SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bolton* [2005] QCA 335
PARTIES:	**R** **v** **BOLTON, Luke Alan** (applicant)
FILE NO/S:	CA No 119 of 2005 DC No 7 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gympie
DELIVERED ON:	9 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2005
JUDGES:	McMurdo P, Keane JA and Fryberg 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 - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - SEXUAL OFFENCES - where applicant pleaded guilty to one count of rape and one count of doing grievous bodily harm - where applicant had used a knife in order to allow him to violently rape a young woman - where the complainant had grabbed the knife in the course of struggling with the applicant and done serious damage to three of her fingers - where the applicant held the knife to the complainant's neck during the course of the rape - where the applicant was a young man with no previous criminal history - where the applicant had given differing accounts of the incident that revealed a lack of insight into the offence he had committed - where the learned sentencing judge found that the applicant was not genuinely remorseful for his behaviour - where the applicant was sentenced to ten years imprisonment with an automatic serious violent offence declaration under Pt 9A *Penalties and Sentences Act* 1992 (Qld) - whether the

sentence imposed was manifestly excessive

R v Basic [2000] QCA 155; (2000) 115 A Crim R 456, distinguished
R v Mallie [2000] QCA 188, CA No 49 of 2000, 17 May 2000, considered

COUNSEL: T D Martin SC for the applicant
M J Copley for the respondent

SOLICITORS: Ryan & Bosscher for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for refusing this application for leave to appeal against sentence.

[2] The applicant used a knife to threaten the complainant into submission. This resulted in cuts to her hand amounting to grievous bodily harm. The information the complainant supplied to the prosecutor at sentence was that she then had a continuing mild disability, limiting movement in her hand. In addition to the use of knife, the offence of rape involved considerable physical violence including stuffing a cloth into the complainant's mouth and unprotected penile penetration of her vagina. The experience was undoubtedly a terrifying one for the complainant. The psychiatric assessment and the pre-sentence report tendered at sentence do not suggest especially promising prospects of rehabilitation for the applicant, although they note that he may well benefit from psychiatric assessment and future psychological counselling.

[3] Even taking into account the youth of the applicant (18 at the time of the offence) and his plea of guilty, in the light of the very concerning aspects of these extremely serious offences I am not persuaded the sentence imposed was manifestly excessive.

[4] **KEANE JA:** On 3 February 2005, the applicant was convicted on his plea of guilty of one count of rape and one count of doing grievous bodily harm. He was sentenced to 10 years imprisonment for the offence of rape and six years imprisonment for the offence of grievous bodily harm, those sentences to be served concurrently. Because of the term of the sentence in respect of the offence of rape, there was an automatic declaration that the applicant was convicted of a serious violent offence under Pt 9A of the *Penalties and Sentences Act* 1992 (Qld). The applicant contends that the sentence was manifestly excessive because it was outside the range of sentences indicated by previous decisions of this Court and because the sentence did not recognize the applicant's pleas of guilty, his youth and his lack of a criminal history.

The circumstances of the offence

[5] The offences occurred at Rainbow Beach on 12 June 2004. The complainant was a 24 year old Japanese student who was studying medicine at the University of Queensland at Brisbane. She was on holiday. At about 5.00 pm she was walking alone along the beach near the edge of a wooded area. The applicant grabbed her from behind and forced her to the ground.

[6] The complainant shouted for help, and the applicant told her to "shut up". The applicant had a knife with a 10 to 12 cm blade. The complainant tried to struggle and, in doing so, grabbed the knife and injured her hand. The applicant told her that if she tried to resist again he would hurt her.

[7] The applicant dragged the complainant into the bush, and pushed her to the ground again. She bit him on the hand, but he was too strong for her. He pushed a cloth into her mouth and took off her clothing. He put the knife to her neck. He then pushed her legs apart and inserted his penis into her vagina. She asked if he was wearing a condom. He shook his head. The applicant finished and then ran away.

[8] The complainant was left with injuries to three fingers of her left hand which required surgical repair. She was also left with fine linear abrasions to the throat and neck consistent with the blade of the knife being drawn across her skin.

The applicant's circumstances

[9] The applicant was 18 years of age at the time of the offence. He was in employment at the time when the offence was committed.

[10] The applicant has no previous criminal record.

[11] A pre-sentence report and a psychological assessment of the applicant were provided to the learned sentencing judge. They suggest that he suffered from Attention Deficit Hyperactivity Disorder while at school. He was treated with Ritalin, but has not used it for many years. It appears, however, that he had problems with alcohol, cannabis and ecstasy. He was also said to lack insight into his behaviour.

The sentence

[12] At the sentence hearing, the applicant's counsel submitted that the appropriate range of sentence was imprisonment between seven and ten years. It is now submitted on appeal that the appropriate sentence was eight years imprisonment with a declaration that the offence was a serious violent offence so that 80 per cent of the sentence must be served before the applicant will be eligible for release into the community.

[13] The learned sentencing judge referred to the circumstance that the prosecution case against the applicant, which included DNA evidence, was overwhelming. Nevertheless, the learned sentencing judge acknowledged that the applicant's early plea of guilty meant that the complainant was not required to return to Australia from Japan to give evidence at the trial.

[14] On behalf of the applicant, it was submitted that he was genuinely remorseful for his offending conduct; but this submission was rejected. As the learned sentencing judge observed, when the applicant was first interviewed by the police, he denied his involvement and gave a false alibi. He then gave an interview in which he sought to blame the complainant for the offences. He subsequently asserted that he had consumed a large quantity of alcohol and marijuana before "blacking out" while walking along Rainbow Beach so that when he "came to" he found himself "sexually assaulting" a woman. His Honour concluded that he was unable to accept that the applicant was truly remorseful for what he had done or that he appreciated the gravity of the offences he had committed. The absence of genuine remorse

meant, of course, that considerations of deterrence and protection of the community were especially significant in determining the appropriate sentence.

[15] In fixing the sentence, the learned sentencing judge expressly took into account the applicant's age, his plea of guilty and the absence of prior criminal history. He also took into account the psychological assessments of the applicant.

[16] The learned sentencing judge referred to the decision of this Court in *R v Basic*[1] and *R v Mallie*[2] in reaching his conclusion in relation to sentence.

The appeal

[17] It is contended on behalf of the applicant that the decisions of this Court in *R v Basic* and *R v Mallie*, to which regard was had by the learned sentencing judge, indicate that a sentence of ten years for the offence of rape in this case is manifestly excessive. In my respectful opinion, this submission should be rejected.

[18] In *R v Basic*, the offender pleaded guilty to offences which occurred when he attacked a 19 year old complainant early in the morning while she walked to work. The offender was not armed. He raped the complainant and threatened to hurt her if she complained to the police. The offender was 31 years of age and had previous convictions, although only one such conviction was for an offence involving personal violence. The appropriate range in that case was said to be seven to ten years imprisonment.[3] The application for leave to appeal against a sentence of eight years imprisonment with a serious violent offence declaration was refused. Importantly for present purposes, McMurdo P, with whom McPherson JA and Mackenzie J agreed, said:[4]

> "The rape was not in the most violent category. The complainant's physical injuries were thankfully not serious and as has been noted, no weapon was used."

[19] In the present case, the rape was violent and the applicant used a weapon, with the complainant suffering grievous bodily harm as the result of the applicant's use of the knife in his attempts to subdue her. These circumstances are enough to suggest that a notional head sentence in the range of seven to 10 years discussed in *Basic* may well have been inadequate in the present case, even having regard to the applicant's youth.[5]

[20] In *R v Mallie*, the offender pleaded guilty to offences of burglary, stealing, assault occasioning bodily harm, sexual assault and rape committed when he broke into the home of a 37 year old complainant at night time. He punched the complainant several times, both before and after he raped her. The complainant was left with bruising and swelling to her face and some teeth were knocked out. She suffered post-traumatic stress disorder, made several attempts on her own life and was hospitalized for depression. The offender was 20 years of age at the time of the offence. He had a history of alcohol and cannabis abuse. He had a history of offending which included one incident of personal violence. The offences were

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1 [2000] QCA 155; (2000) 115 A Crim R 456.
2 [2000] QCA 188; CA No 49 of 2000, 17 May 2000.
3 [2000] QCA 155 at [27]; (2000) 115 A Crim R 456 at 460.
4 [2000] QCA 155 at [15]; (2000) 115 A Crim R 456 at 458.
5 See *R v Soper* [1994] QCA 254; CA No 119 of 1994, 15 June 1994; *R v Broissand* [1994] QCA 437; CA No 268 of 1994, 12 September 1994; *R v Bielefeld* [2002] QCA 369; CA No 159 of 2002, 19 September 2002.

committed while the offender was affected by the combination of alcohol and amphetamines. This Court held that the appropriate range was 10 to 14 years imprisonment and dismissed an application for leave to appeal against a sentence of 10 years. Importantly for present purposes, the offender was remorseful and it was accepted that there were reasonable prospects of rehabilitation. The pre-sentence report and psychological assessment in the present case did not provide the learned sentencing judge with any encouragement to take a similarly favourable view of the applicant's prospects.

[21] In the present case, as the learned sentencing judge noted, there was no evidence of the extent to which the complainant had been adversely affected psychologically by her ordeal at the hands of the applicant. The consequences for the complainant in *Mallie* were very serious indeed. Of course, it may be assumed, and it was so conceded by counsel for the applicant, that being the victim of such an offence would inevitably carry with it some psychological consequences. In any event, while exceptionally severe consequences of the kind found in *Mallie* were not shown to have ensued for the complainant on this occasion, there are countervailing considerations which emphasise the importance of deterrence in this case. The applicant's assertions of remorse were comprehensively rejected by the learned sentencing judge and, in my opinion, no basis has been shown to conclude that his Honour erred in this regard. The pre-sentence report and psychological assessment suggest that his Honour was correct to attribute the applicant's attempts to avoid responsibility for his offending to a lack of remorse rather than to youthful panic or shame for what he had done.

[22] This Court's decision in *R v Mallie* does not imply that the sentence imposed was not within the range of sentences which might have been imposed in this case by the learned sentencing judge in the proper exercise of his discretion.

[23] Further, it cannot be said that no weight was given by the learned sentencing judge to the applicant's plea of guilty, his youth and his lack of a prior criminal history. The learned sentencing judge expressly referred to these factors. The sentence which was imposed reflected these factors, but it also reflected the very serious nature of the applicant's offending, including the fact that the rape was accompanied by the infliction of grievous bodily harm, and the very disturbing feature of the applicant's lack of remorse.

Conclusion and order

In my respectful opinion, no error has been demonstrated in the decision of the learned sentencing judge.

[24] The application for leave to appeal should be dismissed.

[25] **FRYBERG J:** I agree with the orders proposed by Keane JA and with his Honour's reasons for those orders.