SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wano; Ex parte Attorney-General (Qld)* [2018] QCA 117
PARTIES:	**R** **v** **WANO, Xzaveah Elijah** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 304 of 2017 DC No 775 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 30 November 2017 (Morzone QC DCJ)
DELIVERED ON:	12 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2018
JUDGES:	Fraser JA and North and Henry JJ
ORDERS:	**1. Appeal allowed.** **2. The sentences imposed below are varied to the following extent:** **(a) on count 2 (rape) the sentence of three years imprisonment is set aside and instead a sentence of three and a half years imprisonment is imposed;** **(b) the order partly suspending the terms of imprisonment is set aside and instead a parole eligibility date is set at 24 July 2018.** **3. A warrant will issue for the arrest of the respondent.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the Attorney-General (Qld) appeals against sentence – where the respondent pleaded guilty to burglary and stealing, rape, sexual assault in company and attempted burglary in the night in company – where the respondent was given head sentences of three years imprisonment for burglary and stealing, rape and sexual assault in company and 18 months imprisonment for

attempted burglary in the night in company, suspended after 323 days which was declared as time served in presentence custody – where the applicant was entitled to credit pursuant to *AB v The Queen* (1999) 198 CLR 111 – whether the sentence was manifestly inadequate

Evidence Act 1977 (Qld), s 132C(3)
Penalties and Sentences Act 1992 (Qld), s 9(1)(e), s 9(2)(f), s 9(3)(h), s 15(1), s 160C, s 160D

AB v The Queen (1999) 198 CLR 111; [1999] HCA 46, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Kentwell v The Queen (2015) 252 CLR 601; [2014] HCA 37, cited
R v Billy [1997] QCA 290, cited
R v Forrester (2008) 180 A Crim R 510; [2008] QCA 12, cited
R v Gesler [2016] QCA 311, cited
R v Henderson; Ex parte Attorney-General (Qld) [2013] QCA 63, cited
R v Lee [2012] QCA 313, distinguished
R v Lovell [1999] 2 Qd R 79; [1998] QCA 36, cited
R v Mules [2007] QCA 47, cited
R v Ramm [2008] QCA 13, cited
R v Troop [2009] QCA 176, cited
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: Michael Byrne QC for the appellant
No appearance for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
No appearance for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Henry J and the orders proposed by his Honour.

[2] **NORTH J:** I agree with the reasons of Henry J and the orders proposed.

[3] **HENRY J:** The respondent pleaded guilty to the following four counts, receiving the following sentences:

1. Burglary and stealing – three years imprisonment.
2. Rape – three years imprisonment.
3. Sexual assault in company – three years imprisonment.
4. Attempted burglary in the night in company – eighteen months imprisonment.

[4] His time in presentence custody of 323 days was declared to be time served under the sentences and his term of imprisonment was partly suspended after serving 323 days for an operational period of three years.

[5] The Attorney-General appeals those sentences on the ground that the sentences imposed are manifestly inadequate.

Facts

[6] The offences occurred in the course of a criminal escapade by the respondent and his accomplice Kima Bagie on the night of 10 into 11 January 2017.

[7] After discussing that they would steal from houses they ventured into the Cairns suburb of Kanimbla around midnight. They arrived near a house which had a light on and prepared to break in. Through a front window they observed the first complainant asleep on her bed in a bedroom. The respondent put socks on his hands, using them as gloves to avoid leaving fingerprints, and wrapped a shirt around his face. Bagie pulled the hood of his jumper over his head. Bagie said, "Let's go play with her pussy" to which the respondent said, after pausing to think, "Na bro, we are just here to steal".

[8] They entered the house via an unlocked glass sliding door off the rear patio. They split up to search for items to steal and gathered two handbags, two mobile phones, two purses, cash and a sword, leaving them with Bagie's backpack on a table at the rear patio.

[9] Bagie then repeated his earlier words to the effect of, "Let's go play with her pussy" and this time the respondent agreed. They went back inside the house to the first complainant's bedroom. In so doing, the respondent took the sock from his right hand, being of the understanding they were going to "finger" the complainant.

[10] The first complainant had been sick and was in a deep sleep. She was lying on top of the bed linen, on her back, wearing a singlet and underpants. Bagie approached her, lifted her underwear to the side, rubbed her vagina and placed his two fingers inside her vagina, moving them in and out for one to two minutes.

[11] Bagie then nodded at the respondent saying, "Go on, try it." Bagie then pulled his penis out of his pants and masturbated with his penis about 30 centimetres from the face of the first complainant, who was still asleep. Meanwhile the respondent used his left hand to pull the first complainant's underpants to the side and placed his right index finger on her clitoris and rubbed it around. He was about to insert his finger inside the first complainant's vagina but she woke up.

[12] The first complainant opened her eyes and saw the respondent standing beside her bed next to her. The facts placed before the court do not indicate whether or not, in waking up, she noticed that her vagina was being touched or noticed whether Bagie had his penis out not far from her head, masturbating.

[13] The offenders ran out, collecting the stolen property en route. The first complainant briefly ran after them and heard Bagie say words to the effect of, "Do you want a fuck?" or "You want my dick?" The first complainant yelled after them that she was "calling the cops".

[14] Apparently undeterred by these events, the offenders walked up the street, around a corner to another home where they saw the second complainant, a woman, lying on her bed using her mobile phone. They checked the doors and found an unlocked sliding door. When the second complainant heard the door open she thought it was her husband getting home and yelled out, "Why did you use that door?" She then heard the door close.

[15] When she went to investigate she saw the offenders in her back yard, walking away towards the front gate. She screamed to her son who then drove her down the street

after the men, in so doing coming upon attending police. The offenders evidently witnessed this and split up, running in different directions. Bagie was caught that night and the respondent was arrested the next day.

[16] The respondent made full admissions in an ensuing interview with the police.

[17] These events had a significant impact upon the first complainant, who took stress leave from work. She was so emotionally distraught she could not bear to be in her own house, not feeling safe in it. When she eventually returned to her house she felt so insecure that she installed further security measures and her mother and brother flew from Victoria to stay with her. She also sought counselling. Despite these measures she continued to feel unsafe in her own home and arranged to move from it at an earlier time than had hitherto been planned for her return to Victoria. Even after returning to there, she finds herself consistently checking locks and becomes very anxious and scared by any noises outside her home.

The offender's circumstances

[18] The respondent was 17 at the time of the offences and 18 at the time of sentence. He is a Torres Strait Islander who was raised in Cairns by his mother, along with his eight younger siblings. He stayed at school until year 10. He accumulated a number of convictions as a juvenile, for offences including serious assault, armed robbery, attempted burglary and unlawful use of a motor vehicle.

[19] The subject offences were committed only four months after his release from a lengthy period of detention imposed by the Children's Court.

[20] The sentencing remarks in the matter for which he was detained as a juvenile noted he could not control his drinking and other abuses of substances, had refused to participate in offence related programs whilst in detention and had expressed an interest in going to TAFE and working in the fishing industry on Murray Island.

The sentence proceeding below

[21] The Crown Prosecutor below noted that, with the exception of the sexual offending, the respondent had committed similar offences in the past and submitted for "a global head sentence in the range of three years". After some equivocation the Prosecutor eventually submitted that the respective conduct of the offenders should give rise to the same penalty, although the discussion appears to have been academic at that stage since Bagie was yet to be sentenced.

[22] The Crown Prosecutor submitted the charging of counts 2 and 3, the two sex offences, was "as a result" of the "admissions to the police, because as your Honour's heard she was initially asleep".[1]

[23] Defence counsel below did not cavil with the suggested head sentence of three years. He submitted, without contradiction, that the respondent had entered early pleas.[2] Defence counsel submitted the respondent was significantly affected by cannabis, having consumed 10 cones within four hours of the offence. It was

---

1 It is not discernible from the record why, if the complainant woke up while the respondent was touching her vagina and Bagie was masturbating 30 centimetres from her head, she was unaware of those facts.

2 Why it took over ten months to commit, indict and sentence such a young offender, after he made full admissions and was remanded in custody, is not discernible from the record.

submitted the respondent had displayed quite significant remorse, in the sense that he made full admissions and that without his admissions there was no case against him in respect of the sexual offences. This submission was consistent with the earlier submissions of the Crown Prosecutor and not disputed by the Crown Prosecutor in reply.

[24] Defence counsel informed the court the respondent had not been able to access any courses whilst on remand. Since his return to custody he was said to have lost all contact with his family, with the consequence "he doesn't have much in the way of family support".[3]

[25] Despite those features, defence counsel submitted for a partial suspension, so that, allowing for time served, the respondent would be released on a partly suspended sentence on the day of sentence. This groundless submission was doubtless calculated at avoiding the consequence, because the respondent had been convicted of a sexual offence, that he would, if imprisoned conventionally, only receive a parole eligibility date rather than a parole release date.[4] That outcome would have precluded immediate release and meant the respondent would have remained in custody after sentence, pending the making, and properly informed determination of, a parole application.

Sentencing remarks

[26] In sentencing the respondent the learned sentencing judge noted the circumstances of the offences and the significant victim impact consequences for the first complainant. His Honour noted the respondent's youth but also noted his criminal history.

[27] In referring to the application in the case of *AB v The Queen*[5] the learned sentencing judge said:

> "[W]hen you spoke with police, you made very significant admissions about your conduct and what happened, and that ought be properly recognised by me in accordance with the principles of the High Court case of *AB v R*. That is, the things you told the police, in particular about the rape and your offending in the sexual assault, would have probably been undetected and therefore may not have resulted in any charge, in particular for counts 2 and 3, since they occurred whilst the complainant was asleep and not conscious of the offending."

[28] The learned sentencing judge noted the lack of family support for the respondent meant "a lot will depend on you and it will be on your shoulders to change". This did not prompt any reference to the desirability of supervision of this young sex and property offender when released back into the community.

[29] The learned sentencing judge made a number of observations about the risk of the respondent re-offending, about which no submissions or information had been advanced. His Honour said:

---

3 While the respondent is a Torres Strait Islander this was not a case involving any submissions per s 9(2)(p) *Penalties and Sentences Act* 1992 (Qld), for example regarding his relationship to his community or cultural considerations.

4 Compare ss 160C and 160D *Penalties and Sentences Act* 1992 (Qld).

5 (1999) 198 CLR 111.

> "I have tried to work out the risk of you re-offending. It seems to me that, unless you control your drinking and cannabis use, your risk of re-offending is moderate for the offences other than the sexual offences, for which it seems to me your risk of re-offending varies to moderate, if not low."

[30] In going on to discuss the need to craft an appropriate sentence his Honour observed, inter alia:

> "[T]he sentence must also protect the community from you, and since you are a violent offender in the sense of sexual offending, I have considered the risk of further harm to the community if a sentence requiring you to remain in prison is not imposed. As I said, in respect of that type of offending, it seems to me your risk of re-offending is at the most moderate and more likely to the low range."

[31] The learned sentencing judge especially took into account the respondent's "early plea of guilty", his "very significant and full co-operation with the police" and his co-operation with the prosecution in bringing the matter to an early conclusion without a trial necessitating the giving of evidence by the complainants.

[32] In referring to comparative cases cited by counsel before him, the learned sentencing judge noted:

> "No two cases are alike. Your circumstances are remarkably different, because of the extent of your co-operation, your age, your limited criminal history, there being no criminal history for sexual offending, and the circumstances of your offending here, where, for the most part, you were led by Mr Bagie in the more serious of the offences. …"

[33] In arriving at the conclusion the sentence ought be partly suspended, his Honour observed:

> "I have taken into account the matters I have referred to, in particular, your age, the time that you have spent in presentence custody, your significant co-operation with the police, your lack of criminal history in respect of some of the offending, and it seems to me that it is appropriate that I order that the term of imprisonment be partly suspended after you have served 323 days, with an operational period, under this order, being three years."

[34] No reference was made to the desirability of on-going supervision and the option of a sentence under which the respondent would be supervised on parole rather than left to his own guidance under a partly suspended sentence. Regrettably his Honour was left unassisted by any submissions from the prosecution below in respect of this important point.

The appellant's contention

[35] The appellant submits that the learned sentencing judge erred in assessing the risk of future offending, when there was insufficient material upon which to base any assessment, and then allowed that assessment to influence the sentence imposed, thus resulting in a manifestly inadequate sentence.

[36] Alternatively, the appellant submits the sentence imposed was manifestly inadequate in the sense of the last category referred to in *House v The King*.[6]

Discussion

[37] It is trite that protection of the community from the offender is a relevant consideration on sentence. As much was confirmed in *Veen v The Queen [No 2]*[7] and such protection was enshrined as one of the purposes for which sentences may be imposed by s 9(1)(e) *Penalties and Sentences Act* 1992 (Qld). An assessment of future risk of re-offending is logically relevant to that sentencing purpose, in that it will inform the weight to be given in an individual case to that purpose, relative to other sentencing purposes, such as rehabilitation of the offender. However, such an assessment can only have that relevance if there exists an adequate foundation for the making of it.

[38] The learned sentencing judge's conclusion that the respondent's risk of re-offending was moderate for burglary offences, and at most moderate and more likely low in respect of sexual offences, identified no foundation for the making of such an assessment.

[39] The teenage respondent had been previously convicted of three counts of robbery in company with personal violence, one count of attempted burglary in the night whilst in company and one count of unlawful use of a motor vehicle. Whilst on bail for that offending he had committed a serious assault. He committed the present offences only four and a half months after his release from detention. In the interim he had not acted upon his earlier stated resolve to attend TAFE. He had continued abusing cannabis. The subject burglary offences represented a repetition of conduct for which he had been previously convicted and the subject commission of the sex offences, in the course of a burglary, represented a disturbing escalation in that offending. It is difficult to see how such circumstances allowed a benevolent assessment of the risk in particular of further sex offending.

[40] Such an assessment necessarily involved the drawing of an inference from information. It ought be acknowledged s 15(1) *Penalties and Sentences Act* 1992 (Qld) confers a broad discretion on a sentencing court to "receive any information … that it considers appropriate to enable it to impose the proper sentence". Similarly it ought be acknowledged a sentencing court is entitled to draw inferences which logically arise from such information and that fact finding on sentence is on the balance of probabilities.[8] However the present dilemma is that there was no information before the learned sentencing judge from which his Honour could logically draw any inference on the balance of probabilities about the degree of risk of the respondent committing further sexual offences.

[41] There was no report before the court relevant to the issue. Further, there was no evidence of any rehabilitative progress since the offending, during which time the respondent had been on remand without access to rehabilitative courses. To make matters worse, by the time of sentence he had no family support. The respondent's stated wish to become a better man, and the notion that he had "for the most part" followed Bagie's lead, fell well short of information capable of permitting a

---

6 (1936) 55 CLR 499, 505.

7 (1988) 164 CLR 465, 473.

8 Per s 132C(3) *Evidence Act* 1977 (Qld), subject to the variable degree of satisfaction referred to in s 132C(4).

properly informed assessment of the respondent's risk of committing further sexual offences.

[42] His Honour erred in arriving at his inference as to the degree of risk of further sex offending because there was no information before him logically capable of supporting an inference on the topic.

[43] His Honour expressly referred to his erroneous assessment of the risk of the respondent committing further sex offences in explaining his consideration of the need for a sentence which protected the community from the respondent. A further indication that the error infected the sentence process is the decision to partly suspend the sentence without there being any evidence of the respondent's rehabilitative progress prior to sentence and without him being the subject of any supervision on his release forthwith into the community.

[44] A curious feature of the sentence proceeding is that no-one identified any basis at all as to why a partly suspended sentence was preferable to one which would involve at least some ongoing supervision on the respondent's release, as for example occurs when a prisoner is released on parole. The respondent was a long remanded teenager, without tangible rehabilitative progress or family support, whose continued burglary offending had disturbingly escalated to accompanying sex offending. The need for him to be under supervision when released back into the community was compelling.

[45] It follows that, further to the above identified specific error, the imposition of a sentence involving no element of supervision on his release was so inadequate to the circumstances of this case as to manifest error.

[46] The appellant's complaint of error having been made good, it falls to this court to exercise the sentencing discretion afresh.[9]

Re-sentence

[47] The appellant contends for a head sentence of at least four years imprisonment, one year longer than the sentence the prosecution submitted for below. There is no immutable rule disqualifying a different approach on appeal to that taken below. As was observed in *R v Henderson; Ex parte Attorney-General (Qld)*:[10]

> "[T]he ultimate responsibility for the imposition of an appropriate sentence rests with the sentencing judge rather than the prosecutor, and this Court will intervene where the sentencing judge failed to appreciate the seriousness of the offending or it is necessary to maintain public confidence in the administration of justice. In *R v Wilde; ex parte A-G (Qld)* the sentence imposed on appeal exceeded not only that sought by the prosecutor at first instance, but also that sought by the Attorney-General on appeal." (citations omitted)

[48] The more material difficulty confronting the appellant in seeking a head sentence of at least four years here is the relevance of the respondent's youth, the principle in *AB v The Queen* and, to a lesser extent, parity.

---

9 *Kentwell v The Queen* (2015) 252 CLR 601, 615.

10 [2013] QCA 63 [51].

[49] The age of an offender is a matter to which a sentencing court must have regard.[11] An offender's youth is well acknowledged as potentially attracting a degree of leniency not afforded to older offenders. For instance in *R v Lovell*[12] Byrne J, in observing that the youth of an offender carries less weight where violence is used, noted:

> "Nonetheless youth remains a material consideration; for the rehabilitation of youthful, even violent, offenders, especially those without prior, relevant convictions, also serves to protect the community."

[50] In a similar vein in *R v Mules*[13] it was observed:

> "This Court's decision in *R v Horne*, a case to which her Honour unfortunately was not referred, makes clear that youthful offenders with limited criminal histories and promising prospects of rehabilitation who have pleaded guilty and co-operated with the administration of justice, even where they have committed serious offences like these, should receive more leniency from courts than would otherwise be appropriate."

[51] The respondent's criminal history tempers the significance of his youth as a consideration. Nonetheless it remains a material consideration that he was only 17 at the time of the offences.

[52] As to the principle in *AB v The Queen* it is, relevantly to the present case:

> "[A]n offender who brings to the notice of the authorities criminal conduct that was not previously known, and confesses to that conduct, is generally to be treated more leniently than the offender who pleads guilty to offences that were known."[14]

[53] The principle's application in the present case to the sex offences is uncontested.

[54] As to parity, Mr Bagie was sentenced subsequently to the respondent, receiving sentences of four years imprisonment for count two and three years imprisonment for counts one and three respectively. He was a year older than the respondent and faced sentence for additional offending. While not as co-operative as the respondent his co-operation also attracted an *AB v The Queen* discount. I would not regard the fact Mr Bagie actually carried out the rape as inevitably warranting the imposition of a lesser penalty on his accomplice the respondent, who was, by the time of the sex offending, a willing and active accomplice in it. However parity considerations suggest the other variations mentioned may support a marginally less significant head sentence for the respondent than was imposed upon Bagie.

[55] The appellant's submissions on re-sentence were particularly targeted at the appropriate head sentence overall.

[56] The court was referred to *R v Billy*,[15] *R v Ramm*,[16] *R v Forrester*,[17] *R v Troop*[18] and *R v Gesler*.[19] It is unnecessary to here repeat the detailed review of those cases

---

11 Per s 9(2)(f) and s 9(3)(h) *Penalties and Sentences Act* 1992 (Qld).
12 [1999] 2 Qd R 79, 83.
13 [2007] QCA 47 [21].
14 (1999) 198 CLR 111, 155.
15 [1997] QCA 290.

already undertaken by this court in *R v Gesler*. Considered collectively they readily support the head sentence of at least four years submitted for by the prosecution here, particularly given that none of them actually involved a sexual assault constituting rape by reason of digital penetration.

[57] The court was also referred to *R v Lee*,[20] in which a head sentence of three and a half years for the rape of a seven year old girl was not disturbed on a prisoner's appeal. It was a different type of case to the present, involving no accompanying burglary, although the young age of the victim was an aggravating feature of the facts.

[58] The appellant rightly emphasises the seriousness of the respondent's conduct. He broke into a house at night and stole from it. While there, he was an eventually willing party to Bagie's act of rape on the sleeping victim, standing by with his glove off waiting his turn, and then set about sexually assaulting the victim himself, ceasing only when disturbed. He and his co-offender then immediately set about the targeting of another residence in which they had spied another woman alone in her bedroom. The inherent gravity of the misconduct supports the appellant's submission for a head sentence of at least four years.

[59] It was implicit in that submission that the head sentence could be higher than four years but that there ought be some allowance for the respondent's youth and the operation of the principle in *AB v The Queen*, at least to the extent that those features warrant mitigation in the head sentence rather than in the setting of a parole eligibility date. Such considerations are relevant to the determination of a just sentence overall, not merely the setting of a parole eligibility date.

Conclusion

[60] Those considerations, in the circumstances of this case, favour a more material degree of moderation in the head sentence than is evident in the sentence sought by the appellant. They also favour the imposition of a somewhat more generous parole eligibility date than is often imposed after pleas of guilty.

[61] I would impose a head sentence of three and a half years imprisonment. In the interests of consistency with Bagie's sentence structure I would impose that sentence on count two, rape, and impose head sentences no different to those imposed below in respect of the other counts. I would set a parole eligibility date after 12 months.

[62] It will be necessary for a warrant to issue. While such warrants are sometimes left to lie in the Registry for a short time, I incline against doing so in circumstances where the respondent elected not to appear in this appeal.

Orders

[63] I would order:

---

16 [2008] QCA 13.
17 [2008] QCA 12.
18 [2009] QCA 176.
19 [2016] QCA 311.
20 [2012] QCA 313.

1. Appeal allowed.
2. The sentences imposed below are varied to the following extent:
   (a) on count 2 (rape) the sentence of three years imprisonment is set aside and instead a sentence of three and a half years imprisonment is imposed;
   (b) the order partly suspending the terms of imprisonment is set aside and instead a parole eligibility date is set at 24 July 2018.
3. A warrant will issue for the arrest of the respondent.