SUPREME COURT OF QUEENSLAND

CITATION:	*R v Faifuaina* [2004] QCA 262
PARTIES:	**R** **v** **FAIFUAINA, Fereti** (applicant)
FILE NO/S:	CA No 119 of 2004 DC No 2808 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	29 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2004
JUDGES:	Davies and Jerrard JJA, Mullins 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 – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant sentenced to 7 years' imprisonment for rape after pleading guilty – whether sentence was manifestly excessive *R v Basic* (2000) 115 A Crim R 456, cited *R v Bielefeld* [2002] QCA 369; CA No 159 of 2002, 19 September 2002, cited *R v Williams* [2002] QCA 211; CA No 36 of 2001, 21 June 2002, cited
COUNSEL:	C A Cuthbert for the applicant M J Copley for the respondent
SOLICITORS:	Robinson Hoskin for the applicant Director of Public Prosecutions (Queensland) for the respondent

DAVIES JA: I will ask Mullins J to deliver her reasons first.

MULLINS J: On the day fixed for trial the applicant pleaded guilty to two counts of deprivation of liberty, one count of attempted rape and one count of rape. There were two victims. One of the counts of deprivation of liberty and the count of attempted rape related to the first complainant. The applicant was sentenced to twelve months' imprisonment and four years' imprisonment respectively for those offences.

In respect of the second complainant, the applicant was sentenced to eighteen months' imprisonment for deprivation of liberty and seven years' imprisonment for rape. The sentences were ordered to be served concurrently and the period of 587 days of pre-sentence custody was declared to be time already served under the sentences.

The solicitors who acted for the applicant at the time of the sentencing prepared the application for leave to appeal against sentence. The application is directed primarily at the sentence for rape and the grounds for the appeal were shown in the notice as manifest excessiveness and, in particular, that the learned sentencing Judge failed to reduce the head sentence sufficiently on account of the guilty plea and erred in not nominating a non-release period.

The applicant was unrepresented in connection with the application for leave to appeal against sentence until

yesterday, when the solicitors and counsel who had acted for him on the sentence undertook his representation.

The applicant was born in Samoa in March 1978. He was 26 years old at the date of sentence and 24 years old at the date of the offences, which was 19 August 2002. The applicant had come to Australia only in May 2002. He obtained employment working in a factory and, on the day of the offences, had gone to Centrelink to try and obtain a better job.

The first complainant was a 16 year old schoolgirl who was wearing her school uniform when she met the applicant at the Centrelink office. The first complainant accompanied the applicant from Centrelink to the local shops where the applicant purchased take-away food. The first complainant was walking with the applicant towards his unit when she said she had to go to school. It had started raining and the applicant suggested that she come inside out of the rain. She did that and was leaving the unit when she was grabbed from behind by the applicant who pulled her back inside the door. The applicant closed the front door and forced her down on to a mattress which was on the floor. He lay on top of her as she tried to get up. He offered to pay her money. She kicked and screamed and he put his hand over her mouth and told her to shut up. She started crying. His efforts to kiss her and lift her shirt up were successfully resisted by the first complainant. The applicant got up and told the first complainant to, "Wait there." He started to walk up the

hallway. The first complainant got up, left the unit, went to school and promptly complained.

Within a couple of hours, the second complainant, who had just turned 14 years, was walking past the units where the applicant lived. She also should have been at school, but was not, and was not in school uniform. It was raining and the applicant was standing under a tree behind a fence and approached the second complainant and suggested that she come and stand under the tree out of the rain. Eventually, the applicant offered to get her a towel to dry herself off. The second complainant walked up to the applicant's unit and waited outside while he went in and got a towel and a soft drink. He used the towel to rub her to dry her off and then tried to kiss her. The second complainant said she had to leave to get ready for school, but her attempt to walk away was thwarted, when the applicant dragged her inside and locked the door.

The second complainant attempted to get out and managed to open the door but was dragged back in and pushed on to the mattress by the applicant. The second complainant screamed. He offered her money. He lay on top of her, pulled down the front of her top and bra and started to suck on her breast. He then tried to pull her skirt up. The second complainant was attempting to resist him but was overpowered with his heavier weight.

The applicant inserted his penis into her vagina. The second complainant believed that he ejaculated inside her. DNA tests reveal that semen matching the applicant's DNA was found on the inside of the skirt that the second complainant was wearing. The applicant offered the second complainant money. She took from him $10. She ran away and went to school where she told others of what had occurred. The applicant was arrested the following day and remained in custody from that time.

The learned sentencing Judge referred to the aggravating feature of the rape of the second complainant, that it was committed after the applicant had some two hours before attempted to rape the first complainant and had been unsuccessful. The learned sentencing Judge rejected the submission that was made on behalf of the applicant that his sentence should be suspended to assist the Federal authorities in deciding when to deport the applicant and to give the applicant some certainty about his future. The learned sentencing Judge did take into account that the applicant and his family would be affected by the fact that he could expect to be deported as a result of being sentenced.

The applicant had no previous convictions. The offences were described as opportunistic, although the learned sentencing Judge had no doubt that the applicant intended to force his attentions on the second complainant.

Apart from the violence inherent in the nature of the offences themselves, there was not extreme violence and there were no notable injuries. It was clear from the learned sentencing Judge's remarks that the guilty plea, even though it was late, was taken into account in fixing the sentence for the rape at seven years.

On the hearing of this application, Ms Cuthbert of counsel highlighted the fact that no weapon was involved and referred to the sentence in *R v Williams* [2002] QCA 211 where a sentence of seven and one half years was imposed for the rape of a 16 year old virgin where a weapon was involved. The respondent's counsel referred the Court to *Basic* (2000) 115 A Crim R 456 and *R v Bielefeld* [2002] QCA 369 to support the submission that the sentence of seven years for rape in the circumstances, even allowing for the factors in favour of the applicant, was clearly not outside the appropriate range.

I consider that the respondent’s submission is well made even though the applicant's counsel can point to other sentences that do not seem to be completely consistent with those relied upon by the respondent. It is to be expected there is some variation in sentencing, having regard to the fact that there is a range of sentences appropriate to any particular offence. The application should be dismissed.

DAVIES JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The application is dismissed.