labouring work about aged 17 yrs.</p> <p>Commenced cannabis and alcohol use aged 12 yrs; regular user of methyl and alcohol excessively.</p> <p><u>Sheppard</u> 23 yrs at time offending. 27 yrs at time sentencing.</p> <p>Convicted after PG (ts 1, 4, 6, 7, 16 and 35) (10% discount). Convicted after trial (cts 2; 3; 5; 8-15; 17-22; 25; 28; 29; 32; 34; 36; 38 and 39).</p> <p>Lengthy criminal history.</p> <p>Positive, stable and prosocial upbringing until the deaths of his mother and grandmother aged 15-16 yrs; struggled to deal with the grief; became homeless and associated with negative family members.</p> <p>Completed yr 10; no real work history.</p> <p>Methyl use from aged 15-16 yrs.</p> <p><u>Woods</u> 26 yrs at time offending. 30 yrs at time sentencing.</p> <p>Convicted after trial (cts 1; 2; 4; 5; 7-14; 18-22; 28 and 29).</p>	<p>8 x Agg sex pen without consent. 3 x Agg indec assault. 1 x Demanding property with oral threats. 11 x AOBH. 7 x Acts with intent to harm. 1 x Threat to harm.</p> <p><u>Woods</u> 8 x Agg sex pen without consent. 1 x Agg indec assault. 1 x Demanding property with oral threats. 4 x AOBH. 4 x Acts with intent to harm. 1 x Threat to harm.</p> <p>The victim, M, was aged 22 yrs. He was remanded in custody and had never been to prison before.</p> <p>Tumata, Sheppard and Woods, who were also prisoners, entered M's cell, alleging he was an informant. Sheppard told M he had to pay a fine, to increase each wk until it was paid. If the fine was not paid M was told he would be killed.</p> <p>After this incident, over a period of 18 days and on an almost daily basis, Tumata, Sheppard and Woods subjected M to violence and brutality of the most extreme kind. This included beating, kicking and indecently assaulting him, choking him to the point he lost consciousness, burning him with boiling water and repeatedly sexually penetrating him with their bodies, a broom handle and a pencil.</p> <p>Tumata, Sheppard and Woods also threatened to rape his partner.</p>	<p>Sheppard the ringleaders and that Woods' acted 'more as a follower' and he was overall less culpable than Tumata and Sheppard; after the initial extortion the three respondents, sometimes as a pair or individually, engaged in a concerted, persistent and ongoing course of conduct against M over an extended period; they subjected M to increasingly violent physical and sexual attacks to enforce their demand for money; Tumata and Sheppard were physically powerful men, M, helpless and defenceless and extremely frightened and scared of the three respondents who terrorised him; the attacks designed to intimidate and frighten; they attacked M's personal dignity and caused him to suffer significant embarrassment; the sexual offences designed to cower, humiliate and demean for the purpose of forcing him to pay money when there was no legitimate basis for the demand; the respondents' domination and control over M extended to his communications with his family and the attacks generally occurred inside a prison cell away from the sight of prison guards and other prisoners, with one of the respondents acting as a lookout.</p> <p>No demonstrated insight into the consequences of their offending; no exhibited remorse, apart from the PGs entered by Tumata and Sheppard.</p> <p>Offending profound effect on the victim.</p>	<p><u>Sheppard</u> TES 16 yrs 6 mths imp. EFP.</p> <p><u>Woods</u> TES 14 yrs 6 mths imp. EFP.</p> <p>At [113] The offending was aptly characterised by the State ... as sadistic, malicious, humiliating and intimidating. The respondents, in concert, deliberately preyed upon a highly vulnerable victim. ... Together, the respondents waged a campaign of terror upon M, which caused him significant physical injury and broke him psychologically. The respondents' acts were merciless. They involved a level of deliberate callousness, cruelty and depravity seldom seen by this court.</p> <p>At [114] An especially serious feature of the offending was that it was committed in a prison by inmates upon another inmate. ... Prisoners, particularly those who, like M, are young, alone and have never been incarcerated before, may be highly vulnerable to the threats and intimidation of more experienced prisoners such as, in this case, the respondents. ... [The victim's] vulnerability would have been apparent to the respondents, who immediately proceeded to take advantage of it. ...</p> <p>At [118] ... the eight offences of agg sex pen involved a high level of criminality. The respondents together committed each of these offences over three separate and distinct incidents on different days, either as a principal or an aider. ... Each offence was committed in company and was designed to, and did in fact, terrify, degrade and humiliate M as well as cause him physical and psychological harm. ...</p> <p>At [120] The seriousness of the offences of agg sex pen without consent was heightened because they occurred in the context of the ongoing extortion of M, ... All of these offences, when considered together, substantially increased each respondent's overall criminality, ...</p>
--	--	---	---	--	--

		<p>Significant prior criminal history.</p> <p>Parents separated aged 2 yrs; lived with mother and siblings; positive home life; eventually lived with father, exposing him to domestic violence and substance abuse.</p> <p>At time sentencing father and four brothers serving terms of imp.</p> <p>Left school during yr 10; never had paid employment.</p> <p>Long-term relationship; two children.</p> <p>Introduced to methyl by his father.</p>			
1.	<p>Musgrave v The State of Western Australia</p> <p>[2021] WASCA 67</p> <p>Delivered 23/04/2021</p>	<p>23 yrs at time offending. 25 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>Prior juvenile and adult criminal history.</p> <p>Youngest of three siblings; home environment free from substance abuse and violence; experienced some difficulties growing up; overweight; father a strict disciplinarian with high expectations; sexually abused by two ministers of religion aged 14 yrs.</p> <p>Left school aged 14; bullied; often retaliated resulting in his expulsion.</p> <p>Commenced TAFE pre-apprenticeship; did not complete the course.</p> <p>Some short term relationships; no established long term relationships.</p>	<p>Ct 1: Indec assault. Ct 2: Sex pen (digital).</p> <p>The victim, S, was a young female backpacker from Europe. On her arrival in Perth she obtained work at a country tavern owned by Musgrave's parents. She was provided with a room, containing two beds, attached to the tavern.</p> <p>On New Year's Eve S completed her shift and joined patrons and Musgrave's family in the celebrations. During the evening she sat at a table and spoke with Musgrave, his mother and other people. However, S did not know Musgrave's name and at no time did she talk solely with him.</p> <p>At about 4.00am S went to her room and went to sleep in her bed. Sometime later Musgrave went to her room without invitation. He knocked persistently on the door until she answered. He said something which she did not understand before asking S for a hug. She told him, 'no'. S then made it clear she was not interested in him and</p>	<p>Ct 1: 6 mths imp (conc). Ct 2: 3 yrs 6 mths imp (conc).</p> <p>TES 3 yrs 6 mths imp.</p> <p>EFP.</p> <p>The trial judge characterised the sexual penetration as no less serious by the fact that it was a digital penetration than it would have been had it been a penile penetration.</p> <p>The trial judge found the appellant's offending aggravated by his persistence; the victim's vulnerability and defencelessness and the power imbalance, in that she was a foreigner who had recently arrived in Australia, she had limited English skills and she was employed by his parents.</p> <p>Offending very significant and continuing impact on victim.</p> <p>No victim empathy or demonstrated remorse; continued to deny the offences; little understanding of appropriate conduct towards women; elevated risk of reoffending if treatment needs not addressed.</p>	<p>Dismissed.</p> <p>Appeal concerned error in characterisation of the seriousness of ct 2 and length of sentence of ct 2.</p> <p>At [3]-[6] Ground 1 challenges the ... remark that the offence of sex pen without consent committed by the appellant, which consisted of [him] inserting his fingers into the complainant's vagina, was 'no less serious' by the fact that it was digital pen than it would have been had it been a penile pen. Underlying that challenge is the proposition that penile-vaginal sex pen without consent is inherently more serious criminal conduct ... That proposition is not only wrong, as a matter of law. It is incoherent. ... this Court has repeatedly confirmed, there is no hierarchy of sex pen. The seriousness of every offence of unlawful sex pen must be determined by its own individual circumstances. ...</p> <p>At [186]-[187] ... the statement by the sentencing judge ... that the appellant's offending in relation to ct 2 was 'no less serious by the fact that it was a digital penetration than it would have been had it been a penile penetration' indicated that, in her Honour's view, the sentence that should be imposed on the appellant for ct 2 involving digital penetration should not be materially less than the sentence that would have been imposed if the ct had involved penile penetration. ... her Honour's view was not erroneous.</p> <p>At [205] ... The appellant did not simply digitally penetrate the complainant's vagina without her consent. [He] sexually penetrated [her] despite [her] having made plain ... that she was not interested in him. Later, when the appellant was getting into her bed [she] reiterated</p>

		<p>Short periods of work various roles; employment terminated primarily because of alcohol and drug misuse; unemployed two yrs prior to sentencing.</p> <p>Good physical health; history of hospital admissions for drug induced psychosis; periods of depression and suicidal ideation.</p> <p>History of cannabis and alcohol use; later amphetamines and other drugs, including LSD; intravenous methyl use aged 14-15 yrs.</p>	<p>that she wanted to sleep on her own. He then asked if he could sleep in her bed, to which she responded 'no'.</p> <p>As he was the son of her employer S did not consider herself to be in any danger from Musgrave, and appreciating he was drunk and would be unable to drive a motor vehicle, she offered him the other bed in her room. He agreed.</p> <p>As S was falling asleep she realised Musgrave was getting into her bed. She screamed and told him to leave her alone. She then got out of her bed and into the other bed. Sometime later Musgrave offered to get out of her bed. S agreed and she returned to her own bed and went back to sleep.</p> <p>Later S woke up to find Musgrove in her bed. Her clothing was pulled down. He was touching her breasts and penetrating her vagina with his fingers. Shocked, S tried to push Musgrove away. She immediately got out of bed and left the room crying.</p> <p>A short time later S returned to her room, locked the door, showered and prepared to leave. S then left the tavern and hitchhiked to a regional urban area. She reported the matter to the police that same evening.</p>		<p>..., forcefully and unequivocally, that she did not want any physical contact with him. The appellant ignored [her] wishes and, despite her having in substance expressly refused consent, sexually penetrated her while she was sleeping. [His] offending was persistent and involved some premeditation. He breached the trust which the complainant had shown by permitting him to sleep separately from her but in her room.</p> <p>At [283] Nothing in the definition in s 319(1) or in s 325 of the <i>Criminal Code</i> suggests that any particular form of sex pen is, of itself, more serious than another. ... That is not to suggest, ... that all offences of sex pen without consent will be equally serious. Rather, the seriousness of a particular offence will fall to be assessed by reference to all of the circumstances of the case, ...</p> <p>At [322] ... The offending in ct 2 was clearly not at the most serious end of the spectrum of offending conduct of this kind. Nevertheless, ... this case involved a very serious instance of sex pen without consent.</p>
--	--	--	--	--	---