SUPREME COURT OF QUEENSLAND

CITATION:	*R v OU* [2017] QCA 266
PARTIES:	**R** **v** **OU** (applicant)
FILE NO/S:	CA No 87 of 2017 DC No 80 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction & Sentence)
ORIGINATING COURT:	District Court at Gladstone – Date of Conviction & Sentence: 17 November 2016 (McGill SC DCJ)
DELIVERED ON:	7 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2017
JUDGES:	Sofronoff P and McMurdo JA and Bowskill J
ORDERS:	**1. Refuse the application to extend time in which to appeal against the applicant's convictions.** **2. Refuse the application to extend time in which to seek leave to appeal against the sentences imposed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant was convicted of three counts of rape of his de facto partner and sentenced to concurrent terms of four, five and seven years' imprisonment – where there was a delay of five months between the convictions and the filing of the notice of appeal – where the applicant explained the delay by reference to limited access to telephones in prison, illness, a condition affecting his eyesight, and limited education and literacy skills – where the complaint alleged that the offending took place between episodes of consensual sex, including anal sex – where the applicant was said to have confiscated the complainant's phone and raped her anally and vaginally – where the offending was particularly severe, including simultaneous penetration of the complainant's anus with the applicant's penis and a dildo, and where the applicant handcuffed the complainant to a bed, despite her protestations that she would lose control of her bowels – where the complaint gave evidence that the applicant left the complainant handcuffed in a bed lying in her own excrement – where the medical evidence was largely equivocal – where

the complainant made preliminary complaints but only in relation to one of the counts – where there were discrepancies in the complainant's police interview and her evidence given at trial – where the applicant contended that the verdict was unreasonable because the complainant continued to live with him and did not seek medical attention or go to the police, and on the basis that the medical evidence was equivocal – whether it was open to the jury to conclude, beyond reasonable doubt, that the applicant was guilty – whether defence counsel's decision not to lead character evidence or have the applicant give evidence was so obviously wrong that there was a miscarriage of justice – where the applicant contended that the case against him was so weak that he should have received a non-custodial sentence – where the complainant was left with some difficulty of incontinence and suffered a minor lesion in the rectum in consequence of the offending – where the complainant had suffered a quite severe psychological injury as a result of the offending – where the applicant demonstrated no remorse – where factors in mitigation were taken into account by the sentencing judge – whether there was any error in the judge's reasoning or error indicated by the magnitude of the sentences

R v Amundsen [2016] QCA 177, cited
R v Appleton [2017] QCA 125, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: The applicant appeared on his own behalf
G J Cummings for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and with the orders his Honour proposes.

[2] **McMURDO JA:** After a four day trial by a jury in the District Court, the applicant was convicted of three counts of rape. The offences were found to have been committed during a period of about five months, in late 2014, when the applicant and the complainant lived together in a de facto relationship. He was sentenced to concurrent terms of four, five and seven years' imprisonment. Each was declared to be a domestic violence offence.

[3] The applicant was convicted by the jury on 16 November 2016 and sentenced on the following day. On 26 April 2017, he filed this application for an extension of time in which to appeal against his convictions and his sentences.

[4] In order to obtain an extension of time within which to appeal against a conviction, it is usually necessary to provide a good explanation for the delay in challenging the conviction and to show that the proposed appeal has sufficient merit to require the

Court, in the interests of justice, to grant the extension which is sought.[1] But where there is not a satisfactory explanation for the delay, the apparent merits of the appeal may still warrant an extension of time.

[5] The applicant, who is without legal representation, seeks to explain the delay as follows. During the term permitted for his appeal, he was prevented by circumstances beyond his control from obtaining legal advice. He says that when he first went to prison after the trial, he was unable to obtain access to the few telephones available for prisoners. He did manage to arrange a video conference call with his former solicitor, but for some reason, beyond his control, that did not take place. He then became very ill, and was taken to hospital where he was diagnosed with emphysema. Upon being discharged from hospital he returned to prison where, again, he had difficulty obtaining access to a telephone. He has also been hampered by his poor eyesight. He has a condition called Retinitis Pigmentosa, which makes it difficult for him to read. He has limited education and poor literacy skills.

[6] From those matters, there is a credible explanation for not challenging his convictions or sentences within the permitted time. On the other hand, there is not a satisfactory explanation for taking as long as five months to do so.

The evidence at the trial

[7] The complainant, who was aged in her early forties at the time of the trial, gave the following evidence. She and the applicant met in early 2014. A sexual relationship between them soon developed. The relationship continued for about five months before they began to live together. There was no alleged offending during that period, during which the complainant was living with her teenage children. The applicant persuaded her to leave her employment and live with him, where she could receive an income from public funding as his carer. His need for care came from the visual impairment to which I have referred. In August 2014, the couple moved to a town in Central Queensland and commenced to live together. To that point there had been no discord in their relationship. She said that they were having sex "probably every day".

[8] Two of the three counts were alleged to have occurred in the house in which they first lived. The complainant said that as soon as they began to live together, their relationship deteriorated: the applicant's behaviour towards her became aggressive and abusive. He confiscated her phone and her SIM card so that, she said, she was unable to talk to her children, her mother or her friends. And he began to sexually abuse her.

[9] She described the first count as having occurred in this way. In their house, he pushed her down and held her down whilst he had anal sex. He also penetrated her anus with a dildo (which the couple had purchased). On her evidence, he simultaneously penetrated her with his penis and the dildo. She said that this was very distressing and painful and, as it was occurring, she was crying and pleading with him to stop. She said that this went on for about half an hour, leaving her with consequential bleeding in the anus.

[10] After then, there were episodes of consensual sex, including anal sex. She said that the consensual sex was occurring "a few times a week" but the non-consensual sex

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1 *R v Appleton* [2017] QCA 125; *R v Amundsen* [2016] QCA 177 at [7]; *R v Tait* [1999] 2 Qd R 667 at [5].

was happening "more regularly". Most of the non-consensual sex, she said, was anal sex. But she agreed that prior to this count, there had been occasions of consensual anal sex between them.

[11] The second count was said to have occurred in this way. The complainant was in the kitchen cooking dinner, when the applicant pulled down her underwear, bent her over and penetrated her anally with his penis, despite her saying that he should stop. When she tried to stand up, he forced her down and anal intercourse continued for about half an hour. Again, she said, she was left with consequential bleeding.

[12] Subsequently, the couple moved to another town. The complainant knew no one in the area. The applicant still had her telephone. She had had no contact with her children, mother or friends for about six weeks. The couple continued to have consensual sex, but the applicant's behaviour was becoming more aggressive. She said that by this stage the sex was more often than not non-consensual. The third count then occurred. The complainant described an incident when the applicant hand-cuffed her to a bed and had anal intercourse with her, without her consent. She said that this episode had begun with consent, including her consent to being hand-cuffed to the bed. But she consequently withdrew her consent, telling him to stop because it was hurting and she feared that she was about to lose control of her bowels. She said that he persisted for some time after that and, indeed, after she did lose control of her bowels. He stopped only after he had ejaculated and left her hand-cuffed to the bed for a period of time before releasing her. During that time, she said that her own excrement was "all up my arm and leg [and] all over the bed". And as he was leaving the bed and the complainant in this position, he said to her that "you are not doing it properly – anal sex, that is, unless you've struck oil."

[13] The relationship ended 2 January 2015. The last occasion on which there was sex between the couple was on New Year's Eve. The complainant agreed that this was consensual, although she said that she participated only because she believed he would force himself on her if she did not consent. The complainant left the house and sold the small amount of furniture which she had brought to the house to a neighbour. She went to a nearby house, from where she rang a friend who drove to the town and picked her up, taking her back to the friend's house.

[14] On 12 January 2015, she was examined by a general practitioner. He gave evidence that she complained to him of sexual abuse and asked him to examine her vagina and rectum for damage. He found no abnormality and said that the complainant did not seem to experience pain during the examinations.

[15] The complainant saw a surgeon in April 2015. The surgeon gave evidence that the complainant said that she was experiencing pain from the insertion of a dildo and penis into her anal canal. The complainant had apparent pain in the course of the surgeon's examination. To the surgeon, that indicated damage to the anal wall, possibly attributable to a large, hard object passing through the anal canal. The surgeon conducted an ultra sound examination, revealing a possible internal injury to the anal canal, and an MRI scan, revealing an old lesion of the rectum. The surgeon said that the lack of pain response, when the complainant had been examined by the general practitioner a few months earlier, was surprising, but could be explained by some trauma occurring in the intervening period.

[16] Consequently the medical evidence, as the respondent now fairly concedes, was mostly equivocal.

[17] There was a preliminary complaint made to a friend, but only in relation to the third count, in September 2014. There was also a complaint, at least in relation to the third count, made to a social worker in April 2015. The complainant first went to the police at the end of July 2015.

[18] The cross-examination of the complainant provided several bases for the ultimate argument of defence counsel that the complainant was not to be believed and there had been no episodes of non-consensual sex. The complainant had made no reference to hand-cuffs when interviewed (twice) by police. It was not until her evidence in chief that her complaint included that particular. She told police that the second count, the episode occurring in the kitchen, had involved vaginal and not anal sex. The complainant had not sought medical treatment at times when she said that she had suffered injuries from these offences: she went to a doctor only after the relationship had ended. There was an incident in November 2014, when a police officer came to the house where the couple were living because the complainant's mother had called police, concerned that she had not heard from the complainant for many weeks. The complainant did not say to the officer that she had been raped or otherwise abused. The cross-examination revealed that she and the applicant had exchanged Christmas gifts.

[19] The applicant did not give or call evidence. The arguments put to the jury by defence counsel, as summarised by the trial judge, were as follows. The complainant's evidence was not to be accepted because it was vague, evasive and argumentative during cross-examination. Her evidence in relation to count one was inconsistent with the opening of the prosecution case. And on that count, her description of the applicant's penis and a dildo being in her anus at the same time was implausible. Her claim that she had suffered pain from the time of that first offence was inconsistent with the evidence of the general practitioner, that she exhibited no pain in the course of the examinations which he conducted. The medical evidence overall was consistent with there having been no more than consensual anal intercourse in the course of the relationship. There were the matters which emerged in cross-examination to which I have referred. And it was implausible that she would continue to live in a consensual, sexual relationship after these incidents occurred, seeking no medical assistance.

The proposed grounds of appeal

[20] There are two outlines of argument filed by the applicant, to which he added little in his oral submissions. Only the first of those outlines sets out the grounds of his proposed appeal against conviction.

[21] There are several arguments which together amount to claim that on the evidence which was led at the trial, the applicant should not have been convicted. There are other arguments which complain that no evidence was given or called by the applicant. There is a complaint that defence counsel was incompetent, which is said to have been demonstrated by the trial judge's repeated criticism of his cross-examination. And there is a complaint that the applicant was convicted on count 3 by a majority, rather than by a unanimous verdict.

[22] I go first to the arguments that he ought not to have been convicted, on the evidence which was led at the trial. To set aside the convictions upon the basis of these arguments, this Court would have to conclude that it was not open to the jury to

find, beyond reasonable doubt, that he was guilty.[2] Because of the jury's role as the constitutional tribunal for deciding issues of fact, as representative of the community, the setting aside of a jury's verdict on the ground that it is unreasonable is a step not to be taken without regard to the advantage enjoyed by the jury over a Court of Appeal which has not seen or heard the witnesses called at the trial.[3]

[23] The matters which are advanced for this first argument are as follows. No specific dates were established as those upon which the offences occurred. There was no substantial evidence, including medical evidence, to support the complainant's evidence. Medical assistance was not sought by the complainant at or near the time of the offences. There were the inconsistencies in the complainant's evidence to which I have referred. The complainant did not go to police until some eight months after the end of the relationship. There was a physical impossibility that the first offence, involving the dildo, occurred as the complainant described in her evidence.

[24] For the most part, these were arguments of substance, which defence counsel was able to make, and did make, at the trial. Nevertheless, it was open to the jury, having considered them, to be persuaded by the complainant's evidence. If the complainant had been the victim of an abusive domestic relationship, as she described in her evidence, the facts that she did not immediately seek medical attention or go to the police were not so unusual. Similarly, the fact that she did not immediately cease the relationship, but remained and participated in sex with the applicant, could also have been explained by her circumstances of being dominated in an abusive domestic relationship, when she was in a remote town with no family or friends nearby. Although the medical evidence did not support the prosecution case, it did not disprove it. Her failure to refer to the handcuffs, in her statements to police, could have been attributed to some embarrassment on her part.

[25] There are then the complaints that his case was not conducted as it should have been. He says that he cannot "help but feel that it was a one way hearing" because his "side was not heard". In his oral submissions, he complained that his "statement wasn't read out". He says that he had made a statement, in which it was said that he had "dismissed [the complainant] as my carer and partner because she was on illicit drugs ...". He claims that he "drug-tested her" and that when "she tested positive to a lot of drugs", the applicant dismissed her. He claims that she then threatened to make his life "a living hell" and to "destroy" him. He says that his defence counsel told him that he had decided not to use that evidence. He claims that he had asked for "a lot of witnesses to be subpoenaed" but that his counsel did not do so.

[26] In his outline of argument, the applicant complains that his lawyers did not contact his family and friends in order to obtain character references. In that respect, he relies upon an affidavit, affirmed by his eldest daughter in July this year, to which there are exhibited several statements, all made since the trial, which vouch for the applicant's good character. All of these statements are by members of the applicant's family, with the exception of one by the applicant's former wife and by another woman with whom he had a short relationship. There is no suggestion that any of this evidence could not have been procured at the time of the trial. On its face, this character evidence would not have disadvantaged the applicant's case.

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2 *M v The Queen* (1994) 181 CLR 487 at 493.

3 *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65].

Subject to what might have emerged in the cross-examination of these witnesses, the evidence may have been of some value to the defence case. However it is unlikely that it would have had any impact upon the jury in the absence of evidence from the applicant himself.

[27] The decision that the applicant should not give evidence at his trial had an apparently rational explanation. As I have discussed, the cross-examination of the complainant provided several arguments for defence counsel to put to the jury. Those arguments, of course, were unsuccessful. But whether they could have been assisted by testimony from the applicant remains a matter of speculation. The impact, favourably or otherwise to the defence case, would have been affected not only by what the applicant said, but also by the jury's impression of him as they watched him give his evidence. Assuming that the applicant's counsel advised the applicant that he should not give evidence, that advice was not so obviously wrong that it can be said that there was a miscarriage of justice, so that the convictions should be set aside. In this context, the following remarks, by Gleeson CJ in *TKWJ v The Queen*,[4] are apposite:

> "It was the kind of tactical decision routinely made by trial counsel, by which their clients are bound. And it was the kind of decision that a Court of Criminal Appeal would ordinarily have neither the duty nor the capacity to go behind. Decisions by trial counsel as to what evidence to call, or not to call, might later be regretted, but the wisdom of such decisions can rarely be the proper concern of appeal courts. It is only in exceptional cases that the adversarial system of justice will either require or permit counsel to explain decisions of that kind. A full explanation will normally involve revelation of matters that are confidential. A partial explanation will often be misleading. The appellate court will rarely be in as good a position as counsel to assess the relevant considerations. And, most importantly, the adversarial system proceeds upon the assumption that parties are bound by the conduct of their legal representatives."
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> (footnotes omitted).

[28] Consequently, the applicant has not demonstrated a good ground of appeal in his complaints that his case should have been conducted differently, such as by leading character evidence or evidence of his own.

[29] The trial judge did interrupt the cross-examination of the complainant many times. But having read the whole of the evidence, I am of view that there could have been no prejudice to the defence case from those interruptions. The judge interrupted to point out the objectionable nature of some of the cross-examiner's questions. This did not reflect on the applicant and his case in the minds of the jury. Overall, the cross-examination was conducted competently and, as I have discussed, with some effect.

[30] There is no substance in the complaint that there was a majority verdict on count 3. It is not suggested that there was some non-compliance with the requirements for a majority verdict, as set out in s 59A of the *Jury Act* 1995 (Qld).

[31] Lastly, it is said that in truth, the complainant could not have been traumatised because she commenced a sexual relationship with another person immediately after

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4 (2002) 212 CLR 124, 128 [8].

this case was tried and the applicant was sentenced. If that was the fact, it would provide no basis for challenging these convictions.

[32] For these reasons, the proposed appeals against conviction have no evident merit and the application for an extension of time in which to appeal should be refused.

Proposed appeal against sentence

[33] The applicant states in his outline that:

> "As [the] evidence [at the trial] was inconsistent and unreliable, the maximum sentence should [have] been one (1) year good behaviour to be served concurrently."

[34] This appears to be an argument that the case against him was so weak that he should have received a non-custodial sentence. Clearly that would have been an impermissible course for the judge. Once the jury had convicted the applicant, the judge was bound to sentence him on the premise that he was guilty. The judge imposed different but concurrent terms for the three offences. In describing the third offence, for which a seven year term was imposed, the judge said that it had the "particularly disgusting feature" that the complainant was left "soiled in the bed". He found that "the complainant has been left with some difficulty of incontinence and suffered a minor lesion in the rectum" in consequence of at least one of these offences. He said that apart from the physical injuries, what was apparent was that the complainant had suffered a quite severe psychological injury as a result of this offending. He observed that the applicant showed no remorse.

[35] The applicant was aged 53 at the time of the offending and was 55 when sentenced. He had a criminal history but one which was described by the judge as "nearly all quite old" and not containing any similar offending to that of the present case so that it was of little significance. The judge accepted that the applicant's visual impairment would be something which would make prison a much more severe punishment for him than it would be for an ordinary prisoner, even one of his age. But he observed that this condition was present at the time of the offending so that it could only be taken into account to a limited extent. The judge said that the circumstances of the third offence were "particularly upsetting" such that he had thought about making a serious violent offender declaration in relation to that count. But he concluded that in the light of the applicant's medical condition, that would be inappropriate.

[36] There is no apparent error in the judge's reasoning. Nor is an error indicated by the magnitude of these sentences. There is no basis for the proposed appeal against sentence.

Orders

[37] I would order as follows:

1. Refuse the application to extend time in which to appeal against the applicant's convictions.

2. Refuse the application to extend time in which to seek leave to appeal against the sentences imposed.

[38] **BOWSKILL J:** I agree with the reasons of McMurdo JA and with the orders his Honour proposes.