SUPREME COURT OF QUEENSLAND

CITATION:	*R v D* [2003] QCA 88
PARTIES:	**R** **v** **D** (applicant)
FILE NO/S:	CA No 444 of 2002 DC No 184 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	4 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2003
JUDGES:	McMurdo P, Mackenzie and Philippides JJ Separate reasons for judgment for each member of the Court, each concurring as to the orders made
ORDERS:	**Application for leave to appeal granted** **Appeal allowed** **Order that the sentence of 12 years imprisonment for the offence of rape be overturned and a sentence of 10 years imprisonment imposed in lieu thereof** **No interference with the sentence for the offence of deprivation of liberty**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AN 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 the applicant was sentenced for rape and deprivation of liberty – where the complainant was a child – where the offences occurred after changes to indecent dealing provisions - whether the sentence imposed was manifestly excessive
COUNSEL:	N V Weston for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

MACKENZIE J: This is an application for leave to appeal against sentence. The applicant who was about 40 years of age at the time of the offences pleaded guilty to one count of deprivation of liberty and one count of rape. The offences arose out of the same events. The sentencing proceedings were initially adjourned after the applicant had pleaded guilty for the purpose of allowing the preparation of a presentence report which included psychological and psychiatric reports.

After the report was received the applicant was sentenced to three years imprisonment for deprivation of liberty and 12 years imprisonment for rape, those sentences to be served concurrently. 330 days that the applicant had already spent in custody were declared to be time already served.

The applicant had a very lengthy criminal history included offences of dishonesty and violence but no previous convictions for sexual offences. The offending behaviour had begun in 1980 when he was about 19 years of age and had continued fairly consistently over the years. There was also information in the presentence report that suggested that he had a poor response to community service and probation orders although he had completed home detention successfully.

The bases upon which it is said that the sentence was manifestly excessive are that it was not clear that the learned sentencing Judge had taken into account the fact that there had been a plea of guilty to both counts which demonstrated some degree of cooperation with the justice

system; it was submitted that there should have been some reduction in sentence for that; it was conceded that the offences were heinous but it was submitted that the offence was of relatively short duration and was not as serious as some of the other cases.

It was submitted that having regard to a variety of authorities that were drawn to our attention that the sentence was high. It is a case where the change in the legislation equating what was previously indecently dealing to rape is said by the Crown to be an issue and we were invited to express a view as to the proper approach in cases of this kind. For my part I doubt whether this case is a suitable vehicle for embarking on an extended exercise of that kind. It seems to me that in the end each case will depend on its own facts. That is plainly recognised by counsel who conceded that none of the authorities that were referred to are necessarily equivalent to the present case.

At the sentencing, counsel for the applicant had submitted that three to five years would be appropriate. It seems to me that that was a quite unrealistic expectation. Before us it was submitted in the written submissions that a nine year sentence was apposite but it was accepted in oral submissions that up 10 years would be within an appropriate disposition of the matter. The Crown, on the other hand, submitted that the sentence was appropriate and not manifestly excessive.

The complainant was a five year old child. On the day of the offences she was playing in her front yard. Her mother was inside the house and other children were also playing in the yard. At a time prior to the offences the applicant, whose house backed onto the complainant's, was seen sitting in his back yard drinking and listening to music. The complainant's mother's attention was distracted for about 10 to 15 minutes after which time she checked again on the children and found that the complainant was missing.

After sending some of the children to check the neighbourhood the complainant's mother noticed that the applicant was no longer sitting in his yard. She ran to his house. She received no answer after knocking. She entered the house and saw the complainant's clothing on the bed in the first bedroom. She opened the door to the second bedroom with some difficulty and found the complainant naked on the bed with the applicant leaning over her and touching her vaginal area while holding down her legs.

While the applicant's attention was distracted by the mother's arrival the complainant was able to release herself and run to her mother who immediately carried her home. She was later examined by a government medical officer and injuries to the vaginal area were found. It was said that the complainant refused to discuss what had happened, only telling her mother that she had not responded to her earlier calls because of threats made by the applicant that he would punch her. The

hymen was found to be bruised and haemorrhage was evident with a suspected possible laceration of it.

The medical practitioner was of opinion that the injuries were consistent with digital penetration and that penile penetration was unlikely. The circumstances of the offence are nevertheless very serious although, fortunately, the intervention of the mother may well have saved the situation from becoming rather worse. The applicant was apprehended the following day.

The trial Judge said that he had regard to various factors including the applicant's criminal history, the presentence report and the victim impact statement tendered on behalf of the complainant's mother as well as the schedule of sentences provided by the Crown.

He considered the offence and the accompanying injury to be serious having regard to the indication that acute blunt force had been used.

He also had regard to the emotional effects of the offence on the complainant. There was information in the victim impact statement that the child's behaviour had changed since the offence. She was sleeping with her mother on most nights. Her sleep was interrupted and she was wary and distrustful of strangers.

The trial Judge had the benefit of a series of reports including psychiatric and psychological reports. The effect of them was that the applicant was diagnosed as suffering from antisocial personality disorder and substance abuse. The consequence of that was that he tended not to internalise his ideas of right or wrong and some problem to his self control and diminished self concern for the consequences of behaviour.

However the psychiatrist expressed the view that he did not appear to be the usual kind of habitual child molester. Dr Richards also said that another major problem that the applicant had was his heavy use of alcohol and marijuana and in the absence of his confronting that he was likely on release to suffer episodes where he committed further offences including threatening and aggressive behaviour and other antisocial acts, which he conceded might conceivably include a further sexual offence.

The trial Judge focused to some extent on the decision of Daphney, Court of Appeal 328 of 1998, 16 March 1999, where the offender was sentenced to 15 years' imprisonment. However it was accepted by the sentencing Judge and it was agreed in this Court that Daphney was a somewhat worse case.

The sentence of 12 years was imposed using, it seems to me, Daphney as a benchmark and having regard to some extent to the kinds of matters that were referred to by the experts who gave reports as to the prognosis for the applicant.

As I have already said, it seems to me that each case has to depend very much on its own facts. It cannot be doubted that this is a very serious case in the sense that a child was abducted from the yard of her home and taken to another house and there dealt with in the way that has been described.

When one looks at the authorities to which we were referred, however, it does seem to me that if the matter is looked at as a factual issue, the particular circumstances of the case are such that a sentence of 12 years for the rape is on the high side, to the extent that I think that is manifestly excessive.

In the circumstances it seems to me that the application must be allowed and that a sentence of 10 years for the offence of rape be imposed in lieu thereof. With regard to the sentence for abduction, I see no reason to interfere with that.

Accordingly I would grant leave to appeal, allow the appeal, set aside the sentence of 12 years' imprisonment on the count relating to rape and substitute in lieu thereof a sentence of 10 years. Otherwise the sentence would remain undisturbed.

THE PRESIDENT: I agree. This offence of rape involved digital penetration of the vagina rather than penile penetration, without the consequential risk of pregnancy not apposite here because of the age of the child, or sexually transmitted diseases. Penile penetration of a five year old child could also be expected to cause even more serious injury than those inflicted here. The facts of this case were

therefore less serious than if the offence of rape had involved penile penetration.

Nevertheless the intention of the legislature is to raise the penalty to be imposed in cases where the rape involves digital penetration, in the past, an offence charged as indecent dealing with a maximum penalty of 10 years.

The particularly serious aspects of this case were that the child was only five years old; she was grabbed from the safety of her own backyard; the applicant, a mature man, had a bad criminal history and his alcohol and drug abuse means that there is a real risk of reoffending when released if he continues to abuse alcohol and drugs.

The only factors in favour of the applicant were his late plea of guilty on the morning of the trial and the absence of previous convictions for sexual offences.

The sentence of 12 years imprisonment was, as Justice Mackenzie explains, manifestly excessive in the circumstances. A sentence of 10 years appropriately reflects the legislative changes and the relevant aggravating and mitigating factors.

I agree with the orders proposed by Justice Mackenzie.

PHILIPPIDES J: I also agree that leave to appeal should be granted and for the reasons stated by Justices Mackenzie and

McMurdo that a sentence of 10 years' imprisonment in relation to the count of rape should be imposed.

THE PRESIDENT: The orders are as indicated.
