SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bouttell* [2018] QCA 52
PARTIES:	**R** **v** **BOUTTELL, David George** (applicant)
FILE NO/S:	CA No 112 of 2017 DC No 208 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba – Date of Sentence: 18 May 2017 (Kefford DCJ)
DELIVERED ON:	27 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2017
JUDGES:	Holmes CJ and Fraser and Gotterson JJA
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the defendant pleaded guilty to two counts of using electronic equipment to procure a child and two counts of indecent treatment of a child under 16 – where the defendant was found guilty by a jury of a further count of indecent treatment of a child under 16 and rape – where the defendant was sentenced to six years imprisonment with statutory parole eligibility after three years – where the defendant was 18 and 19 at the time of the offences and had no criminal history – where the offences occurred over a period of five weeks – where the defendant was friends with the complainant – where the complainant was five years younger than the defendant – where there was delay in the trial, not attributable to the defendant – where the defendant was found to lack remorse – whether the sentence imposed by the sentencing judge was manifestly excessive *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, applied *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25, applied *R v BBP* [2009] QCA 114, cited *R v Breckenridge* [1998] QCA 136, cited *R v FAK* [2016] QCA 306, considered *R v HAN* (2008) 184 A Crim R 153; [2008] QCA 106, considered

R v Kinersen-Smith & Connor; Ex parte Attorney-General (Qld) [2009] QCA 153, considered
R v L; ex parte Attorney-General [1996] 2 Qd R 63; [1995] QCA 444, considered
R v Lee [2012] QCA 239, distinguished
R v Lovell [1999] 2 Qd R 79; [1998] QCA 36, considered
R v MAH [2005] QCA 13, distinguished
R v Miller [2012] QCA 168, considered
R v Mules [2007] QCA 47, considered
R v Myers [2009] QCA 14, distinguished
R v Pickup [2008] QCA 350, distinguished
R v Postchild [2013] QCA 227, distinguished
R v Stephens; Ex parte Attorney-General (1994) 76 A Crim R 5; [1994] QCA 507, distinguished

COUNSEL: S J Hamlyn-Harris for the applicant
G P Cash QC, with P J McCarthy, for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I have had the advantage of reading the draft reasons for judgment of Fraser JA. I have, however, come to a different conclusion from his Honour and Gotterson JA as to the proper result. In my view, the sentence of six years imprisonment on the rape count was manifestly excessive and ought to be set aside.

[2] It is unnecessary for me to rehearse the facts on which the applicant was sentenced in any detail, because they are comprehensively set out in the judgment of Fraser JA. I would simply observe as relevant to the proportions of the offending that it occurred over a relatively short period; that the offences involving physical contact were part of a single sequence of events, and the major offence, rape, was extremely brief in duration and involved no gratuitous violence; and that although the sentencing judge found there to be a level of breach of trust, which her Honour described as a relevant circumstance "particularly having regard to the authorities", this applicant was not in any position of responsibility for the complainant.

[3] In my view, none of the comparable sentences put before this court or the court at first instance, including *R v Miller*,[1] had sufficient factual similarity to the present case to be of any real assistance. Nonetheless, I would accept as a general proposition that a sentence of six years imprisonment without amelioration by early parole eligibility would be within a proper range for a mature adult offender who had gone to trial. But the circumstances of this particular case render the sentence manifestly excessive, particularly given that lack of any amelioration.

[4] Although the sentencing judge referred to mitigating circumstances, the sentence imposed forces me to the conclusion that they were not in any real sense taken into account. This was a young, immature offender, 18 and 19 years old at the time of his offences. Section 9(6) of the *Penalties and Sentences Act* requires a sentencing judge dealing with a sexual offence against a child to give primary regard to a number of factors, which include:

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1 [2012] QCA 168.

"…

(f) The prospects of rehabilitation…to cause the offender to behave in a way acceptable to the community; and

(g) The offender's antecedents, age and character…"

[5] This court has on other occasions explained the community interest in the rehabilitation of young offenders,[2] an interest which is not limited to the circumstance where the offender has pleaded guilty. In the present case, there were strong signs that the prospects of the applicant's rehabilitation were good: he had previously been of good character, having no criminal history, and had, as a result of delay which was no fault of his, spent two years on bail, during which he had not offended further. He had part-time employment, and a reference from a more senior employee spoke of his good work performance and marked increase in maturity.

[6] There were other mitigating factors: the effect on the applicant of the extended delay in resolution of the charges and his plea of guilty to four out of six charges, which, while the trial judge found a lack of remorse, was of some significance in assisting the administration of justice. But far more importantly, the sentence as imposed gave, in my view, no recognition to the important features of youth and the desirability of rehabilitation.

[7] My conclusion, then, is that this is not merely a severe sentence, but one that is plainly excessive because it made no allowance for those considerations. I would grant leave to appeal against sentence, allow the appeal, set aside the sentence on count 6, and substitute a sentence of five years imprisonment, with parole eligibility after two years.

[8] **FRASER JA:** On 18 May 2017 the applicant was given an effective sentence of six years imprisonment, with statutory parole eligibility after three years, for offences committed against a child on various dates between 27 November 2014 and 3 January 2015. He has applied for leave to appeal on the ground that the sentence is manifestly excessive. The offences and the concurrent terms of imprisonment to which the applicant was sentenced are as follows:

Count 1: Indecent treatment of child under 16 on 27 November 2014	12 months
Count 2: Using electronic equipment to procure a child on 27 December 2014	18 months
Count 3: Using electronic equipment to procure a child on 2 January 2015	18 months
Count 4: Indecent treatment of children under 16 on a date unknown between 26 December 2014 and 3 January 2015	Two years
Count 5: Indecent treatment of children under 16 on a date unknown between 26 December 2014 and 3 January 2015	Two years
Count 6: Rape on a date unknown between 26 December 2014 and 3 January	Six years

[2] *R v Mules* [2007] QCA 47 at [21]; *R v Kinersen-Smith & Connor*; *Ex parte Attorney-Geneal (Qld)* [2009] QCA 153 at [26]; *R v Lovell* [1999] 2 Qd R 79 at 83.

2015	

[9] The applicant entered pleas of not guilty to counts 1 and 6 and was found guilty of both counts by a jury after a trial in May 2017. The applicant pleaded guilty to counts 2-5 in August 2016 at the commencement of a trial which was aborted.

[10] The applicant was 18 when he committed the first offence and 19 at the time of the other offences. He was 21 when sentenced. The complainant was 13 years old at the time of the offences. He was a friend of the applicant's younger brother. The applicant, his younger brother and the complainant were often together. They sometimes slept at each other's homes. The evidence adduced in the prosecution case included numerous social media messages over about two years. The messages evidenced a friendship between the applicant and the complainant with a good deal of juvenile banter between them. There were also attempts by the applicant to encourage the complainant to communicate about masturbation and other sexual activity. The complainant's messages gave no encouragement to the applicant to commit the offences.

[11] All of the offences occurred within a period of about five weeks. The offence in count 1 was committed by the applicant sending pictures of female buttocks to the complainant. The applicant did not deny that he sent the pictures. The issue resolved against the applicant at the trial was whether or not any of the pictures were indecent. Counts 2-6 were committed within a period of one week. Counts 2 and 3 were based upon Facebook messages the applicant sent to the complainant on 27 December 2014 and 2 January 2015 with intent to procure the complainant to masturbate. Counts 4, 5 and 6 were committed on one occasion between 26 December 2014 and 3 January 2015. The applicant sent the complainant Facebook messages asking the complainant to go to the applicant's room. The applicant went out to the living room and asked the complainant to go into his room. The sentencing judge found that when the complainant moved to go into the applicant's room, the applicant grabbed the complainant by his arm and pulled him into the room. The applicant forced the complainant to put his hand on the applicant's penis and forced the complainant to put his hand on the complainant's penis (counts 4 and 5). Thereafter the applicant forced the complainant onto the bed and the applicant placed his penis in the complainant's anus for about 20 seconds (count 6). The applicant then let the complainant leave the room.

[12] Just after the beginning of 2015 the complainant's father saw Facebook messages on the complainant's phone which suggested the applicant had a sexual interest in the complainant. The complainant's parents complained to police and the complainant was first interviewed on 4 January 2015. The complainant made progressive disclosures during four police interviews. He disclosed the most serious offence (count 6) during the fourth police interview in September 2015. There was a fifth police interview in July 2016, in which the complainant was questioned about messages between him and the applicant but little more information was obtained. The complainant gave pre-recorded evidence in November 2015 and in August 2016.

[13] The sentencing judge referred to the following matters. The applicant had ingratiated himself with the complainant's parents and breached the trust they showed by allowing the complainant to stay for sleepovers at the house of his friend, the applicant's younger brother, where the applicant lived. A victim impact

statement by the complainant's parents referred to the complainant having depression and not engaging in discussions with anyone, including a psychologist the complainant had been seeing, and the complainant having lost all confidence. The offending shattered the family's lives, resulted in sleepless nights and a rift between family members. The complainant's father quit his job so that he could be at home taking care of his family. There was no evidence of physical harm to the child but there was mental scarring. Violence was used to effect penetration but there was no additional violence. The offending stopped only because of the complainant's father's intervention. There was a need for general deterrence in the sentence particularly because this was a rape on a child who was a vulnerable person in the community. The applicant lacked remorse: he went to trial on the count of rape, the complainant was required to give evidence and be cross-examined, and the pleas of guilty to counts 4 and 5 were late pleas entered after the applicant's defence counsel had already cross-examined the complainant. (In the first pre-recording of the complainant's evidence defence counsel put to the complainant that there was no sexual contact between the applicant and the complainant, which the complainant denied. At the second pre-recording of evidence defence counsel put to the complainant that the complainant's evidence that he and the applicant masturbated each other was true (with which the complainant agreed) but the applicant did not have anal sex with the complainant (which the complainant denied).)

[14] The sentencing judge took into account in the applicant's favour that he was young and had no criminal history. The sentencing judge also took into account that through no fault of the applicant there had been a delay in excess of two years after the matter was first to proceed to hearing and in the intervening period there had been no suggestion of any re-offending. The sentencing judge observed that having regard to *R v L; Ex parte Attorney-General* [1996] 2 Qd R 63 some weight was given to the delay in terms of the applicant's prospects of rehabilitation. The sentencing judge also took into account the references in the applicant's favour, emphasising a reference which spoke of the applicant being a very young and immature person for his age when he first started at a workplace and having since shown a lot more maturity and becoming more aware of the consequences of his actions.

[15] Defence counsel referred the sentencing judge to *R v Myers* [2009] QCA 14 and *R v MAH* [2005] QCA 13. They involved maintaining offences and were unlike the present offence. In this application the applicant referred to those cases but did not submit that they supported his application. They have no material bearing upon the present case. The applicant argued that *R v FAK* [2016] QCA 306 indicated that for the offence of maintaining an unlawful sexual relationship with a child, which included rape, sentences of between five and seven years imprisonment were often imposed and found to be acceptable. If that general proposition is correct it does not establish that the applicant's sentence is excessive. Furthermore, if it be the case that the level of sentences in maintaining offences which involve penile rape seems low in comparison with the level of sentences in cases of the present kind it would not necessarily follow that there should be a general reduction in the level of sentences imposed in cases of the present kind. The applicant also relied upon the discussion in *FAK* at [111] – [115] in which Morrison JA pointed out that in *R v HAN* (2008) 184 A Crim R 153 the Court concluded that in maintaining cases where there was no penile penetration or violence and the maintaining offence had commenced when the complainant was 13 years old a head sentence in the order of six years imprisonment was the maximum sentence open on the authorities. That

does not shed much light upon the different case of an adult's penile rape of a child. *FAK* and *HAN* are too different from this case to support a conclusion that a head sentence of six years imprisonment for offences including the rape by an adult of a 13 year old child is manifestly excessive.

[16] The applicant referred to additional cases in this application. In *R v Postchild* [2013] QCA 227 the Court refused an application for leave to appeal against the sentence of six years imprisonment for a rape described by the sentencing judge as involving a brutal act in which the offender treated the complainant as an object for his own sexual gratification. There were significantly more serious aspects of that offence than count 6 in the present case, but it was an offence committed in the context of an existing de facto relationship between the offender and an adult complainant. The case is factually too different from the present case to be of any assistance here. In *R v Pickup* [2008] QCA 350 and *R v Stephens; Ex parte Attorney-General* (1994) 76 A Crim R 5, sentences of five years imprisonment with provision for early parole eligibility reflecting pleas of guilty in each case were imposed for offences committed against adults. Those offences were in other respects of a more serious nature. In *Postchild*, Holmes JA (as the Chief Justice then was) described those sentences as being "certainly at the lenient end of the spectrum". Again, those cases have little bearing upon the appropriate sentence in this very different case.

[17] The prosecutor referred the sentencing judge to *R v Breckenridge* [1998] QCA 136, *R v Miller* [2012] QCA 168, *R v Lee* [2012] QCA 239, and *R v BBP* [2009] QCA 114. In this application the respondent relied upon *Breckenridge*, *Miller* and *Lee*. In *Breckenridge* the sentencing judge reduced a notional sentence of six years imprisonment to five years to take into account the plea of guilty and other mitigating circumstances. The Court's decision that there was no manifest excess in the sentence is of no real assistance here because that offender was not youthful (he was 34 years old) and the facts were otherwise not similar to the present case. In *Lee*, in the context of a sentence imposed upon a 48 year old offender, Holmes JA (as the Chief Justice then was) rejected a contention that *Breckenridge* and another case, *R v Hutchison* [2010] QCA 22, showed that six years imprisonment was excessive for the rape of a vulnerable young person where there was no gratuitous violence. The decision in *Lee* that a sentence of six years imprisonment upon a conviction of rape after a trial was not manifestly excessive is also of no real assistance in this case, given that the offender was very much older than the applicant and the decision does not imply that a more severe sentence might not have been imposed.

[18] In *Miller*, the Court rejected an argument that a sentence imposed upon a plea of guilty of five and a half years imprisonment with parole eligibility after one-third of that term, was manifestly excessive. In that case both the offender and the complainant were 18 years old. The offender had no criminal history, he was otherwise of good character, and he had good prospects of re-employment in the future. He was a close friend of the complainant's partner. He entered the lounge room in the complainant's house, where the complainant was asleep fully clothed, undressed her, and penetrated her vagina with his penis. The complainant said her partner's name, the offender replied that he did not know, and the complainant then identified the applicant. She immediately stood up and went to a bathroom to shower. It appears that the period occupied by the offence must have been very short as in this case. After the complainant had finished showering the offender had

gone. The offender initially denied having sexual intercourse with the complainant. He later attributed his initial denial to embarrassment. There was no additional violence or significant injury accompanying the offence. The sentencing judge took into account that the offender pleaded guilty, there was no cross-examination of the complainant, the offender was very youthful and remorseful, he was a person of ordinarily good character, he had entered a stable relationship, he had a good work history, and he no longer consumed alcohol after having been intoxicated at the time of the offence. It could not be assumed that there was no trauma for the complainant but the absence of a victim impact statement allowed defence counsel to distinguish the matter from more serious cases. The Court accepted that a variety of authorities demonstrated that "the range for some so-called rape by stealth cases extends upwards of seven years, but that less serious instances might attract sentences of less than seven years".

[19] In *Miller* aggravating features were the offender's illicit entry into the lounge room and his taking advantage of the complainant being asleep. The applicant's different conduct of coercing the complainant into the bedroom and using the force necessary to effect the rape offence and the other offences committed on the same occasion was no less serious. Importantly, the applicant's offence was committed against a child five years younger than the applicant, whereas the complainant in *Miller* was an adult of the same age as the offender. That is a very serious feature of the applicant's offence even when weight is given to the applicant's own immaturity. There remained a great disparity in maturity between the applicant and the complainant. It is an odious exercise to compare different offences of this kind but in my respectful opinion it was open to the sentencing judge to regard *Miller* as a comparable sentencing case in which the circumstances of the offence overall were materially less serious than the offence committed by the applicant.

[20] The sentencing judge accepted that some weight in terms of the applicant's prospects of rehabilitation should be given to the fact that he did not re-offend during an excessive two years delay in bringing the matter to trial. That does not materially distinguish this case from *Miller* in which the offender had favourable personal circumstances and was also treated as having good prospects of rehabilitation. The circumstance that for a significant period and without any fault of the applicant he was left in a state of uncertainty caused by the failure to prosecute his case more quickly is itself capable of being regarded as a mitigating factor: *R v L*, *ex parte Attorney-General* [1996] 2 Qd R 63 at 66. In the absence of any evidence that this had some significant effect upon the applicant this seems a relatively minor point. The applicant did not contend that there was any specific error by the sentencing judge in failing to mitigate the sentence on this account. A much more significant point is that the applicant was found to lack remorse whereas *Miller* was found to be remorseful. The applicant's offences resulted in significant adverse impacts for the complainant and members of his family, whereas there were no victim impact statements in *Miller*. Furthermore, the applicant committed additional offences against the same complainant during a period of weeks. This is not a case of one, opportunistic offence, as was *Miller*.

[21] For these reasons it was open to the sentencing judge to treat this case as requiring a more severe sentence than was imposed in *Miller* and upheld in this Court. I am unable to conclude that the six year term was excessive in the particular circumstance of this case when compared with the five and a half year term in *Miller*. The severity of the sentence in this case is increased further by the absence

of any order ameliorating the statutory provision for parole eligibility after three years, but that is explicable. *Miller* was given the benefit of parole eligibility after one-third of the term. That reflects a conventional sentencing practice in cases in which an offender pleads guilty. The applicant was found to lack remorse, he did not plead guilty to the most serious offence and his pleas of guilty to other offences were late and entered only after the complainant had been cross-examined. In that context, whilst some credit should be allowed to the applicant for the limited utilitarian value of the late pleas of guilty, the extent of the credit would not be very significant.

[22] This Court's remit to interfere in a sentence does not arise if it concludes only that a sentence seems severe. To establish that a sentence is manifestly excessive an applicant must demonstrate that there must have been a misapplication of principle or that the sentence is unreasonable or plainly unjust: *Hili v The Queen* (2010) 242 CLR 520 at [58], [59]. Sentencing judges are to be allowed as much flexibility in sentencing as accords with the relevant statutory regime and a consistency of approach: *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27]. A more lenient sentence could have been imposed but I am unable to conclude that the applicant's sentence is **manifestly** excessive.

Proposed order

[23] I would refuse the application for leave to appeal.

[24] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.