SUPREME COURT OF QUEENSLAND

CITATION:	*R v Buckley* [2004] QCA 148
PARTIES:	**R** **v** **BUCKLEY, Jason Charles** (applicant)
FILE NO/S:	CA No 327 of 2003 DC No 1204 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2004
JUDGES:	de Jersey CJ, Davies JA and Holmes J Separate reasons for judgment of each member of the Court, de Jersey CJ and Davies JA concurring as to the order made, Holmes J dissenting in part
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 – CIRCUMSTANCES OF OFFENCE – where the applicant pleaded guilty to five counts of rape, one of burglary by breaking in the night with violence, one of indecent assault and one of grievous bodily harm – where an indefinite sentence pursuant to s 163 of the *Penalties and Sentences Act* 1992 was imposed – where the applicant seeks leave to appeal against the imposition of the indefinite sentence – whether the sentencing judge had adequate regard to the applicant's antecedents, age and the risk of serious harm to members of the community, as is required by s 163(4) of the *Penalties and Sentences Act* 1992 CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CHARACTER OF OFFENCE – GENERALLY – whether the sentencing judge adhered to the common law principle that an indefinite sentence should only

be exercised in exceptional cases

CRIMINAL LAW – EVIDENCE – GENERALLY – where three psychiatrists prepared reports and gave evidence at the sentence proceedings –whether the sentencing judge erred in preferring the evidence of certain psychiatrists

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – FACTUAL BASIS FOR SENTENCE – PROOF AND EVIDENCE – GENERALLY – whether certain findings made by the sentencing judge were supported by the evidence – whether such errors affected the exercise of discretion under s 163 – whether an indefinite sentence was warranted in the circumstances

Penalties and Sentences Act 1992 (Qld), s 163(3), s 163(4), s 168, s 169, s 170

Chester v R (1988) 165 CLR 611, considered
Narrier v R (2000) 111 A Crim R 405, considered
R v Moffatt [1998] 2 VR 229, considered
Thompson v R (1999) 73 ALJR 1319, considered

COUNSEL: P E Smith for the applicant
A J Rafter SC for the respondent

SOLICITORS: Fisher & Company for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Holmes J. Save for what follows, I agree with Her Honour's analysis of the case. My judgment also would lead to the position where an indefinite sentence applies. The extent of my departure concerns only the route taken to that position.

[2] Her Honour identifies three misstatements of evidence. In my view none of those matters should be seen as vitiating the process by which the learned sentencing Judge determined upon the imposition of the indefinite sentence.

[3] As to the first, referring to killing animals after rather than before acts of sexual perversion, the learned Judge said that "One cannot speculate on whether, if the [applicant] had not been arrested and there were further incidents, that the life of a complainant might have been at risk", and he referred shortly thereafter to the impermissibility of speculation. This aspect appears not therefore to have influenced the Judge's process of reasoning materially.

[4] As to the second, boastfulness "about his actions in the matters in the indictment", that is sufficiently supported by the applicant's written material provided on 20 October 2000 to Dr Fama, in which, under the heading "frame of mind before rapes", he said "I feel like this powerful beast like a warrior with happy aggression but so righteous. I can make people suffer and feel pain so they can see clearer".

[5] As to the third, a lack of insight through blaming the events on intoxication, His Honour's form of expression is tentative: "*If* that were a view to be held or to be persisted in it shows a worrying lack of insight. It is also relevant *arguably* to the matter of remorse and that *might arguably* not bode well for successful treatment."

[6] I am not satisfied that the first or third of those matters affected the Judge's judgment to the point where any error should vitiate that judgment. As to the second, my view would be the same, but there appears to have been no error.

[7] I regard these as three matters of detail in a comprehensive judgment covering numerous matters, which discloses, through acceptance of the evidence of Professor Yellowlees and Dr Kingswell, a compelling case for the imposition of the indefinite sentence which was imposed.

[8] I would therefore refuse the application.

[9] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of the Chief Justice and of Holmes J. I agree with what Holmes J has said under the following headings: "Indefinite sentence", "The offences", "The psychiatric evidence", "The sentencing judge's conclusion", "Failure to make findings in terms of s 163" and "The failure to state that the case was exceptional". However I agree with the Chief Justice, for the reasons which he gives, that none of the misstatements of evidence identified by her Honour should be seen as vitiating the process by which the learned sentencing judge determined upon the imposition of an indefinite sentence. For that reason I agree with the Chief Justice that the application should be refused.

[10] **HOLMES J:**

Indefinite sentence

The applicant for leave to appeal against sentence pleaded guilty to five counts of rape, one of burglary by breaking in the night with violence, one of indecent assault and one of grievous bodily harm. An indefinite sentence pursuant to s 163 of the *Penalties and Sentences Act* 1992 was imposed upon him. Section 163(3) enables the imposition of an indefinite sentence on an offender convicted of a violent offence where the court is satisfied that the *Mental Health Act* 2000 does not apply (as it did not here, the Mental Health Court having determined that the applicant was of sound mind at the time of the offences and was fit to plead) and that the offender is a serious danger to the community because of:

> "(i) the offender's antecedents, character, age health or mental condition; and
> (ii) the severity of the violent offence; and
> (iii) any special circumstances."

Section 163(4) requires the court in determining whether the offender is such a danger to have regard to:

> "(a) whether the nature of the offence is exceptional; and
> (b) the offender's antecedents, age and character; and
> (c) any medical, psychiatric, prison or other relevant report in relation to the offender; and

(d) the risk of serious physical harm to members of the community if an indefinite sentence were not imposed; and

(e) the need to protect members of the community from the risk mentioned in paragraph (d)."

[11] The onus of proof on the application lies on the Crown[1] and the finding that an offender is a serious danger to the community may be made only on satisfaction by "acceptable, cogent evidence" "to a high degree of probability" that the evidence is of sufficient weight to justify it.[2] The Court, if it imposes an indefinite sentence, must give detailed reasons for doing so at the time the sentence is imposed.[3]

[12] Section 163(2) requires the court to state in its order the term of imprisonment it would otherwise have imposed. In this case the learned sentencing judge imposed sentences of 22 years imprisonment on each of the rape counts, 10 years imprisonment in respect of the burglary, 4 years in respect of the indecent assault and 7 years in respect of the grievous bodily harm. In each case the applicant was declared to have been convicted of a serious violent offence and a declaration was made as to pre-sentence custody.

The offences

[13] The applicant committed the offences for which he was sentenced between 6 March 1999 and 21 January 2000. The first two rapes were committed on a 20 year old woman who was walking alone to her home in Dalby at about 4am. The applicant grabbed her from behind and forced her to the ground. He then used the strap of her shoulder bag around her neck to choke her and force her to an area where he anally and vaginally raped her, causing what was described in a medical report as "major anal trauma" and other less serious genital injuries. At the end of the assault he threatened to kill the complainant if she moved as he left.

[14] The second series of assaults was committed on a 67 year old woman. At about 5am one morning, the applicant broke a window to get into the bedroom where the victim was sleeping. He tried to sodomise her inside the bedroom and then dragged her out of the house into the backyard, where he attempted to put his penis into her mouth. He then sodomised her while placing his fingers in her vagina. Those events gave rise to rape and indecent assault charges.

[15] The third set of offences was committed on a 15-year-old girl whom the applicant attacked as she walked alone in a Toowoomba city street at about 1am. He chased her, and then knocked her to the ground from behind, causing her in the fall to suffer a fractured femur. Notwithstanding her plea that she thought her leg was broken, he raped her vaginally and anally. At one stage when he thought she had looked at him he slapped her on the face and head.

[16] Prior to his conviction for these offences, the applicant had a relatively minor criminal history entailing a number of summary offences such as wilful damage, assault police, and assault occasioning bodily harm. Probably the most significant, as matters developed, were two offences of being found in an enclosed yard without lawful excuse, each of which involved his engaging in voyeurism.

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1 Section 169

2 Section 170.

3 Section 168.

The psychiatric evidence

[17] While in custody the applicant was examined by three psychiatrists, Dr Moyle, Dr Fama and Professor Yellowlees, all of whom interviewed him in 2000. Dr Moyle re-interviewed him for the purposes of a pre-sentence report in July 2003. In the following months, Professor Yellowlees provided further reports in response to Dr Moyle's 2003 report, and Dr Kingswell also provided two reports on the body of psychiatric opinion that had emerged. Dr Moyle, Dr Kingswell and Professor Yellowlees all gave evidence at the sentence hearing. It was common ground between the three that the applicant exhibited paraphilias in the form of voyeurism, sexual sadism and a practice of intercourse with animals. There was divergence in this respect, however: Professor Yellowlees considered the applicant to have an anti-social personality disorder, which he equated with psychopathy; Dr Kingswell similarly considered that the evidence he had seen pointed to an anti-social personality disorder; but Dr Moyle did not think that the applicant met the criteria for anti-social personality disorder, much less psychopathy. For completeness' sake, I should say that Dr Fama had described the applicant as exhibiting an "emotionally unstable personality disorder".

[18] Professor Yellowlees, in reaching his conclusion, described the applicant as having "a long history of severe violence to humans and to animals". Some complaint was made of this reference, in the applicant's written submissions, as not being supported by the applicant's history or criminal convictions, but it does in fact seem to accord with the history given to Professor Yellowlees. The applicant described zoophiliac inclinations commencing from the age of 15, including intercourse with horses during which he "tried to damage the horses", and a history of fighting when drunk from the age of 18, which had led to his being nicknamed "mad dog".

[19] Dr Moyle, on the other hand, while accepting that the applicant's past fighting behaviour and his arrest for the present offences provided some basis for the diagnosis of anti-social personality disorder, considered that there were no signs of conduct disorder in childhood which would support it. The applicant was not impulsive or irresponsible: he had a stable working history and an ability to maintain long-term relationships, and had taken responsibility for the support of his parents and sister. Dr Moyle was particularly emphatic that there was no basis to speak of psychopathy because of those features and because of what he considered to be the applicant's genuine remorse and insight, exhibited both in interviews and in some notes made by the applicant while on remand, apparently recording his efforts to imagine the effects of the crimes on his victims.

[20] Dr Kingswell, on the other hand, pointed out that on the applicant's own report he had as a child a history of truancy, early voyeurism (he described looking up girl's dresses and masturbating) and violent fantasy, which gave support for the conclusion that there was a long-standing conduct disorder. Dr Kingswell also expressed doubts as to the genuineness of any remorse exhibited by the applicant, as opposed to regret for the consequences of his behaviour. His conclusion was that the existence of the various paraphilias, the early onset of abnormal sexual behaviour, the presence of anti-social personality disorder and the very serious nature of the offending against victims not known to him put the applicant into a high risk category for re-offending.

[21] Professor Yellowlees similarly considered that the applicant lacked insight into his behaviour. He did not think the applicant's notes demonstrated any genuine remorse, pointing to features of them which suggested the contrary. His view was that the applicant's history of violence to humans and to animals, his description of his feelings in committing rape as having involved a similar feeling of power, his history of abuse of alcohol and his psychopathy indicated a high likelihood of future recidivism.

[22] Dr Moyle, in contrast, thought that the risk was relatively low, although he was unable, not surprisingly, to give any precise proportions to it. In the absence of features of psychopathy, that risk would be considerably lowered by successful treatment for sexual sadism (which seemed to manifest itself only after abuse of alcohol), voyeurism and zoophilia. The applicant was a "likely candidate" for a sexual offenders' treatment program while in custody. A Canadian study had shown a correlation between failure to complete such programs and high rates of recidivism in sexual assault cases. Dr Moyle accepted, however, that the risk of the applicant's re-offending currently (as opposed to on release) could properly be described as moderate to high.

[23] Given the existence of the paraphilias, Dr Moyle did not think that time alone would make much difference to the applicant's behaviour. Professor Yellowlees, however, accepted that offending due to anti-social personality disorder was likely to decline with age, so that the risk of the applicant's offending would decline over the next 15-20 years. Dr Kingswell also accepted that for the high risk group of offenders as a whole, the risk of re-offending was likely to decline with time. But he did not think the Canadian study assisted greatly; it did not follow from the finding that failure to complete programs corresponded with a high rate of recidivism that the applicant's successful completion of a program would lower his risk of re-offending.

The sentencing judge's conclusion

[24] The learned sentencing judge preferred the evidence of Drs Yellowlees and Kingswell to that of Dr Moyle in reaching his conclusion, set out in this passage:

> "When one looks at the very offences themselves, the background of the accused, including his abnormal, deviant sexual behaviour over quite a period of time, most importantly the evidence of the psychiatrists, I come to the firm view that there would be very real risk of serious physical harm to members of the community if an indefinite sentence were not imposed, and the need to protect members of the community from the said risk would require an indefinite sentence."

Failure to make findings in terms of s163

[25] The applicant complains that the learned sentencing judge failed, as required by s 163(4), to deal with the applicant's antecedents[4] (specifically, his relatively limited criminal history) or his age,[5] or with the risk of serious physical harm to members of the community if the indefinite sentence were not imposed.[6] As to the last, he had

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4 Section 163(4)(b).
5 Section 163(4)(b).
6 Section 163(4)(d).

not made any finding about the applicant's prospects after treatment, although Dr Moyle had described him as insightful and motivated to attend programs; the applicant's own notes indicated remorse and insight; and the Canadian study supported a relationship between re-offending and non-completion of programs. And, by way of a more general criticism, it is said that the learned sentencing judge failed to "specifically and in detail examine each of the matters mentioned in s 163".

[26] The learned sentencing judge, however, noted the applicant's age, 27. He referred to the background of the applicant, including his abnormal sexual behaviour. He was not obliged to confine himself to what was recorded on the criminal history. Indeed, the absence of a previous criminal history for violence or sexual offences paled rather into insignificance compared with what was known of the applicant's previous sexual behaviour; and certainly what did appear on the criminal history (particularly the offences involving voyeurism) could hardly be regarded as a positive feature. It was not, I think, necessary or useful for the trial judge to say that the criminal history was not as bad as some; which was about all that could be said.

[27] The learned sentencing judge recounted what the psychiatrists had to say about the lessening of the risk of recidivism if the applicant successfully undertook appropriate programs in custody, nonetheless concluding that there was a very real risk of serious physical harm to members of the community in the absence of an indefinite sentence. Having accepted the evidence of Professor Yellowlees and Dr Kingswell – including what they had to say as to the applicant's personality disorder, the risk he posed, the dubious worth of his expressed remorse, and Dr Kingswell's view of the limited significance of the Canadian study - it would not have been possible for him to make the positive findings as to the effect of treatment for which the applicant contends.

[28] Nor do I consider the broader complaint, that the learned sentencing judge failed adequately to deal with each of the matters raised in s 163, to have any substance. His Honour did deal with those matters, in a relatively long judgment which canvassed the offences, relevant aspects of the applicant's criminal history and background, the psychiatric evidence about him and the risk he posed. I do not think it was necessary for him to deal with those matters on a one-by-one basis, identifying each by reference to sub-section.

The failure to state that the case was exceptional

[29] The applicant submits that the learned sentencing judge failed to give express recognition to the common law principle that such powers as that under s 163 should be exercised only in exceptional cases. He relies in this regard on *Narrier v R*,[7] in which the Court of Criminal Appeal of Western Australia was considering the imposition of an indefinite sentence under s 98 of the *Sentencing Act* 1995 (WA). There, Wallwork J, with whom the other members of the court agreed, concluded that the sentencing judge in that case had not taken sufficient account of what had been said in authorities such as *Chester v R*,[8] *R v Moffat*[9] *and Thompson v R*[10] as to the need to exercise the power only in limited and exceptional cases. The sentencing judge's reasons did not demonstrate consideration of whether this was one of the

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7 (2000) 111 A Crim R 405.
8 (1988) 165 CLR 611.
9 [1998] 2 VR 229.
10 (1999) 73 ALJR 1319.

"very exceptional cases where the exercise of the power is demonstrably necessary to protect society from physical harm".[11]

[30] That conclusion is not surprising in the context of the facts in *Narrier*. The applicant there had a previous criminal history of offences dealt with in the Children's Court, mainly of dishonesty, but including 5 counts of aggravated sexual assault and one count of deprivation of liberty (committed on a single occasion) and further offences of child stealing and assault occasioning bodily harm in circumstances suggesting preparation for sexual assault. On the occasion on which the indefinite sentence was imposed, he was being dealt with for a rape, two burglaries and an assault occasioning bodily harm, all of which had occurred on the same evening. He had been assessed by a psychologist who considered him a suitable case for treatment in a sexual offenders' program; there was no other expert evidence, and none suggesting that his prognosis after such a program was not good. To my thinking at least, the circumstances were not obviously exceptional.

[31] If the judgment on appeal in *Narrier* was intended to mandate pronunciation of a formula in every case as to its exceptional nature, however obvious that might be, I would not agree with it; but I do not think it was. In any event, it does not seem to me that it was incumbent on the learned judge here expressly to state that this was an exceptional case, when there was no statutory requirement for him to do so, and the facts and the expert opinion he accepted spoke for themselves.

Findings not supported by the evidence

[32] I do, however, think that there are three matters in respect of which his Honour's reasons were not obviously supported by the evidence. Professor Yellowlees took a history from the applicant of shooting wild horses in order to have intercourse with them, which his Honour seems to have taken up incorrectly, stating that it was a matter of concern to Professor Yellowlees that "on occasions after the act of sexual perversion, that the accused would kill animals." He continued, "One cannot speculate on whether, if the applicant had not been arrested and there were further incidents, that the life of a complainant might have been at risk".

[33] His Honour also observed that the applicant was "quite boastful about his actions in the matters in the indictment before me". That does not seem to be supported by anything in the evidence. Professor Yellowlees agreed that any pride exhibited had been in relation to the applicant's fighting prowess, not the sexual offences; at another point he suggested that the applicant's candour in recounting his behaviour with animals might possibly be a form of exaggeration and boasting. Neither of those would appear to support his Honour's view that the applicant had been boastful about the rapes; which, he said, was a matter of concern.

[34] The third issue is this: his Honour said:

> "I have inquired on occasions in evidence whether the accused seems to give the impression this is a somewhat simplistic situation. That, to use Professor Yellowlees' words, to place the blame for all this was that he, the accused, was adversely affected by the voluntary consumption of liquor. Meaning the simplistic development of that, that if he does not drink he will not reoffend. To state the obvious

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[11] At p 411.

> the problem is much more deep-seated than that. If that were a view to be held or to be persisted in it shows a worrying lack of insight. It is also relevant arguably to the matter of remorse and that might arguably not bode well for successful treatment."

I was unable to find anything in Professor Yellowlees' evidence which attributed to the applicant such a deflection of blame. Dr Moyle, when he was asked about the matter, said that he did not think that the applicant took that approach.

[35] Those apparent mis-statements of the evidence must, I think, cause some concern, because they seem to have influenced his Honour's view of the prospects of the applicant's re-offending. They amount, in my view, to an error affecting the exercise of the discretion under s 163.

Conclusion

[36] That being the case, this Court ought to consider the matter afresh. But there seems no reason not to accept his Honour's view that the evidence of Professor Yellowlees and Dr Kingswell was to be preferred. Inevitably, having regard to what is known about the applicant's background, the gravity of the offences and the expert evidence, one comes to the conclusion that the applicant does present a serious danger to the community, both in terms of the likelihood of re-offending and the seriousness of any offence to be committed should he do so. I do not think one can draw much comfort from the proposition that the applicant will undergo treatment while in custody: neither Professor Yellowlees nor Dr Kingswell thought that that prospect offered any reassurance. There is plainly a need to protect members of the community from the serious risk posed by the applicant now, and, as far as can presently be determined, on his release. In light of all the evidence, particularly the psychiatric evidence, one cannot avoid the conclusion that an indefinite sentence was warranted.

[37] For the reasons in the two preceding paragraphs, I would give leave to appeal against sentence, but would dismiss the appeal.