SUPREME COURT OF QUEENSLAND

CITATION:	*R v M* [2003] QCA 451
PARTIES:	**R** **v** **M** (applicant)
FILE NO/S:	CA No 240 of 2003 DC No 254 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED EX TEMPORE ON:	17 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2003
JUDGES:	Davies and Williams JJA and Wilson J 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 dismissed**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – applicant convicted on own plea of one count of rape – where sentenced to seven years' imprisonment – where appellant showed remorse – where early plea of guilty – where applicant seeks leave to appeal against sentence – whether sentence manifestly excessive *R v George* [1991] CCA 225; CA No 226 of 1991, 13 June 1991, considered *R v Stirling* [1996] QCA 342; CA No 205 of 1996, 17 September 1997, considered
COUNSEL:	J T Bradshaw for the applicant (pro bono) C W Heaton for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

DAVIES JA: I will ask Justice Wilson to deliver her reasons first.

WILSON J: The applicant seeks leave to appeal against a sentence of seven years' imprisonment for rape.

The offence was committed in Cairns on 15 January 2003. The complainant and the applicant, both aged about 45 years, and both members of the indigenous community, were part of a group of people drinking in a park.

The complainant fell asleep. When she awoke, she found that everyone but the applicant had gone. The complainant asked where they were, and the applicant told her they had gone to get wine and that she should follow him. She did so, thinking that they were going to find the others. When they were near to a shed, the applicant asked the complainant to sit down. She refused, and he grabbed her by the arm and dragged her across to the shed. He began to touch her breasts, and when she told him to stop, he hit her on the stomach and ribs with his elbow. She tried to get up but he grabbed her by her clothing and pulled her back down. He pinned her to the ground, took off her pants and underpants, opened her legs, got on top of her and put his penis in her vagina. When she told him to stop, he said he would "bust up” her mouth if she opened it.

The applicant continued to have intercourse with her for over five minutes. Then he simply got up, pulled up his shorts and walked off, taking her bag with him.

The complainant ran across the road to a female passer-by, who took her to the hospital and stayed with her until police arrived.

The complainant stayed in hospital overnight. Fortunately the physical injuries she had sustained were slight. The applicant visited her in hospital and returned her bag.

Be that as it may, she had been violated in a frightening, degrading and violent manner. Six months after being raped, she was still frightened of the applicant and said she drank every day to try to forget about it. She did not go out anywhere by herself and was afraid that if the applicant were released from prison, she would have to leave town, leaving her boyfriend, sister and son.

The applicant cooperated with the police and entered a plea of guilty at the committal.

He was born on Boigu Island. He did primary schooling there, but never any secondary schooling. He worked on the island for a time, and worked part-time as a crayfisher and diver and with a pearling company. In 1995, he went to Cairns where he stayed with a cousin. He had various jobs. He lived at Herberton for a while with a de facto by whom he has two

children. In fact, he was living with the de facto in Cairns in a unit until she went back to Kowanyama, apparently shortly before this offence. He then got on the streets, left the unit, and was living day to day on the streets and in night shelters when this incident happened.

The applicant clearly has a drinking problem. He also has a criminal history of violent offending including two convictions for aggravated assaults on females, a conviction for attempted rape, a conviction for indecent dealing with a girl under 14, a conviction for assault and a conviction for assault occasioning bodily harm. The attempted rape resulted ultimately in a sentence of three years' imprisonment.

At the time of this offence he was on probation for the assault occasioning bodily harm which had been committed in August 2001.

The sentence which was imposed was seven years. Before this Court, the applicant's counsel submitted that the appropriate range was four to six years. The respondent's counsel submitted that the sentence should stand.

A substantial period of imprisonment was clearly called for and what was imposed was within range. I refer to two cases.

The first, Stirling, CA No. 205 of 1996, 17 September 1997. There the applicant and the complainant knew each other as they lived in adjacent units. A group from both units were

consuming liquor and marijuana in the complainant's unit, but by 10.40 p.m. the complainant and the applicant were left alone.

The complainant went to bed. The applicant said he was leaving. But at 2 a.m. the complainant awoke and found someone interfering with her underpants and her genital area under the bedclothes. She saw the applicant and told him to get out of the bed. He refused, continued the assault, and it culminated in rape. He was aged 30 with a criminal history of offences of violence. He was on parole at the time of the rape. His sentence of nine years was reduced to seven years with an early recommendation for parole.

The other case is a fairly early one, George, CA 226 of 1991, 13 June 1991. The applicant there was an 18 year old with a minor criminal history but no previous conviction for sexual offences. He violently raped and sodomised a 27 year old Aboriginal woman in an isolated area after following her for a kilometre. He was intoxicated. He struck her with a large stone or rock and hit her on the head with his fist. Her shoulder was dislocated and she suffered some other relatively minor injuries. He pleaded guilty at an early stage and was sentenced to 11 years' imprisonment. That was reduced on appeal to nine years with no early recommendation for parole.

Here the applicant was a man of mature years. He had a significant criminal history. In his favour he showed remorse, both by visiting the complainant in hospital when he

returned her bag, and by his early plea of guilty. Although the offence had no lasting physical effects on the complainant, it left her emotionally scarred.

Counsel for the applicant submitted that the Court should take account of excessive alcohol and a degenerate lifestyle amongst Aborigines in Cairns.

The offence was committed in a large urban centre and it would be wrong for the Court to act on such a broad generalisation about the lifestyle of members of the indigenous community there. In general, ethnicity should not be a factor in sentencing. Of course there may be cases where it can be shown by admissible evidence that because of considerations relevant to a particular applicant, a proposed sentence would have some unique or at least uncommon impact on him. I am not unmindful of the personal circumstances of this applicant, but I do not consider that this has been shown to be such a case.

In all the circumstances, I would dismiss the application for leave to appeal against sentence.

DAVIES JA: I agree.

WILLIAMS JA: I agree.

DAVIES JA: The order is as indicated by Justice Wilson.