SUPREME COURT OF QUEENSLAND

CITATION:	*R v Williams* [2002] QCA 211
PARTIES:	**R** **v** **WILLIAMS, David Michael** (applicant / appellant)
FILE NO/S:	CA No 361 of 2001 DC No 424 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2002
JUDGES:	Williams JA, Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**1. Appeal against conviction dismissed;** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – RAPE AND SEXUAL ASSAULT – PROOF AND EVIDENCE – where virgin complainant was raped after being threatened by a knife – whether the verdict was unsafe and unsatisfactory because of impermissible questions relating to the complainant's motive and prejudicial evidence concerning allegations of drug use by the appellant in the Record of Interview which was admitted - whether the failure of the defence counsel to cross-examine a particular witness caused the trial to miscarry – test in *M v The Queen* applied – *R v E* considered – *Festa v The Queen* followed CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE – JURIES – DISCHARGE AND EXCUSING FROM ATTENDANCE – JURY UNABLE TO AGREE- whether learned trial judge erred in making some concluding remarks to a *Black* direction which might lead to putting

unnecessary pressure on the jury to return a verdict

CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT – FACTUAL BASIS FOR SENTENCE – PARTICULAR CASES - whether sentence of 7 ½ years imprisonment was manifestly excessive – consideration of *R v Kenneth Edwards, R v Stirling* and *R v Basic*- application refused

Criminal Code 1899 (Qld) s 668E

Crampton v The Queen (2000) 75 ALJR 133, considered
Crosdale v The Queen (1995) 1 WLR 864, considered
Festa v The Queen [2001] HCA 72, followed
Jones v The Queen (1997) 191 CLR 439, applied
M v The Queen (1994) 181 CLR 487, applied
R v Basic [2000] QCA 155; CA No 11 of 2001, 3 May 2000, considered
R v E (1996) 39 NSWLR 450, considered
R v Edwards [1997] 472; CA No 370 of 1997, 25 November 1997, considered
R v Geary [2002] QCA 33; CA No 241 of 2001, 22 February 2002, followed
R v Palmer (1998)193 CLR 1, followed
R v Perussich [2001] QCA 557; CA No 169 of 2001, 7 December 2001, followed
R v Stirling [1996] QCA 342; CA No 205 of 1996, 17 September 1996, considered
R v Uhrig (unreported) CCA (NSW) 24 Oct 1996, followed

COUNSEL: A W Collins for the appellant
P R Smid, with J Greggery, for the respondent

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

[1] **WILLIAMS JA:** I have read the reasons for judgment of Jones J and agree with the orders proposed.

[2] **CULLINANE J:** I agree with the reasons of Jones J in this matter and the orders he proposes.

[3] **JONES J.**: The applicant was convicted following a trial in the District Court of one count of rape and was sentenced to seven and a half years imprisonment. He now appeals against that conviction and seeks leave to appeal against the sentence.

[4] The initial grounds of the appeal relating to the conviction were added to at the hearing of the appeal. I shall refer to the six that are pursued by their original numbers. They are –

1 The verdict was against the weight of the evidence

2. No reasonable jury properly directed could have been satisfied beyond reasonable doubt as to the guilt of the appellant.

4. The verdict of guilty is unsafe and unsound because of an appreciable risk that:

(a) the learned trial Judge's directions to the jury could have been taken by jury members as direction to compromise their views; or

(b) the learned trial Judge's directions to the jury placed impermissible pressure upon the jury to reach a verdict.

6. The learned Crown Prosecutor's address to the jury contained an impermissible submission which was based upon a passage in the record of interview which should have been excluded.

(a) The learned trial Judge erred in not directing the jury to disregard the submission of the Crown Prosecutor or alternatively to direct the jury of the appropriate use they could make of that submission.

7. The jury's verdict was unsafe and unsatisfactory because there were prejudicial passages in the record of interview which should not have been admitted into evidence.

8. The jury's verdict is unsafe and unsatisfactory because a witness, Ms Jodie Elliot, was not cross-examined about a passage in her original statement to the police.

Background facts.

[5] The complainant alleged that she was raped on or about 3 October 1993 at her residential flat on Magnetic Island which was occupied by her friend, Ms Elliot. The trial was delayed until 28/9 November 2001 because the appellant had left the area. No suggestion was made by the prosecution that his absence could be regarded as flight to escape the prosecution.

[6] The complainant was 16 years old at the time of the offence. She had spent the day of the incident at the flat only returning to her home late in the afternoon. During the day the complainant, Ms Elliot and other friends had decided to go camping overnight at the nearby White Lady Beach. The complainant left her home to return to the flat in the early evening accompanied by her five year old sister. The complainant was delayed and by the time she arrived at the flat the others had already left. Their mother was not told of the plan to go camping.

[7] The appellant was staying at the flat as a temporary visitor. He was 28 years of age at that time. He was known to the complainant, they having met about 8 months earlier. According to the complainant the appellant was minding Ms Elliot's 18 month old son Brandon whilst Ms Elliot was on the overnight camping trip.

[8] Also present at the flat for some time after the complainant's arrival was a person named Brian who was the occupier of the adjoining flat. He had left before the conduct giving rise to the complaint occurred.

[9] It is common ground that an act of sexual intercourse occurred. The only issue for the jury was whether they were satisfied beyond reasonable doubt that the complainant had not consented to this act.

[10] The complainant made no complaint to anyone about the incident until some ten days later when she spoke initially to her boyfriend, later to her parents and then to the police. There was no evidence to corroborate her complaint. Essentially the jury's decision depended on the credibility of the two participants.

[11] The appellant's version of events was set out in a particularly detailed video taped record of interview. This interview was conducted on 20 October 1993, some seventeen days after the incident. In the course of the interview, the appellant's version of events was recorded and then the complainant's allegations were put to him with precision. The appellant did not give evidence at trial but an edited version of the video taped interview was tendered and played to the jury and a transcript provided. The video had been edited to an agreed extent in order to remove inadmissible and/or prejudicial comments. Ground 7 argued on appeal was to the effect that the editing process was incomplete and that other parts of the record of interview should have been excluded.

[12] The complainant's version is that she put Ms Elliot's baby to sleep in his cot in the main bedroom and then she sat on the couch to watch television. After a time she had a shower, changed her clothes and lay down on a bed in the sleepout where she intended to sleep. There were two beds in the sleep out. The complainant's sister Amy was asleep on the bed on the right and the complainant went to the one on the left. Approximately 15 minutes after she went to bed the appellant arrived back in the flat. He had a shower and emerged from the bathroom wearing a towel around his lower body. He came to where the complainant was in bed and said "What will you do if I take this towel off?" [1] to which she replied, "I wouldn't do anything. I have a boyfriend. I love him, and I wouldn't do anything with you anyway." The complainant claimed her boyfriend at that time was Stephen Martin (also known as Marto). He was with the others on the overnight camping trip. She had regarded him as her boyfriend for the past month.

[13] The complainant alleges that the appellant went into the kitchen and returned with a black handled, serrated edged knife. He then asked the complainant if he could make love to her and he took the knife from where he had placed it inside the towel. There was no suggestion at that time that the complainant was directly threatened with the knife. The appellant was just holding it. During the discussion the

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[1] Record p 15/44

complainant's five year old sister, who was sleeping in a nearby bed woke up and the complainant settled her down..[2] The appellant became angry when the complainant refused his request and said "If you don't let me do it I'll cut your head off." [3] The appellant then sat on the complainant's hips, pinned her down with his legs. She headed butted him striking him on the forehead. The appellant then pulled the leg of the complainant's shorts and underpants to one side and inserted in his penis into her vagina.[4] She was at the time wearing loose fitting blue and white shorts with a flower pattern. Sexual intercourse continued for 15 to 20 minutes which was interrupted when the appellant removed his penis and ejaculated on her upper leg. The appellant then threatened the complainant and told her not to complain about the incident saying that if she did tell "he knew where she lived".[5] The appellant then went into the main bedroom, and slept there.[6] The complainant went to the bathroom where she removed her clothes and wiped away the ejaculate with her shorts before placing them in the washing basket. She then put on fresh clothes and returned to the bed on the sleepout.[7] It was put to her that the appellant in fact slept on the bed in the sleepout and that it was she who went into the main bedroom, but she denied this.[8]

[14] The appellant's version of the events appears in the record of interview (Exhibit 2). He stated that the act of intercourse was preceded by a walk to the beach across the road from the flat. At the beach the appellant and the complainant talked and kissed and some acts of intimacy occurred. On return to the flat they watched TV for a period of time and then the appellant went to the bed on the sleepout which he used. He was still dressed in the clothes which he had worn earlier in the evening. Soon after he lay down on the bed on the right side of the sleep-out, the complainant came over and sat on the bed and they started talking. He agrees that whilst they were talking the complainant's sister woke up but the complainant without leaving the bed was able to settle her down. Then they started kissing and ultimately engaged in consensual sexual intercourse. This intercourse ended with the appellant withdrawing his penis and ejaculating on the complainant's stomach. After intercourse the complainant left the appellant's bed but he remained there and went to sleep. She went to the main bedroom where he believed she went to sleep.

[15] The complainant and the appellant remained in the flat until the following morning and were still there when Ms Elliot and the others returned from the camping excursion.

[16] Ms Elliott found the appellant asleep in the bed on the right side of the sleepout.

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2 Record p .17/1-10

3 Record p.17/17-20

4 Record p18/10-30

5 Record p18/44-46

6 Record pp 18-19

7 Record p 19/10-16

8 Record p43/40-44

[17] Ms Elliot gave evidence which confirmed that the complainant was expected to accompany the others on the camping trip and that she had left Brandon at the flat in the care of the appellant. She was however, not completely sure about this latter fact as revealed in the passage of her evidence as follows:

> *"So, is it possible that you didn't ask him to come over and look after Brandon – baby sit Brandon?—No, I'm pretty sure I did.*
>
> *Pretty sure?—I'm not 100 per cent sure, but I'm pretty sure I did. I'm not too sure."*[9]

[18] After Ms Elliot returned to her flat she found clothes belonging to the complainant amongst the washing which is consistent with the complainant's evidence. These included a pair of blue and white shorts, a black dress, bra and a pair of panties. This latter piece of information comes from the statement made by Ms Elliot on 19 October 1993 which was admitted into evidence on appeal as an exhibit to an affidavit of Petrina Mae Enchong. The fact that the statement was not put into evidence at trial is a matter relied upon to show that verdict is unsafe. However the contents of the statement contained other material which was damaging to the defence case which would have justified counsel's decision not to pursue that course.

[19] Whilst the issue of non-consent was the critical question on trial, there were a number of factual issues to which the jury would have regard in determining the credibility of the complainant and the appellant.

[20] Before considering the general issues raised in grounds 1 and 2 of the appeal, I shall deal with the specific issues.

Ground 4 – the Black direction.

[21] The jury retired to consider its verdict at 10.37 a.m. on the final day of the hearing. At 3.46 p.m. they had requested that the transcript of the complainant's evidence be read over to them. This was done taking approximately one hour. At 8.07 p.m. the jurors indicated that they believed they could not reach a decision. The Learned Trial Judge then gave the *Black* direction in the standard form after which he concluded with these words –

> *"Now, members of the jury, apart from what I am directed I should say to you, I am extremely conscious that you have been considering this matter for some time, so that I will within a relatively short time inquire whether the position has changed, or whether you think there may be some productive benefit by further discussion.*
>
> *I am not going to detain you. I will have the inquiry made in half an hour or so. So I indicate that to you, being mindful of the fact that you have been considering the matter for quite some time."*[10]

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9 Record p55/50

[22] The jury returned its verdict at 9.16 p.m.

[23] The appellant argues that those concluding remarks put unnecessary pressure on the jury to return a verdict and that in so doing His Honour breached a cardinal rule of criminal procedure "that a trial judge must avoid any hint of pressure on a jury to reach a verdict."[11]

[24] To my mind the salient features of His Honour's words were that he was not going to detain them (which I interpreted as indicating that he would discharge, rather than sequester them) and that he would inquire in a short time, approximately in half an hour, whether any progress had been made. The inference to be drawn, I believe, was that if some progress had been made he would sit on a little longer, but if not, the jury would then be discharged.

[25] If that inference is correct, then His Honour's statement ought to have relieved the jury from any sense of personal inconvenience which might have resulted from their being detained. But whether it had the effect of imposing the different pressure of reducing the time for "calm and objective discussion", for which the *Black* direction calls, is difficult to gauge. Much would depend on how many jurors at that time were not convinced of guilt. On balance, I do not regard the words as imposing undue pressure on jurors to reach a verdict in a precipitated manner but rather as a means of informing the jury of the course which the trial would take.

Ground 6 – Impermissible question as to motive.

[26] It is conceded by the respondent that the question asked of the applicant in the record of interview about the complainant's motive should have been excluded. The passage is as follows:-

> *"All right. To your knowledge has [the complainant] any reason whatsoever to – to make up any stories about yourself and her?—No.*
>
> *Have you ever done anything to her to want her to sort of get back at you in any way?—No. Maybe. Oh, like what's happened with this.*
>
> *All right?—I don't know.*
>
> *But apart from that. We'll talk about that later if you want to. But have you done anything to her or-----?—No.*
>
> *Have you made – do you think she's got any reason whatsoever to make up stories?—No, not that I know.*
>
> *Do you think she's that sort of person?—Well, it's just things that I've heard from other people and – you know, that she's lied to other people, things like that. Like I got told yesterday – a lady, Ben's mother, she's seen me yesterday at Social Security and she said "I know what happened" and I said "Oh*

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10 Record pp85/50-86/20

11 See *Crosdale v The Queen* (1995) 1 WLR 864 at 875

yeah" and then she called me over aside from other people and she said "I also got told that you – that you're being charged with rape" and I said "No" I said "that's not right" and she said, "I didn't think that was right". She said, "If anything" she said "she would have forced her on to – on to you. She would have forced herself on to you".

Well, was that the case? Did she force herself on to you?—No. Well, you know, it was – it was a mutual consensual thing.

At any time did you get the feeling that she was sort of the instigator of what took place that night?—No, no, not really."[12]

[27] Such a question and answer would not be permitted during questioning before a jury. See *R v Palmer* and *R v Perussich*[13] But counsel is entitled, in address, to question what a witness's motive might be for giving the evidence he or she did. See *R v Geary* and *R v Uhrig*.[14] The appellant argues that the effect of the receipt of this impermissible evidence was in this case compounded because the topic was referred to, both in the prosecutor's address and in the summing up. The only reference to this is found in His Honour's summing up, where the following passage appears –

"The Crown Prosecutor referred to the fact that there were two versions given of the relevant events of the night. It was clear, he submitted, that either the complainant or the accused was not telling the truth. He suggested to you that it was a 10 day interval before the accused was asked to give an account. He asked you to take into account that the complainant was 16 and therefore not to be judged by the standards of a mature woman. He said that her account was, in his words, wholly believable. He asked rhetorically, 'Why would she make this up?'"[15]

[28] The appellant argues that, though it is permissible for counsel to make such statements in address, these later references in the address and summing up compounded the harm that was done by admitting in evidence the offending passage. Further, the fact that the prosecutor's address may have asked the question rhetorically would have been less effective if it were not supported by the applicant's inability to identify a motive when the question was put during the interview. In the absence of any reference to the words used by the prosecutor in his address, it is not possible to gauge the likely impact on the jury. Certainly the remarks of the learned trial judge were entirely permissible.

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12 Record pp29-30

13 *R v Palmer* (1998) 193 CLR 1; *R v Perussich* [2001] QCA 557; CA No 169 of 2001, 7 December 2001

14 *Geary [2002] QCA 33; Uhrig* (unreported) CCA(NSW) 24 Oct 1996 per Hunt CJ at 17. "What this Court said in *R v F* and in *R v E* should not be interpreted as excluding arguments being put to the jury, by either counsel or the judge, relating to the validity of the motive to lie which has been asserted in relation to a witness in the particular case."

15 Record pp76-77

[29] Though conceding that the passage ought to have been deleted from the record of interview, the respondent maintains that the defence counsel at trial (who was not counsel on appeal) may have preferred, for some perceived forensic advantage, to let the passage go to the jury because of the suggestion of the complainant's being sexually promiscuous. The respondent argues that, as a consequence, the Court would be less disposed to hold the verdict as unsafe.

[30] Even if there were some forensic advantage, in my view, it was very limited because the appellant expressly disavowed the suggestion. Nonetheless, consideration must be given to the principle that as a general rule, "litigants are bound by the conduct of their counsel". See *Crampton v The Queen.*[16]

[31] The offending passage ought to have been deleted. The only question then is to consider the impact which the receipt of this impermissible evidence had in the context of the trial considered as a whole. I shall return to this point later.

Ground 7 – other prejudicial passages in the record of interview.

[32] A comparison between ex 2 and the transcript of the video taped record of interview reveals that there was quite extensive editing of the tape and original transcript. Ultimately the exhibit was introduced into evidence without any objection being made by the appellant's counsel at trial. This ground of appeal raises a criticism of counsel at trial suggesting that it was through inadvertence that he failed to object. The criticism is that objection ought to have been made to questions in the interview stemming from the complainant's allegations that the appellant and the man named Brian had smoked marijuana and that they were both "stoned".[17] The record of interview then goes on to allege that the accused said he wanted to go to another place in order "to score again". [18] The appellant denied those allegations.

[33] In the complainant's evidence the following passage appears –

> "*What happened while you watched Brandon?—While I watched Brandon, Dave and Brian went into the storeroom in the flat and I could smell marijuana. They were in there smoking cones.*
>
> *Perhaps if you can tell us what you saw about them later on?—Well, when the came out they had red eyes and I could smell marijuana. Then I was asked if I wouldn't mind watching Brandon some more while they went up to Jeff's place to get some more cones."*[19]

[34] No objection was taken to that passage of evidence being lead from the complainant and the allegation does not appear to have been a topic raised in cross-examination.

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16 (2000) 75 ALJR 133 at para 18

17 Ex 2 pp 35-36

18 Ex 2 p26

19 Record p13/15-30

The appellant's denial of these allegations was not put to the complainant in cross-examination.

[35] On behalf of the appellant, it is argued that that evidence was not relevant. But even if it were, then its prejudicial effect should have led to its exclusion. This was because the evidence might lead the jury to speculate that, by the consumption of marijuana, the appellant was disinhibited and therefore more likely to commit the offence.

[36] The respondent argues that the appellant's ingestion of the drug is relevant to the narrative of the events leading up to the commission of the offence, that it provides an explanation of the appellant's movements in and out of the flat and that it was relevant to show that the appellant may have been affected by his ingestion of the drug. The respondent argues that the situation would have been no different had the offender been drinking alcohol prior to the commission of the act.

[37] The events of smoking marijuana were, in my view, sufficiently proximate to the act of intercourse to form part of the relevant background to which the jury could properly have had regard. It was relevant also to explain the movements of the appellant in and around the flat and relevant also to the disputed fact as to whether the complainant and the appellant were likely to have gone to the beach on their own and spent approximately half an hour there. In my view there was no ground for objecting to the evidence either when it was given in court or received as part of the record of interview. The reason why defence counsel at trial did not put to the complainant that her allegations about this fact were untrue cannot be gauged. It may have been because of his client's instructions or a tactical concern that further reference to the matter would serve only to emphasise the complainant's version.

Ground 8 – Failure to cross-examine Ms Elliot on her original statement.

[38] I have already detailed the substance of Ms Elliot's evidence and the evidence that was available through the tendering of her original statement to the police. It seems to me that Ms Elliot's evidence as to where the appellant was sleeping when she returned from the camping excursion and the location of the complainant's clothes in her bedroom were matters which were only marginally relevant to the issue of credibility between the principal actors. In each case there appears to have been significant lapse of time between Ms Elliott's observations and the sexual intercourse. In relation to the complainant's clothing, this was seen first by Ms Elliot amongst the washing which supports the complainant's version. I am not persuaded that the conduct of defence counsel has caused the trial to miscarry.

Is the verdict unsafe or unsatisfactory?

[39] It is seen from the foregoing that I find no merit in grounds 4, 7 and 8. The impact of the impermissible evidence then has to be considered in the context of this particular trial.

[40] The test which must be applied on this question is well established by the High Court decisions in *M v The Queen*[20] and confirmed in *Jones v The Queen*[21]. The relevant expression of the test is –

> *"...whether [the Court of Appeal] thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the Court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence..."*

[41] and

> *"If the evidence, upon the record itself contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted then the court is bound to act and set aside a verdict based upon the evidence."*[22]

[42] From what appears above there remains the concern that the record of interview contained a passage which was impermissible which therefore ought to have been deleted. The inherent danger of the impermissible question arises at three levels which were identified by Sperling J in the Court of Criminal Appeal in New South Wales in *R v E.*[23] Firstly, such questioning invites the jury to speculate; secondly, it might be unfair to the accused who is not in a position to know what is in the mind of the complainant; and thirdly, the effect of the question might have the result of reversing the onus of proof. In this instance the question arose on page 29 of a forty six page Record of Interview. The transcript was made available to each member of the jury during the playing of the video but then retrieved from them before they retired to consider the verdict.[24]

[43] The impact that the impermissible evidence has upon the fairness of the trial is not of a high order coming as it did in a long record of interview. It is unlikely that the offending statement in the whole evidence in the circumstances of this case gave rise to the dangers identified by Sperling J.

[44] The single issue raised for the jury's determination involved a straight question of credibility. This is quintessentially a jury matter. The jury had the opportunity to see the complainant give evidence and to see and hear the appellant by means of the videotaped interview. There was no independent evidence which put in doubt the complainant's credibility. In the circumstances the short offending passage in the

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20 (1994) 181 CLR 487 at 494 and 504

21 (1997) 191 CLR 439 at 450-451

22 See *Jones* at pp493-494

23 (1996) 39 NSWLR 450 at 464.

24 Record p 48/45

long record of interview is unlikely to have impacted on the jury's consideration of the ultimate question.

[45] The grounds of appeal identified specific points as supporting the general contention that the verdict was "unsafe and unsatisfactory". In my point of view the only irregularity is the admission into evidence of the impermissible passage in the record of interview. Neither this defect nor a consideration of the evidence generally gives rise to a concern that the verdict was unsafe or unsatisfactory.

Conclusion

[46] For reasons mentioned above the one matter of irregularity is unlikely to have altered the course of the jury's deliberation. In line with the principles stated in *Festa v The Queen*[25] , I am satisfied that no substantial miscarriage occurred in this case. I would therefore apply the proviso to s.668E of the *Criminal Code*.

[47] In my view the appear should be dismissed..

Sentence

[48] The appellant seeks leave to appeal against his sentence of 7 ½ years imprisonment contending that the appropriate term would be in the order of five years.

[49] Counsel for the applicant argued that the facts that the applicant had been assaulted by the complainant's father and lived in fear of his safety were mitigating factors which had been given insufficient weight by the learned sentencing Judge. A further matter referred to in mitigation was the fact that the applicant had not in the eight years between the date of the offence and trial committed any other offence.

[50] In his sentencing remarks the learned sentencing judge did take into account both these facts. But there was no evidence before His Honour as to the extent of any injuries sustained by the appellant nor whether this resulted in any permanent sequelae. By reason of the applicant's flight from the jurisdiction after the assault and his imprisonment now his claimed fear for his own safety could not be seen as particularly significant.

[51] His Honour found that this was a serious rape perpetrated on a 16 year old virgin with some threat of harm to her if she did not comply. His Honour also noted the disparity in ages, the applicant's lack of remorse and his giving a false account of the circumstances.

[52] Counsel for the applicant relied on the Court of Appeal decision in *R v Edwards*[26] in which a sentence of seven years was not disturbed even though it involved a second count of rape during which the offender threatened to stab the complainant with a screw driver.

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25 185 ALR 394

26 [1997] 472;CA No 370 of 1997, 25 November 1997

[53] The Crown relies on the Court of Appeal decisions of *R v Stirling*[27] and *R v Basic*[28] as showing this sentence was within range. In *Stirling* the Court of Appeal reduced a nine year term of imprisonment to seven years in respect of a 30 year old appellant who entered the complainant's bedroom while she was sleeping. He forcefully overcame her resistance and had sexual intercourse with her. He was at the time on parole for crimes committed in Western Australia and as a consequence of this crime his parole was cancelled which was a complicating factor in his sentence. However in terms of the appropriate range of penalty for this type of offence Thomas J said:-

> "We have been referred to a variety of past sentences for like offences, including *R v Raymond* CA 299 of 1994, 12 September 1994, *R v Chinfat* CA 354 and 355 of 1995, 17 November 1995, and *R v Day* CA 247 of 1993, 13 September 1993. Sentencing patterns are discussed in these and many other cases in this Court, and there is little point in restating the position. Suffice it to say that a nine-year sentence seems more appropriate for those cases where specially serious factors operate such as the infliction of injury or the use of serious threats, possession of a weapon or some factor of a particularly aggravating kind. The present circumstances suggest that a sentence of seven years was the appropriate response, and I am accordingly of the view that the sentence of nine years was manifestly excessive and that it should be replaced with one of seven years."[29]

[54] The circumstances in the present case are somewhat similar by reason of aggravating features such as the threats and the presence of a weapon.

[55] In *Basic* the offender attacked the complainant as she was leaving her residence to go to work. He dragged her into nearby bush land and thereafter threatened and raped her. As in this case the complainant was not bashed but the President of the Court of Appeal described the event as "humiliating, degrading and a terrifying attack upon a young woman in her early twenties".[30] The penalty of eight years imprisonment was not disturbed on appeal. A perusal of the schedule of comparable cases suggests that the penalty range for the offence of rape with similar features to the circumstances here is 7 – 9 years.

[56] The grounds for mitigation of sentence are relatively few and these were properly considered by the learned sentencing judge. The sentence in my view is not manifestly excessive and should not be disturbed. I would refuse the application for leave.

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27 [1996] QCA 342; CA No 205 of 1996, 17 September 1996

28 [2000] QCA 155; CA No 11 of 2001,3 May 2000

29 See *Stirling* at p8

30 See *Basic* at p7