SUPREME COURT OF QUEENSLAND

CITATION:	*R v Viliafi* [2005] QCA 12
PARTIES:	**R** **v** **VILIAFI, Usufonoimanu** **(applicant)**
FILE NO/S:	CA No 348 of 2004 CA No 395 of 2004 DC No 606 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction) Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	8 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 February 2005
JUDGES:	McMurdo P, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence dismissed.** **2. Application for extension of time to appeal against conviction refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY – GENERAL PRINCIPLES – where applicant convicted of rape – where digital penetration - where applicant convicted of burglary by breaking in the night time with violence and while armed with offensive weapon – where guilty pleas voluntarily entered into by applicant– whether leave should be granted to extend time in which to appeal against conviction CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL BY CONVICTED PERSONS –

APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES - SEXUAL OFFENCES – whether sentence manifestly excessive.

R v M [2001] QCA 166, CA No 221 of 2001, 1 May 2001, discussed
R v S; ex parte Attorney-General of Queensland [2003] QCA 361;CA No 197 of 2003, 25 August 2003,considered

COUNSEL: The applicant appeared on his own behalf
R Martin SC for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland)for the respondent

THE PRESIDENT: Justice Mackenzie will deliver his reasons first.

MACKENZIE J: The applicant pleaded guilty to two related offences, the first being burglary by breaking in the night time with violence and while armed with an offensive weapon, and the second, rape consisting of digital penetration of a woman in the house into which he had broken. He was sentenced to seven years' imprisonment with a recommendation for post prison community based release after two and a half years.

The applicant was sentenced on the 14th September 2004. A form 26 notice was completed on the 12th October 2004 and received by the Registrar on the 18th October 2004. It is in the form of an application for leave to appeal against sentence.

Then on the 29th October 2004, the applicant signed a further notice which specifies that he wishes to appeal against

conviction. Leave to extend time would be necessary in this instance.

In the accompanying application for an extension of time, the applicant says that he did not understand the paper work, because it was the first time he had appealed and he had to get help in prison.

The applicant claims in his written material and before us today that he did not rape the complainant. He says that he entered the house with a key given to him by the complainant, which is contrary to what was put before the learned sentencing Judge, that she had got the key back from him prior to the offences. He says he pleaded guilty because his barrister said if he did, it would make it easy for the Court; that was why he pleaded guilty.

It may be observed in light of this that the complaint seems to focus on the plea to rape rather than on the plea to aggravated burglary, which was a serious example of the offence itself for reasons that I will elaborate on. He told us today that he agreed that he took the knife with him to the premises, but did not intend to use it.

It is desirable to review the facts as presented at sentence to put all the relevant matters in perspective.

The complainant was a woman with whom he had had an affair of about two years' duration which had recently come to an end.

At the commencement of the affair, the applicant had said he was single. Later he said he was separated and his wife and children had moved back to New Zealand.

The complainant separated from her husband during the affair and began to see the applicant more regularly. However the complainant developed suspicions that the applicant was not in fact separated, which caused tension between them. Then the applicant's wife, initially pretending to be her daughter, telephoned the complainant and later phoned her again on several occasions. Notwithstanding this, the applicant continued to deny he was still with his wife.

This caused further tension between the applicant and the complainant which resulted in the complainant ending the relationship and taking out a domestic violence order five days prior to the offences. She says that she got the keys he had back. There was no further contact between them prior to the offences.

The applicant did not suggest before us today that he had any right to go to the house on that evening.

As the matter was put before the learned sentencing Judge, the complainant was asleep in bed about midnight when she was woken by someone jumping on top of her. She turned the lamp on and identified the applicant. He held her down and held a knife with a 10 to 14 centimetre blade in front of her face. The complainant said he put it to her throat and threatened to

kill her. Then he said words implying that he believed she had had sex with another man that evening.

She said the man was just a friend, which caused the applicant to become more aggressive. He pulled down the top of her nightie and demanded she hug him. When she did not, he pressed the knife against her side. She then complied and he started kissing her on the mouth and then on the breasts.

According to her, he put his hand between her legs, but when she resisted he threatened her again with the knife. She then became submissive through fear of being cut or stabbed. The applicant forced her legs apart and inserted fingers into her vagina. He began to undo his belt and turned the light off. In answer to a question by her about why he had turned off the light, he answered in a way that led her to think that he was going to kill her.

The events in the bedroom were interrupted by the arrival of the applicant's wife, who began to bang on the door and the bedroom window. The applicant put his hand over the complainant's mouth to prevent her from saying anything. However she managed to ask the complainant's wife to stop knocking because she would wake the children. Eventually the applicant let her get up to open the door, but walked with her, holding her arm and pressing the knife to her back.

The applicant's wife entered the house and assaulted the complainant, who was trying to tell her that the applicant had

come there with a knife. When the applicant's wife realised that her husband had a knife, she turned on him.

By this time, the complainant's children had woken and started screaming. The complainant grabbed them and ran to her bedroom and tried to call the police. She yelled at the applicant and his wife to go, which they did. Subsequently the applicant stabbed himself in the chest and cut one of his wrists in an attempt to harm himself. He suffers persisting nerve damage to his wrist as a consequence.

It should be noted that before us today he again explained his remorse for what had happened on the night of the offences.

At the time of sentence he was 41 years of age, having been born in Samoa and come to Australia in 1986 following four years in New Zealand. His counsel told the learned sentencing Judge that he had difficulty coming to grips with the end of the affair. While there were matters of detail which the complainant did not either accept or remember, he accepted that he had taken the knife to the premises and admitted the other essential elements of the charges.

He had always intended to plead guilty to the burglary, but had difficulty accepting the digital penetration aspect of rape. However, that issue had been resolved before the matter came to trial. It was accepted by his counsel that a sentence of six to seven years was the proper range for the head sentence.

The learned sentencing Judge took the view that there had been serious offences involving the use of a knife which had been taken to the house. Whatever his intention had been, it had been interrupted by the arrival of his wife. The offences had, as the victim impact statement indicated, led to long term impact on the complainant and her family.

The sentencing Judge also noted the continuing effects on the applicant of the self inflicted injury to the wrist and said that he took into account the plea of guilty, although relatively late.

The allowance made for these factors was a reduction effectively in the time for applying for early release by 12 months.

Discussion below focused on *R v S; ex parte A-G (Qld)* [2003] QCA 361, which, it was accepted, had some worse and some less serious features than the present case, but was accepted as supporting a head sentence in the suggested range.

There is no reason to disagree with the learned sentencing Judge's assessment of the appropriate level of head sentence, nor in my view is there any reason to think that inappropriate allowance was made, adverse to the applicant, in respect of the recommendation. The sentence overall is not, in my view, manifestly excessive.

R v M [2001] QCA 166 was also referred to. It was a case in which a sentence of nine years' imprisonment after trial was held not to be manifestly excessive, but in my view, the case was somewhat more serious than the present.

However it may be noted that Justice McPherson observed that the appellant in that case, where penile rape and oral sex were committed while the complainant had been deprived of her liberty by being tied to a bed with items taken to the house for that purpose, could not have expected less than seven years for the rape and associated indecent assaults considering them in isolation from the other offences of which he was convicted.

There is no material before us that suggests that the applicant's plea of guilty was not voluntarily entered on the day. There is no basis for reopening that issue in these proceedings. As to sentence, given the facts that I have recounted, the appeal against sentence has no reasonable prospects of success.

I would order that the application for extension of time for leave to appeal against conviction be refused and that the application for leave to appeal against sentence be dismissed.

THE PRESIDENT: I agree.

WILLIAMS JA: I agree.

THE PRESIDENT: The orders are as proposed by Mr Justice Mackenzie.
