SUPREME COURT OF QUEENSLAND

CITATION:	*R v Spoehr* [2003] QCA 412
PARTIES:	**R** **v** **SPOEHR, Kym** (applicant)
FILE NO/S:	CA No 210 of 2003 DC No 43 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EX TEMPORE ON:	16 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2003
JUDGES:	McMurdo P, Davies and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – where applicant convicted of assault with intent to rape; deprivation of liberty, sexual assault and seven counts of rape – where applicant sentenced to 14 years imprisonment – where applicant entered plea of guilty – where applicant has minor criminal history - whether sentence manifestly excessive *Criminal Code*, s 27 *Penalties and Sentences Act* 1992 (Qld), Part 9A *R v Bryan; ex parte A-G (Qld)* [2003] QCA 18; CA No 410 of 2002, 5 February 2003, applied *R v Coghlan* [1997] QCA 270; CA No 139 of 1997, 5 September1997, considered *R v Henry* [2002] QCA 520; CA No 272 of 2002, 27 November 2002, considered *R v Mason* [1997] QCA 67; CA No 360 of 1996, 19 March 1997, considered

	R v Penniment [1992] QCA 100; CA No 3 of 1992, 29 April 1992, distinguished
COUNSEL:	K M McGinness for the applicant A J Rafter for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant was convicted on 26 May 2003 in the District Court at Maroochydore of one count of assault with intent to rape; one count of deprivation of liberty; one count of sexual assault and seven counts of rape. He was sentenced to an effective term of 14 years imprisonment and declared to be convicted of a serious violent offence; a period of 488 days was declared as time already served under the sentence. The applicant contends the sentence is manifestly excessive.

The complainant, a 29 year old Japanese woman, had been in Australian for about six months on a working holiday. She arrived in Noosa where she stayed at the Backpackers Hostel on about 23 December 2001. On Christmas Day, she decided to walk along the coastal track to Hell's Gates in the Noosa National Park at about 3.00 p.m. After about an hour and a half, she became concerned that she had lost her way and asked the applicant for directions to return to the car park. They walked along an inland track and chatted together. After about half an hour, the applicant stopped, took a bottle from his backpack and offered her a drink. She declined, drinking from her own water bottle. She felt a blow to the back of her head which caused her to fall to her knees. She looked up to

see the applicant with a stick in both his hands raised up near his head. He swung the stick at her head and struck her. She threw her wallet at him but he hit her again on the back of the head with a stick. She crouched down and tried to cover her head with her hands but was struck on two more occasions on the back of the head. She begged the applicant to help her and offered him money. The stick with which she was attacked was about 30 centimetres long and five centimetres wide. Those facts constitute the first count.

She began to lose consciousness and felt the applicant drag her under her armpits backwards into the bush. Her sandal fell off. He dragged her some distance, perhaps up to 100 metres, from the path to a camp site with an erected tent. He leant her against a tree and when she regained consciousness, she found a rope around her neck tying her to the tree. Her arms and one of her legs were also tied to the tree. Grey duct tape was across her mouth and wrapped around the back of her head. The rope around her neck became undone and the applicant laid her down on the ground, pulled her hands above her head and re-tied her to the tree. He cut the strap of her shoulder bag with a knife and threw the bag away. He then cut her t-shirt, pants, bra and underwear and pulled her clothes off. The knife had a blade of about 10 centimetres. He then cut the ropes tying her to the tree, picked her up and carried her inside the tent where he placed her on a mattress and again tied her up. She remained gagged. These facts constitute the second count.

He next removed money from her wallet and the battery from her mobile phone. He took off his clothes and she noticed that he had tattoos and no pubic hair. He moved her legs apart and shaved her pubic hair. These facts constitute the third count.

He washed her lower body and the blood from her head injuries which had dripped on to her upper body. He placed some lubricant on his penis and on her vagina, lay on top of her, kissed and fondled her breasts and rubbed the outside of her vagina. He performed oral sex on her. That constituted the fourth count.

He then had sexual intercourse with her, stopping periodically to masturbate himself. This continued for about half an hour until ejaculation. He wiped his penis and the complainant with toilet paper. These facts constituted count five.

He offered her a cup of tea but she declined and instead he poured water into her mouth from a bottle around the masking tape which was still in place. He washed her hair around her head injuries with a little water and they talked after he removed the tape from her mouth. He again performed oral sex on her (the sixth count), and inserted his fingers into her vagina (the seventh count). He next applied lubricant to his penis and the complainant's hand and he pushed her hand on to his penis and held it there, forcing her to masturbate him. After a few minutes, he again lay on top of her and inserted his penis into her vagina (the eighth count). He again had

intercourse with her until he ejaculated, after which he once more wiped his penis and her vagina with paper.

He once more offered tea and this time she accepted. He offered to remove her ties if she promised not to do anything. He then untied her but retied her wrists so that her palms were facing together in front of her. He asked her her plans. She said she was meeting a friend on 27 December. He promised he would let her go before then and again checked her head injuries. He apologised that he had hit her so hard but said that he just wanted to have sex with her. She agreed with his demand that she not go to the police. She then said that she planned to go to Fraser Island early on the morning of 26 December and the applicant said he would let her go that morning.

She did not sleep during the night, but she was not able to leave the tent because it was dark and she did not think she could find her way. She was concerned that if she tried to escape the applicant might kill her and she was very anxious not to upset him. During the night, he again fondled her breasts and touched her vagina. He turned on a torch, put some lubricant on his penis, placed her hand on it and again made her masturbate him. He again had intercourse with her until ejaculation (the ninth count).

As dawn approached, the applicant left the tent to urinate and on his return he placed lubricant on his penis, put her hand on it and made her masturbate him. He touched the outside of

her vagina, lubricated it and again lay on top of her and had sexual intercourse (the 10th count).

He desisted after about five minutes, again wiped himself with toilet paper and said that he did not wish to hurt her any more. He gave her some tea, attempted to fixed her handbag, replacing her money. He took her clothes, the stick with which she had been assaulted, the razor, her cigarette packet and the toilet paper and placed them in a blanket. He walked away and then returned without it. He gave the complainant a pair of his shorts and his sandals and they left the camp site. He also gave her a shirt but told her not to put it on until she'd washed the blood from her hair. He walked with her through the bush to the beach where he told her to wash her hair. He was talking quite quickly and she thought he was trying to confuse her as to where she had come from and where she was going. When they got to the beach, she took off the shorts and washed herself. He tried to help her wash her hair in the surf and told her to return to the Backpackers Hostel. She dressed in his clothes and he walked with her for a short distance and then pointed out the route she was to take. It was about 5.45 a.m.

She returned to her room at the Backpackers Hostel and showered. She sat on the beach and waited for her female friend to wake up. At 7.30 a.m. she saw the friend's husband and told him that someone had hit her in the national park and that she wanted to go to the police with his wife. When she

saw her female friend, she complained that she had been hit and raped in the national park.

She made a complaint to police and was taken to the Noosa Hospital where she was medically examined. She had four lacerations to the occipital region ranging from 3 to 6 centimetres, deep tissue bruising to the right and left upper shoulder regions, minor abrasions to the sternum and right lower leg, and pain and tenderness in the wrists and left elbow.

The applicant was apprehended by police at Coffs Harbour on 23 January 2002. Despite three days of police searches through the national park, they were unable to find the applicant's camp site. When interviewed by police, the applicant said that he hit the complainant for no apparent reason but not because he wished to rape her. He then made reasonably full admissions to police and said that he did not realise the seriousness of his actions until after he had committed them.

The applicant indicated an early plea of guilty and the committal proceedings were by way of full hand-up statements so that international witnesses did not need to travel to Queensland.

A victim impact statement from the complainant was tendered which indicated the dreadful consequence the applicant's actions have had on the unfortunate and completely innocent complainant. For cultural reasons, she has been unable to

share her ordeal with those closest to her. Despite her blamelessness, she feels great shame over the incident. She had wisely agreed at the time of making the statement to consult a Japanese-speaking psychologist. She has suffered the expected physical and emotional trauma from such an event and has had the added fear that she may have contracted HIV or a sexually transmitted disease. She has been left with scars on her head and other minor marks on her body. At the time of the statement, 15 January 2003, she had been unable to contemplate an emotional or sexual relationship because of these offences.

Two psychiatric reports were tendered on the applicant's behalf at sentence. Professor Harvey Whiteford noted that the applicant was not suffering from any clinical significant abnormality at the time of his examination on 26 March 2002. The applicant described a pattern of change in his thinking and a feeling of pressure in his head which occurred every four to six weeks throughout much of his adult life. He has no history of psychiatric treatment as an adult and no medical history of any neurological disorder. There was no evidence of psychotic phenomena. Professor Whiteford opined that the applicant met the diagnostic criteria for schizotypal personality disorder which would explain his pattern of unusual psychological and cognitive symptoms and his poor interpersonal relationship and vocational history. He did not consider the applicant to have had psychotic symptoms at the time of his offending and opined that the unusual experiences reported by the applicant were a type of disassociation

phenomena, not automatism, and that the applicant was not deprived of any of the relevant capacities under s 27 of the *Criminal Code*.

Professor Peter Yellowlees examined the applicant on 10 April 2003. Both Professors Whiteford and Yellowlees noted that the applicant claimed to have suffered some form of mild schizophrenia in the past. Like Professor Whiteford, Professor Yellowlees could find no evidence to support that diagnosis or a diagnosis of any other psychotic condition or of epilepsy fits or seizures. Professor Yellowlees agreed entirely with Professor Whiteford's diagnosis that the applicant "is an eccentric loner who has, using the DSM IV, a diagnosis of a schizotypal or and paranoid personality disorder" with no evidence of any major psychotic illness to deprive or impair him in terms of the relative capacities under s 27 of the *Criminal Code*. Professor Yellowlees thought the applicant fit to stand trial, enter a plea, instruct counsel, and endure Court proceedings without suffering serious problems with his mental health.

The applicant was born on 1 May 1952 and was 49 at the commission of these offences and 51 at sentence. He had a minor criminal history but no convictions of a like nature or for violence.

The Prosecutor at sentence contended that a term of imprisonment between 14 to 16 years was appropriate whilst

defence counsel argued that a sentence of 11 to 13 years should have been imposed.

The learned primary Judge expressed his concern that a young visitor to Australia was subjected to a 12-hour ordeal after asking for directions from the applicant and on a holiday reserved for celebration and joy. The attack was initially ferocious and then followed by bizarre features of degradation and humiliation with catastrophic consequences for the victim. His Honour noted that the applicant's plea of guilty was a very significant mitigating factor, especially as the complainant was particularly anxious not to give evidence in Court. His Honour noted that it was not, however, accompanied with genuine remorse towards the victim and that this was demonstrated in his interviews with police and the psychiatrists. His Honour stated that despite the applicant's lack of history for violent offending, the material suggested that he was presently a real danger to women in isolated places.

His Honour referred to *R v Bryan; ex parte A-G* (Qld)[2003] QCA 18; CA No 410 of 2002, 5 February 2003, as authority for the proposition that the legislature has clearly signalled a hardened intolerance of serious violent offending and requires much greater significance and deterrence, punishment and community denunciation rather than taking into account the personal circumstances of the offender.

His Honour also observed that but for the mitigating factor of the plea of guilty, the appropriate sentence here was one of 16 years' imprisonment but reduced it to 14 years to reflect that plea of guilty and cooperation with the authorities. The applicant contends that the learned sentencing Judge erred in determining that the appropriate penalty for this series of offences was 16 years' imprisonment and in reflecting the applicant's plea of guilty by a discount of only two years' imprisonment and that his Honour placed too much weight on the decision of *Bryan*.

Both the applicant and the respondent have referred the Court to a number of sentences imposed in other instances of rape which are said to be comparable. It is not surprising that none of these involves facts closely comparable to the unusual circumstances here.

The applicant especially emphasises the matter of *R v Henry* [2002] QCA 520; CA No 272 of 2002, 27 November 2002, where a youthful offender aged between 17 and 19 at the time of the offences, pleaded guilty to four serious counts of rapes and other offences including burglary. The sentence imposed was 11 years' imprisonment although the range was said by the sentencing Judge to be as high as 14 years' imprisonment. The sentence of 11 years' imprisonment was held by this Court not to be manifestly excessive.

The respondent rightly contends that the sentence here is supported by that imposed in *R v Penniment* [1992] QCA 110; CA

No 3 of 1992, 29 April 1992. In *Penniment* a sentence of 15 years' imprisonment was imposed for an offence of rape coupled with entering a dwelling house at night with intent and rendering a person in the dwelling house incapable of resistance by methods calculated to choke. Penniment's presentence custody meant that the sentence was in fact equivalent to 16 years' imprisonment. The learned sentencing Judge gave a parole recommendation after six years to reflect the early plea of guilty and the applicant's attempts to overcome his serious drinking problems. Part 9A *Penalties and Sentences Act* 1992 (Qld) no longer permits the giving of any recommendations for parole. But the facts in *Penniment* appear to be of comparable seriousness to those here.

R v Mason [1997] QCA 67; CA No 360 of 1996, 19 March 1997, was another case involving a plea of guilty to rape and other counts, namely unlawful assault occasioning bodily harm, disablement to commit an indictable offence and robbery. Although a knife was used in Mason, the overall circumstances, although different, were of comparable seriousness. Mason was an Aboriginal child of the stolen generation and had problems with alcohol and drug addiction. Unlike this offender he did have a prior history for offences of violence. As serious as the facts were in Mason, they were not as concerning as those here. The Court there held that a sentence of 15 or 16 years' imprisonment was justified and that the sentence of 14 years' imprisonment gave sufficient mitigating benefit to the plea of guilty.

R v Coghlan [1997] QCA 270; CA No 139, 5 September 1997 concerned a 22 year old offender with no serious prior convictions, who pleaded guilty to three counts of rape, burglary and other related offences. He was sentenced to 14 years' imprisonment with a recommendation after six years. Again this sentence was imposed before Part 9A *Penalties and Sentences Act* 1992 (Qld). In a general way, it, too, supports the sentence imposed in this case.

A review of the cases referred to by both counsel does demonstrate, however, that the sentence imposed of 14 years' imprisonment was a heavy penalty in light of the applicant's lack of prior convictions and his plea of guilty. The circumstances of the offences were, however, extremely serious and warranted a very substantial sentence.

The applicant was a mature man who took advantage of a vulnerable visitor to this country, walking in a national park in daylight hours on a public holiday. She had every right to feel secure. He violently attacked her with a stick, injuring her and beating her to semiconsciousness. He held her as a prisoner in a secreted location for over 12 hours, including through the night. During that time, he persistently assaulted her sexually, including the commission of seven separate acts of rape. Without question, the complainant would have been terrified and in fear of her life. The victim impact statement demonstrates in an unexaggerated way the deleterious effect the applicant's actions have had on her.

The learned sentencing Judge's approach to the sentence here was sound. The principles espoused by this Court in *R v Bryan* were apposite in a general way to this applicant's offending. A notional head sentence of 16 years' imprisonment was open on the facts here, although a greater discount than two years could have been given for the applicant's plea of guilty. A sentence of 14 years' imprisonment was within range and cannot be said to be manifestly excessive.

I would refuse the application for leave to appeal against sentence.

DAVIES JA: I agree.

JERRARD JA: I agree.

THE PRESIDENT: That is the order of the Court.