

# SUPREME COURT OF QUEENSLAND

CITATION: *R v AR* [2003] QCA 538

PARTIES: **R**  
**v**  
**AR**  
(applicant)

FILE NO/S: CA No 283 of 2003  
DC No 349 of 2003

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Beenleigh

DELIVERED EX TEMPORE ON: 2 December 2003

DELIVERED AT: Brisbane

HEARING DATE: 2 December 2003

JUDGES: McPherson and Williams JJA and McMurdo 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 refused.**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PARITY – CO-OFFENDERS – DISCRIMINATION BETWEEN CO-OFFENDERS – where applicant convicted of kidnapping, common assault, assault occasioning bodily harm in company, sexual assault and sexual assault in company – where co-offender involved in kidnapping and sexual assault – where applicant sentenced to six and a half years imprisonment with serious violent offence declarations – where co-offender sentenced to five years imprisonment with recommendation for release after two years – where applicant instigator of offending conduct and was principal offender – whether applicant has legitimate sense of grievance because of the different sentences imposed on him and his co-offender – whether sentence imposed manifestly excessive

*R v Eveleigh* [2003] 1 Qd R 398, cited

COUNSEL: K M McGinness for the applicant  
D L Meredith for the respondent

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

**McPHERSON JA:** The appeal against conviction having been withdrawn, the Court dismisses it.

**WILLIAMS JA:** The applicant pleaded guilty to one count of kidnapping, one count of common assault, two counts of assault occasioning bodily harm in company, one count of sexual assault and one count of sexual assault in company.

On the kidnapping count he was sentenced to six years' imprisonment with a serious violent offence declaration and on the sexual assault in company he was sentenced to six and a half years' imprisonment with a serious violent offence declaration. Lesser sentences were imposed with respect to the other counts.

Another person by the name of F was also involved in the commission of the offences. In the end, he was sentenced to five years imprisonment for the kidnapping offence and five years' imprisonment on the count of sexual assault in company. A recommendation for post prison release was made after serving two years' imprisonment.

The applicant now seeks leave to appeal against sentence and the primary submission was that he had a sense of grievance when the sentence imposed on him was considered with that imposed on F. In consequence, it is necessary to say something of the involvement of each in the commission of the offences and their background circumstances.

The applicant was born on 19 April 1968, making him 32 at the time of the offences and 35 at sentence. F was born on 18 March 1978, making him 22 at the time of the offences and 25 at the time of sentence. The applicant's criminal history included numerous convictions for break and enter, stealing and unlawful use, one conviction for unlawful wounding, one conviction for arson for which he received four years' imprisonment and also a conviction for escape from legal custody.

F's criminal history contained numerous dishonesty offences, break and enter, unlawful use, burglary. He had served sentences of up to three years' imprisonment. He had one conviction for armed robbery for which he was sentenced to imprisonment for four years. He was on bail at the time of the commission of these offences. Given that overview, it seems to me that the criminal histories of the two persons involved were broadly similar.

I turn now to the circumstances of the offences. The complainant had been the applicant's girlfriend and the offences in question were committed as revenge for the complainant terminating the relationship. It was the applicant who initially formulated the plan to abduct and sexually assault the complainant.

Among other things, the applicant said on an occasion to F, "We'll kidnap her, rape her, I'll kill her, cut her up and put her remains in the current at The Spit". Prior to the abduction the applicant and F purchased zip ties to bind the complainant and also planned to sedate her by spiking a bottle of bourbon.

However, on the 5th of March, fortuitously, the complainant was seen by the applicant and Fulton while she was walking home with her new boyfriend. At that time the applicant was carrying a baseball bat. The boyfriend began to run towards his house and the applicant called out to F for him to "take L" and he would "get D".

F grabbed hold of the complainant and carried her to a vacant block nearby where he pushed her to the ground and held her there until the applicant arrived. The applicant punched her with a clenched fist three times causing her lip to split and bruising her right eye. Both men then forced the complainant into the back seat of a vehicle. Later the complainant was taken to the back of a shed where the applicant pulled a replica handgun from behind his back and pointed it at her in a threatening way.

She was forced back into the motor vehicle and driven to a remote area. When the car stopped, the complainant got out of the vehicle and attempted to run away. The applicant chased her and caught her. He then held her wrists together while F tied them with a piece of white rope. Thereafter the complainant and the applicant walked away from the vehicle

where the complainant was told to sit down. After a discussion about their previous relationship they returned to the vehicle. The rope was removed from her wrists.

The applicant asked F to leave and he then pulled the complainant towards him so that she was sitting on his lap. He attempted to kiss her and touched her on the breasts but she pushed him away. As the complainant was struggling the applicant tied her hands behind her back again.

He called out to F to hold her legs that were protruding through the motor vehicle window. As F did so the applicant began to pull the complainant's pants and underwear down. The applicant then began rubbing the complainant's breasts and then her vagina. He put his hand on to her vagina and inserted a finger. That did not last for long as the complainant was struggling. The applicant asked F if he wanted a feel and F felt the complainant's breasts. That conduct continued for some time. Both men were laughing.

After that the vehicle drove off to another location where it stopped for about 20 minutes. They then travelled to another isolated location. The complainant was crying out of control. The time was then about 3.30 a.m. She was told that they intended leaving her there for about three hours. Subsequently the applicant released the complainant's wrists on condition that she did not tell anyone about her ordeal. He threatened her with retribution if she did so. The vehicle was then driven back to near the applicant's residence.

Apparently the police had been contacted some time earlier by the complainant's mother and they were looking for her. When the police initially spoke to the applicant he said he had not seen the complainant since the previous afternoon. Ultimately, the complainant was able to escape and run to the police officers. In all the complainant was forcibly detained by the applicant and F for a period of some 12 hours. That is a brief overview of facts relevant to the current application. I should say that the applicant refused to be interviewed by the police.

In my view the above narrative establishes that the applicant was the instigator of the offences and was clearly the principal offender. It was he who was responsible for the vast

majority of the violence inflicted upon the complainant. There was a degree of planning and premeditation and, again, that was primarily on the part of the applicant. It was the applicant who initially had possession of the baseball bat when the complainant and her new boyfriend were confronted and it was he who had the replica firearm. He had previously obtained the zip ties.

There was a victim impact statement before the Court which indicated the serious impact on the complainant of the conduct of both men but, particularly, that of the applicant. It is also of some significance that the applicant was some 10 years' older than F.

In addition to that, when it comes to comparing the sentences that were imposed, it is of real significance that F cooperated with the police, made full admissions and made a statement against the applicant. That is to be contrasted with the position of the applicant. The applicant had committal proceedings where the complainant was cross-examined.

F was sentenced in accordance with s 13A of the *Penalties and Sentences Act* and the material indicates that the sentencing Judge would have imposed a sentence of six years with a recommendation for post community release after serving two and a half years were it not for the s 13A considerations.

In my view, when the factors differentiating the conduct and criminal responsibility of the applicant and F are given weight and, in particular, when one adds in the s 13A component, it cannot be said that there is a lack of parity as between the sentences imposed on the applicant and F.

A consideration of all the material does not establish that the applicant has a legitimate sense of grievance given the different sentences that were imposed on he and F. The circumstances called for the imposition of a heavier sentence on the applicant than that which was imposed on F.

So far as the declaration is concerned, after referring to *R v Eveleigh* [2003] 1 Qd R 398, the learned sentencing Judge said

"The facts supporting a declaration of a serious violent offence are the relatively long period of pre-planning and the preparation and strong element of revenge combined with the general circumstances of the offences I endeavour to identify earlier."

In my view, the learned sentencing Judge was entitled to reach that conclusion. The offences did involve terrorising the complainant over a period of some 12 hours. The violence and threats of violence were such as in all the circumstances warranted the making of the declaration. The application for leave to appeal against sentence should be refused.

**McPHERSON JA:** I agree.

**McMURDO J:** I agree.

**McPHERSON JA:** The order is the application for leave to appeal against sentence is dismissed.