SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hennessy* [2002] QCA 523
PARTIES:	**R** **v** **HENNESSY, Paul Andrew** (applicant)
FILE NO/S:	CA No 308 of 2002 DC No 80 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED EXTEMPORE ON:	28 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2002
JUDGES:	Davies and Williams JJA and Helman J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal** **2. Allow the appeal to the extent of deleting the provision that the sentence be suspended after nine months and in lieu thereof, inserting that the sentence be suspended after serving 11 weeks, otherwise the sentence imposed should stand**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where 17 year old applicant pleaded guilty to charge of rape of his 15 year old girlfriend – where remorse was expressed by the applicant prior to the offence being discovered – no complaint – offence discovered through letter expressing remorse - where applicant was sentenced to three years' imprisonment to be suspended after nine months with an operational period of three years – whether the sentence was manifestly excessive - order sentence be suspended after serving 11 weeks *R v Beaver* CA 114 of 1992, 2 June 1992, distinguished

R v Stallan [1995] QCA 109; CA 8 of 1994, 15 March 1995, distinguished

COUNSEL:	M A Green for the applicant B G Campbell for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

WILLIAMS JA: The applicant pleaded guilty in the District Court at Bundaberg, on the 13th of September 2002, to one count of rape. He was sentenced to three years imprisonment, to be suspended after nine months, with an operational period of three years.

This is an application for leave to appeal against that sentence on the ground that in all the relevant circumstances it is manifestly excessive. The facts could be described as unusual and in the circumstances, it is desirable that the background facts be set out at some length.

The complainant girl was born on the 27th of June 1985, making her 15 at the time of the commission of the offence. The applicant was born on 1 December 1982, making him aged 17 at the time of the offence.

The complainant and the applicant met in about April 2000 and about two weeks later they commenced a sexual relationship, which included sexual intercourse. The complainant's parents were aware of the boyfriend/girlfriend relationship, but were not aware of the sexual nature of that relationship.

They did go to some length to point out the complainant's age to the applicant. There was one occasion, prior to the offence in question, when the applicant and complainant were discovered in a compromising situation and an indication was made to the applicant that such behaviour could result in him being charged.

The offence in question occurred on the afternoon of the 28th of September 2000. The complainant was dropped off by her parents at the accused's residence. This was during school holidays.

There was some cuddling between the two, after which they went to a bedroom. They both sat on the bed and there was some kissing. They then each took off their clothing. They lay on the bed together and the applicant inserted his finger into the complainant's vagina. He did that for a while without objection.

He then inserted some additional fingers into the complainant's vagina and she complained that it began to hurt. He was then told to stop. A short while later, he commenced intercourse with her, inserting his penis into the complainant's vagina.

She told him that it hurt and asked him to stop. He told her to relax and said she would enjoy it. Again she said she did

not want to be there and it was hurting, but the applicant continued to have sex with her.
On a number of occasions, she tried to sit up and push the applicant away, but he was too strong and continued with the act of intercourse. On one occasion during that episode, the complainant called the applicant an arsehole and told him she could not believe he was doing this to her.

After several minutes, the applicant ceased the act of sexual intercourse and the parties then dressed. About 10 minutes later, the complainant's parents arrived. The applicant walked her out to the car and she gave him a kiss on the lips before getting into the car. No complaint was made to her parents, with respect to what had occurred.

Thereafter, the complainant and the applicant continued their sexual relationship, which included sexual intercourse. Sexual intercourse occurred from time to time up until December 2000, when it stopped, because the complainant was concerned about falling pregnant.

Thereafter, a sexual relationship continued until May 2001, that relationship involved fondling and performing oral sex on each other. After they broke up, the applicant wrote a number of letters to the complainant apologising for raping her. The complainant's mother found one of those letters on or about 8 September 2001 and that resulted in a complaint to the police and the laying of the charge in question.

There was never any complaint by the complainant of rape, until the matter had been referred by her mother to the police. That recitation of facts outlines what can be regarded as unusual circumstances.

It was the applicant's expression of remorse before the offence was discovered which brought the offence to light. It was only because of his writing the letters in question that the offence was discovered.

I should also record that there was a victim impact statement in this case. When it is considered in the light of the agreed statement of facts, it does appear that the complainant had had a number of emotional and behavioural problems prior to her relationship with the applicant commencing.

Indeed, it could be said that the relationship in some ways assisted her to overcome those difficulties, but they did re-emerge subsequently. It is difficult in the circumstances to evaluate the extent to which the particular act which constitutes the offence of rape was material in those difficulties re-emerging.

There are some decisions of this Court which are helpful in determining whether or not the sentence imposed in this case is manifestly excessive. There are at least two relevant decisions, which involve an offence of rape occurring during the course of a relationship: Stallan, CA Number 8 of 1994 and Beaver, CA 114 of 1992.

The facts of Stallan indicate several features which distinguish it from the present. Both the complainant and offender there were older. The offender was aged 23. The circumstances of the rape in that case involved more force and was somewhat more brutal.

Also, the offender there had a criminal record, though not for similar offences. There were in that case, no long time consequences for the complainant. In that case, this Court imposed a sentence of three years' imprisonment, with a recommendation for consideration for parole after nine months. In my view, that was a worse example of rape than the present.

In Beaver, the offender had been sentenced to three years' imprisonment, with a recommendation for parole after nine months and this Court did not interfere with that sentence.

There the offence occurred during a period in which the complainant and the offender, who were married, were separated. It involved more force than in this case. The offender forced himself upon his wife without there being any consensual foreplay.

It was made even worse by the degree of violence used. However, the offender, like the applicant here, was remorseful afterwards. Whilst not interfering with the sentence, Justice Pincus expressed concern that the applicant was not treated

more generously in the recommendation for parole as some Judges might have treated him.
Those remarks were endorsed by other members of the Court. Given the age of the parties in this case, the fact the applicant had no criminal history, the circumstances in which the offence occurred and the fact that remorse was expressed by the applicant prior to the offence being discovered, and the fact that it was only because such remorse was committed to writing that the offence was discovered, I am of the view that the sentence imposed here was manifestly excessive.

Because any rape must be regarded by the Courts as a serious offence, it was appropriate, in my view, that some actual period in custody be served, but in my view, the circumstances here warranted the suspension of the custodial sentence at an earlier point of time than after the serving of nine months.

In my view, the circumstances here called for serving actual custody for a period of up to three months. This appeal is being heard on the 28th of November 2002 and as of tomorrow, the applicant would have spent 11 weeks in actual custody. In all the circumstances, it is my view that the appropriate order to make is that the sentence be suspended after serving 11 weeks of the three year sentence.

In the circumstances, I would grant leave to appeal and allow the appeal to the extent of deleting the provision that the sentence be suspended after nine months and in lieu thereof,

insert that the sentence be suspended after serving 11 weeks, otherwise the sentence imposed should stand.

DAVIES JA: I agree with the orders proposed by Justice Williams and, with one qualification, with his Honour's reasons for those orders. I do not think that a sentence of three years, fully suspended, would have been outside the appropriate range, although I concede that a sentence of three years, suspended after three months, would also have been within range. For those reasons, I agree with the orders proposed by and, subject to that qualification, with the reasons of Justice Williams.

HELMAN J: I agree with the orders proposed by Mr Justice Williams and with his reasons.

DAVIES JA: The orders are as Mr Justice Williams has indicated.
