SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dowden* [2010] QCA 125
PARTIES:	**R** **v** **DOWDEN, Mitchum Keith** (applicant/appellant)
FILE NO/S:	CA No 280 of 2009 DC No 3096 of 2009 DC No 1321 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2010
JUDGES:	Holmes JA and Fryberg and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence allowed** **3. The sentence imposed at first instance is set aside** **4. A sentence of eight years imprisonment is substituted**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where appellant convicted of one count of rape – where only issue at trial was consent – where prosecutor put it to the jury that if the complainant's account was false, as suggested by defence counsel in cross-examination and address, it must have been the product of deliberate lying – where prosecutor suggested that nothing in the defence case as put to the complainant explained the reason for the complainant's distressed state following the incident – where appellant argued that the prosecutor's observations effectively placed the onus of proof on the accused to demonstrate why the complainant would maintain a false allegation and to explain the complainant's distressed state – whether the prosecutor's observations amounted to a reversal of the onus of proof – whether a miscarriage of justice had occurred CRIMINAL LAW – APPEAL AND NEW TRIAL –

PARTICULAR GROUNDS OF APPEAL – IRREGULARITIES IN RELATION TO JURY – PARTIALITY – where appellant in custody throughout the course of his trial – where appellant argued that there was a risk the jury had become aware that he was in custody – where there was no direct evidence to suggest that the jury was so aware – whether a miscarriage of justice had occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where appellant argued that defence counsel had misled the jury by not properly putting the defendant's case to the complainant – whether defence counsel acted for legitimate forensic reasons – whether a miscarriage of justice had occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OF INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where evidence that the appellant's spermatozoa was found in the complainant's vagina – where only issue at trial was consent – where complainant a witness of credit – where jury entitled to accept the evidence of the complainant – whether the finding of guilt was open to the jury

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant sentenced to nine years imprisonment for one count of rape – where appellant a stranger to the complainant – where offence carried out in a public park – where appellant 19 years old at the time of the offence – where a relatively harmless weapon was used – where rape not accompanied by a significant degree of violence – where rape not protracted – where no threats made of harm or retribution for complaint to the authorities – whether sentence involved error as to appropriate sentencing range

Malho v The State of Western Australia [2010] WASCA 41, cited
Palmer v The Queen (1998) 193 CLR 1; [1998] HCA 2, considered
R v Basic (2000) 115 A Crim R 456; [2000] QCA 155, considered
R v George, unreported, Court of Appeal, Qld, No 226 of 1991, 13 June 1991, cited
R v Kahu [2006] QCA 413, considered
R v O'Brien [1998] QCA 80, cited
R v Quarrell, unreported, Court of Appeal, Qld, No 248 of 1994, 6 October 1994, cited
R v SAN [2005] QCA 114, considered

R v SAS [2005] QCA 442, considered
R v Sorbey, unreported, Court of Appeal, Qld, No 243 of 1993, 27 April 1995, cited
R v Stirling [1996] QCA 342, considered
R v T [1999] QCA 376, considered
R v Williams [2002] QCA 211, considered

COUNSEL: The appellant appeared on his own behalf
M J Copley SC for the respondent

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

[1] **HOLMES JA:** The appellant was convicted of rape and sentenced to nine years imprisonment. He did not give evidence at his trial, but the defence case, as put through cross-examination and address, was that he had engaged in consensual intercourse with the complainant. The grounds of appeal in his notice of appeal are, in effect, that a miscarriage of justice occurred because the Crown prosecutor in his address invited the jury to ask why the complainant would make and persist with a false complaint of rape and to consider whether anything put by the defence explained her distressed condition, as observed by witnesses, in the hours after sexual intercourse occurred; that there was a risk that the jury had concluded he was in custody at the time of his trial; and that the verdict was unreasonable. In addition, in the course of oral submissions here, the appellant, who was unrepresented in this court, said that his barrister had misled the jury by not informing them more fully of his version of the events of the night in question.

The evidence

[2] The complainant, B, was a 30 year old woman who went with friends to a nightclub one night in October 1998. She gave the following evidence of what happened after she left the club. At around midnight, in a somewhat intoxicated condition, she set out to walk home. Soon after leaving the nightclub, she had a conversation with a man who asked her where he could "score", to which she replied that he should ask someone at the nightclub. B went on her way, but heard the sound of someone walking behind her. Alarmed, she turned into a side street and went into the yard of a house with a well-lit driveway, to make it look as if she had reached her destination. She waited until she could no longer hear footsteps before retracing her steps to the main road she had been walking along, and resuming her journey home. She walked another block before turning into the next street, which led to her house. A short distance from the intersection, there was a vacant lot; as B was passing it, a man grabbed her around the waist and pushed her to the ground.

[3] The assailant told B he had a knife and held a cold object against her temple. She put her left hand up towards it and grabbed it; it did not feel sharp. Her shirt was pulled up over her face and her jeans pulled down. She was told to roll over onto her hands and knees. Her recall was of "feeling the person in the back of my body, like, on my inner thigh". When she could no longer feel the person there, B rolled over and put her clothes back on. The man made her kiss him. He asked if B would call the police, and she said she would not; she was anxious to sound

compliant so that no further harm would come to her. He told her that his name was Mitchell, that he was from Sydney, that he was working on a building site and that he was living with his sister in the vicinity. B got up to leave. The man asked if she would go to the nightclub again the next Thursday night and if he could buy her a drink, and she agreed, again in an attempt to sound responsive. Although B did not give direct evidence of penetration, spermatozoa with a DNA profile matching that of the appellant were found on swabs taken from her vagina.

[4] B made her way home after the assault. A friend who was staying with her, Ms Lisa P, answered the door to find her in an extremely distressed state. B told her she had been raped by someone who had attacked her from behind as she was walking home and that he had held a knife to her head. Another acquaintance, Mr Simon R, who had intended to escort B home, became concerned when he realised she had left the nightclub alone and he could not contact her by telephone. He went to her house to find her there with Miss Lisa P, distraught and shaking. She told him she had been assaulted.

[5] B was examined by a gynaecologist early the next morning. The doctor found a scratch on the palm of B's left hand and another scratch on her right leg. There was no injury to B's vagina, but that was not to be expected, given that she had had two children by vaginal delivery and had not resisted penetration.

[6] B was cross-examined, and was asked a number of questions about aspects of the encounter which might support the claim that it was consensual. She agreed that it was not violent, that she had engaged in conversation with the man involved, that he had told her that he loved her, that she had asked him whether he had a condom, and that after it he had retrieved her shoes for her. Then the following suggestions were put to B. As she was walking home, she fell into conversation with the appellant, and agreed that he could accompany her. When they arrived at the vacant lot they sat down and talked. They began to kiss, followed by consensual sexual intercourse. Afterwards they conversed for another half hour or so, spending, altogether, about two hours in each other's company. B had been embarrassed as to her own conduct when she arrived home; that explained her distressed state. B rejected all of those propositions.

The Crown prosecutor's address

[7] In his address, the Crown prosecutor pointed out that B's evidence was uncontradicted. He continued:

> "But if the account put to her is correct, after having consensually had sex with this man, who she met on a street only a very short time before, having never had a single conversation with him in that nightclub, that she must have then decided to make a false complaint of rape. To have subjected herself to a physical examination in relation to that rape that you heard went from 5.50 in the morning to 6.40 in the morning, to have then given a detailed statement to police, which of course you heard her being cross-examined about, and that she must have, 10 years later, been prepared to continue with that lie, been prepared to come here and be cross-examined about that."

[8] Later in his address, after reminding the jury of Ms P's evidence as to the complainant's distress, the prosecutor said this:

> "Now, the proposition put to you that the prosecution must overcome – and that's important to remember, the prosecution bears the onus of proof – but when propositions are put forward, it's for the prosecution to overcome them. The proposition is that she has deliberately lied – there can't be any mistake about that – that she has deliberately said that she has been raped, a statement that she knows to be false. It's not said that she was in any stressed condition when she left the defendant. On the propositions put to her, it's not said that something occurred to make her distressed. According to them, according to the version put, it was purely consensual."

He returned to the theme subsequently:

> "Now, does anything in the propositions that were put to the complainant explain why she would be so distressed for prolonged period (sic), and, in my submission, none things (sic) in those propositions do; and, ladies and gentlemen of the jury, as I said, this was an overwhelming case of identification. There really was no doubt at all. The issue that's been put before you is whether the complainant consented. It is critical and I stress to understand that the prosecution bears that onus. It is for the prosecution to show that the complainant did not consent; but, as I say, you're entitled to put the propositions that are put to her as whether they explain what occurred. You're entitled to apply your commonsense to the matters that are put to you – put to her, because although those questions aren't themselves evidence, they're what's put to this witness.
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> Does anything that was put to this witness explain what occurred, what was observed by other witnesses? And my submission is it doesn't in any way and that the questioning of the complainant, rather than in any way shaking your confidence in the truth, the knowledge that she was firmly, deliberately, and quite properly cross-examined at some length would you give you (sic) confidence that what you heard was a witness telling the truth."

The prosecutor ended by saying that there was no room for confusion in B's account:

> "... you would find it incredible that she would make a complaint deliberately false – because let's be no – make no mistake about it. It can't be said – and it wasn't, in fact, put to her – that, "Well, look, this just might be a product of confusion in your mind," if it didn't happen the way the complainant said, she would have to have been deliberately lying."

[9] After the prosecutor's address, and in the absence of the jury, defence counsel submitted that the address amounted to an invitation to the jury to consider why B would lie and shifted the burden of explaining the prosecution case onto the defence. The learned trial judge said that he would tell the jury that there was no onus on the accused to explain the complaint and that false complaints were sometimes made for no identifiable reason. Defence counsel thanked him for that indication and made no further application.

The summing-up

[10] The learned judge addressed the jury on the question of the complainant's distressed condition as follows:

> "First of all there is the question of distressed condition. That evidence comes from [Lisa P] and [Simon R]. What is the relevance of distressed condition? Now, someone who has been assaulted, it is not unusual for them to be, particularly a woman or a child, to be distressed after the incident. But that isn't the only possibility and there are other matters you must take into account. Therefore, this idea of distressed condition supporting a proposition that she was not consenting, you must treat with considerable care because there are, as I have mentioned to you, other possibilities. Persons can agree to something, for example, and I am only giving you and (sic) example, under the influence of alcohol or in circumstances which they later regret and can be very concerned about it. So, members of the jury, you look at that with considerable care."

[11] The learned judge dealt with the issue raised by defence counsel in the following directions:

> "Now, members of the jury, in his address the Crown Prosecutor said to you, 'But she went to these people afterwards and she made a complaint of rape. If it is false, she must have known she was lying.' Now, members of the jury, that isn't correct because there are a number of other possibilities. Complaints are made and sometimes they are false. We don't know why. But there is, in the history of our jurisprudence there have been false complaints and it is not for the accused to come forward and say, 'I know why she made this false complaint, this is why.' Nobody can say because we cannot read what is in the mind of another person. Your duty is to make the decision according to the evidence. We don't know why sometimes there are false complaints but it can happen.
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> There was alcohol in this case and we have memory involved as well. The other matter is this, members of the jury, once there is a complaint of rape you set in train a whole lot of events. As the police officer said, a complaint such as this they act quickly and they get there. Then the complainant is, obviously, a brief – information is supplied, doctors are involved, investigations and so forth and so on. Committal proceedings and here we are. Once you set that train in motion it is sometimes difficult to stop.
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> So, those are all factors you can take into account and these are all matters for you. But I stress to you there is no requirement and you would be wrong to go back and say, 'Wait a minute, why would this complaint be false? What has the accused to say about it?' Well, it is not for any accused person to come forward and say, 'Well, it is a false complaint for this reason.' Sometimes we just don't know and never will."

Defence counsel did not seek any re-direction.

Motive to lie and explanation for distress

[12] In *Palmer v the Queen*,[1] the High Court held that a prosecutor's cross-examination of the accused as to why the complainant might lie was impermissible:

> "... the fact that an accused has no knowledge of any fact from which a motive of the kind imputed to a complainant in cross-examination might be inferred is generally irrelevant."[2]

The court went on to observe that:

> "... a complainant's account gains no legitimate credibility from the absence of evidence of motive. If credibility which the jury would otherwise attribute to the complainant's account is strengthened by an accused's inability to furnish evidence of a motive for a complainant to lie, the standard of proof is to that extent diminished. That is the converse of the proposition stated by Cresswell J in the case cited by *Wills* where his Lordship acknowledged that proof of a motive to lie weakened a complainant's credibility. The correct view is that absence of proof of motive is entirely neutral." (citation omitted)[3]

[13] A similar problem may arise if the question as to why the complainant would lie is posed by the prosecutor in his or her address.[4] In *R v T*, Thomas JA, while pointing out that a Crown prosecutor might properly counter suggestions of a motive to make a false complaint, identified the limits to that entitlement:

> "What the Crown must not do, and what the court must ensure does not happen, is to permit the impression to be gained that the defence has any onus of showing that there was a particular reason for the complainant not telling the truth; or that at the end of the day the absence of any perceived reason for a false complaint strengthens the suggestion that the complainant must be telling the truth."[5]

[14] In the present case, the prosecutor's observation that if B's account were untrue, it would have to be the product of deliberate lying rather than confusion, was a rational analysis of the state of the evidence. His remarks were concerned with the necessity, in that context, for the jury to reach a view on whether B was telling the truth, not whether she had a motive to make a false complaint. His submission that the jury would not accept that B had lied did not invite any form of prohibited reasoning; in particular, he did not suggest any onus on the defence to offer a motive to lie. Had he done so, the direction given by the trial judge, which made it clear that it was not incumbent on the defence to offer any such explanation, would have dispelled any misapprehension.

[15] The prosecutor also made the point in his address that had consensual sex occurred, as was suggested in defence counsel's questions to B, it would not cause or account for B's distress. Defence counsel had in his address suggested a reason for B's distressed state – embarrassment after an act of casual sex – but the

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1 (1998) 193 CLR 1.
2 At 7.
3 At 9.
4 *R v T* [1999] QCA 376; *Malho v The State of Western Australia* [2010] WASCA 41.
5 *R v T* per Thomas JA, with the agreement of McMurdo P, at [14].

prosecutor neither commented on that proposition, nor suggested that the defence was obliged to offer any such explanation. To the contrary, he emphasised in the course of his submissions on the topic that the critical issue was whether the complainant had consented, and that the onus was on the prosecution to convince the jury that she had not.

[16] Again, should the jury have been inclined to conjecture as to the absence of an alternative, satisfactory explanation for B's distress, the trial judge's directions were sufficient to guard against that prospect. His Honour urged the jury to consider the possibility of other reasons than assault for the distress; and his direction in more general terms that it was not for the accused to offer a reason for a false complaint was apt to prevent any such reasoning. Defence counsel, unsurprisingly, took no point about the adequacy of the directions given.

[17] There is, in consequence, no basis for concluding that the prosecutor's address on either topic, B's veracity or the inexplicability of her distress, resulted in any miscarriage of justice.

The risk that the jury would conclude the accused was in custody

[18] After the jury had returned its verdict of guilty, and in the course of sentencing submissions, counsel for the defence said that he wished to place on record two matters. The first was that he had attempted to give his client a shirt on the seventh day of the trial, but had been prevented from doing so by Corrective Services staff. The second was this:

> "During the course of the trial the door that was utilised by Corrective Services to take [the appellant] from the dock to the cells downstairs, it was the same door utilised by the jury and the jury room was just outside that doorway."

Counsel did not make any further submission in relation to either matter. Both matters raised seem, in context, to have been expressions of concern as to unhelpful or undesirable practices on the part of Corrective Services staff, without any contention of actual prejudice resulting. Nothing else was identified in the record which might support the assertion of a risk that the jury could have concluded the appellant was in custody. The ground, in my view, is entirely without substance.

The failure of the appellant's counsel to put his case more fully

[19] The appellant's complaint about his counsel's conduct of his defence was not the subject of an appeal ground. Nonetheless, I will deal with it briefly. The appellant asserted that his counsel had misled the jury by not making it clear (presumably through questions, or perhaps by calling evidence from him) that he was, in fact, the occupant of the house where B had sought refuge. Instead, his counsel had made it sound as if he were merely a transient in the district.

[20] Defence counsel asked questions of B which were apt to leave open the possibility, and perhaps create the impression, that the appellant had met her at the nightclub. It should, however, be emphasised that on perusing the transcript with the appellant's version in mind, it is clear that defence counsel did nothing improper; he simply elicited evidence from B in such a way as to leave the possibility open. Certainly the prosecutor seems to have addressed on the assumption that the appellant had followed B from the nightclub.

[21] Assuming what the appellant says about his instructions is correct, defence counsel may have thought that of the two scenarios, the first, in which the appellant met B in the nightclub, walked some distance with her and had consensual intercourse with her, offered his client a far better chance of acquittal than the second, in which B, having hidden in fear from a perceived pursuer in the appellant's yard, then promptly took up with the appellant and agreed to have sex with him. It is difficult to see that he would be wrong. At any rate, if that were how matters stood (the appellant's contentions about it were not supported by affidavit), it was a legitimate forensic choice not to put more detailed instructions to B and not to go into evidence. There is no basis on which to conclude that any miscarriage of justice resulted.

Unreasonable verdict

[22] The evidence of the finding of the appellant's spermatozoa in B's vagina not having been challenged, the only live issue was whether intercourse was consensual. There was, in my view, nothing about B's evidence which should have led the jury to reject her as a witness of credit. The jury was entitled to accept and act on her evidence that she did not consent to intercourse with the appellant and accordingly to conclude, beyond a reasonable doubt, that he was guilty of the offence of rape. The contention that the verdict was unreasonable must be rejected.

[23] I would dismiss the appeal against conviction.

The application for leave to appeal against sentence

[24] The appellant was 19 years old when he committed the rape. He had been sentenced to six months imprisonment in New South Wales, that term concluding on 13 April 1998, for six offences of breaking and entering with intent to steal; it was some six months later that he committed the rape. In the ensuing decade, he was imprisoned in New South Wales in respect of other offences, serving a sentence of two years and six months imprisonment for break and enter with intent. In December 2008, he was arrested and extradited to Queensland in respect of the rape offence. He was 31 years of age when sentenced. His counsel said that he had worked in the building industry. He had in the past, including at the time of the rape, been a user of methylamphetamine, and remained a heavy drinker. He lived with his de facto wife and two daughters, aged three and four.

[25] B provided a victim impact statement. She said that following the rape, she had suffered an anxious time waiting for the results of tests to establish whether or not she was HIV positive. She remained apprehensive when alone at night, and was fearful of being found and harmed by the appellant.

[26] In making his submissions on sentence, the prosecutor referred the learned judge to the decision of this court in *R v Basic*,[6] which he cited as establishing "that for a rape of a stranger without violence the range is seven to ten years", and to *R v Kahu*[7] in which reference was made to *Basic.* He went on to contend that the appropriate range for sentencing in the present case lay between nine and 10 years.

[27] The learned judge commented on the importance of deterrence, in order to protect women who were vulnerable in such situations. His Honour sentenced on the

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6 (2000) 115 A Crim R 456.

7 [2006] QCA 413.

basis that the appellant had claimed to have a knife, but whether he did in fact was unclear, although he had held something against the complainant's throat. The implicit threat of the use of violence and the force used in pushing the complainant into the vacant lot warranted a sentence of nine years imprisonment. Having regard to a number of factors, including that the appellant was 19 years old at the time of the offence, and that while threatening violence, he did not use it, his Honour declined to make a serious violent offence declaration.

[28] Counsel for the respondent here also relied on *R v Basic* and *R v Kahu.* A close examination of those cases, particularly *Basic,* is warranted. In *Basic*, the applicant had pleaded guilty at an early stage to the rape of a 19 year old woman whom he had dragged into bushland and anally penetrated with his penis. He threatened to find her and harm her if she complained to police. That applicant was 31 years old and had a previous criminal history of property offences and drug trafficking. He was sentenced to eight years imprisonment and declared to be convicted of a serious violent offence; that sentence was upheld on appeal. McMurdo P, with whom the other members of the court agreed, concluded, after a review of sentences for rape, that the sentencing range in the *Basic* case fell between seven and 10 years.

[29] The President considered four cases in arriving at that conclusion: *George*,[8] *Sorbey*,[9] *Quarrell*,[10] and *O'Brien.*[11] The first three received (either at first instance or on appeal) sentences of nine years imprisonment for rape offences in which considerable violence was inflicted on the victim. In *George*, the complainant was violently raped and sodomised, struck with a large stone and hit with a fist. Her shoulder was dislocated in the attack. In *Sorbey* the applicant "violently constrained" his victim in order to rape her; he sodomised her, causing "intense pain". She was treated in hospital for various injuries. *Quarrell* involved the terrorising and rape of a 17 year old at gunpoint, with threats to kill her. In the fourth case, *O'Brien,* a sentence of 11 years imprisonment was upheld on appeal, although a recommendation for release after four years was made. In that case too, substantial violence was involved; the victim was grabbed in a park, dragged by her hair, had her head bashed on the ground and was punched a number of times. The applicant there had a substantial criminal history, including the sexual assault of a woman whose house he had broken into. From the foregoing, it can be seen that the submission of the trial prosecutor, that the range of seven to 10 years identified in *Basic* was applicable to "rape of a stranger without violence", was wrong.

[30] The sentencing range identified in *Basic* was referred to in *R v Kahu,* in which the 20 year old appellant was convicted after a trial of three counts of rape. He attacked an intoxicated girl, only 15 years old, whom he pulled by her hair from the street as she walked home from a hotel. He had vaginal and anal intercourse with her and forced her to perform fellatio on him. Those rapes were committed during the operational period of a partially suspended sentence imposed for offences of dishonesty. A sentence of eight and a half years imprisonment, to be served cumulatively with the four month balance of the suspended sentence, was upheld on appeal.

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8 Unreported, Court of Appeal, Qld, No 226 of 1991, 13 June 1991.
9 Unreported, Court of Appeal, Qld, No 243 of 1993, 27 April 1995.
10 Unreported, Court of Appeal, Qld, No 248 of 1994, 6 October 1994.
11 [1998] QCA 80.

[31] The sentencing range for rape had earlier been considered in *R v Stirling*.[12] The appellant there had been sentenced after a trial to nine years imprisonment for rape. He had been drinking with the complainant who lived in an adjoining unit on the previous evening and returned to her unit in the early hours of the following morning when he held her down, licked her genital area and had sexual intercourse with her. He had a criminal history, including an offence of armed robbery for which he had served a lengthy term of imprisonment, but had no record of committing any sexual offences. Thomas J, with whom the other members of the court agreed, noted previous sentencing patterns and went on to say:

> "Suffice it to say that a nine-year sentence seems more appropriate for those cases where specially serious factors operate such as the infliction of injury or the use of serious threats, possession of a weapon or some factor of a particularly aggravating kind."

The court concluded that a sentence of nine years imprisonment was manifestly excessive in the circumstances of the case and should be replaced with one of seven years.

[32] Thomas J's observation was cited in *R v Williams*,[13] which concerned the rape of a 16 year old, who was a virgin, when she was left alone with the appellant in the flat of a mutual friend. The appellant was 28 years old. He threatened the complainant with a kitchen knife and, despite her physical resistance, had intercourse with her. He told her not to complain about the incident, saying that he "knew where she lived". The appellant was convicted after a trial. The court noted that the circumstances of threats and use of a weapon were those described by Thomas J in *Stirling* as warranting a nine year sentence. It concluded that the penalty range for the offence in the circumstances of the case before it was seven to nine years, and that the sentence imposed at first instance, of seven and a half years imprisonment, should not be disturbed.

[33] *R v SAN*[14] concerned, as this case does, a young offender. The applicant there was 18 years old when he committed the offences of assault with intent to rape, rape and assault occasioning bodily harm to which he pleaded guilty. He had a substantial criminal history for offences of dishonesty and assault, but had no convictions for sexual offences. He had been drinking with the complainant in an alley when he attacked her. He punched her a number of times to overcome her resistance, raped her and held her around the neck, causing her to have difficulty breathing. He desisted only when three men came to her assistance. He was sentenced to seven years imprisonment for the rape and lesser concurrent sentences for the other offences. Helman J, with whom the other members of the court agreed, observed that at first sight the sentences might appear "unduly severe for a youthful offender", but concluded that they were not excessive, having regard to the applicant's lengthy criminal record and the violence of his attack.

[34] In *R v SAS*[15], the 14 year old complainant had gone with the applicant to a motorcycle gang's club house. The applicant performed a number of sexual assaults on her, including two vaginal rapes, threatening to hit her with a pool cue if she did not comply. The complainant had tried to leave the club house but was

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12 [1996] QCA 342.
13 [2002] QCA 211.
14 [2005] QCA 114.
15 [2005] QCA 442.

unable to open the door. She was cross-examined at length in a committal hearing and pre-recording of evidence, but the applicant ultimately pleaded guilty to the charges. Jerrard JA, with whom McMurdo P agreed, referred to the decisions in *Williams, Basic* and *Stirling* and in particular to Thomas J's comments in *Stirling*. He noted the aggravating circumstances: the youth of the victim and the deprivation of liberty involved. However, he said, the limited force used made the case one at the mid-point of the available range of seven to nine years. The majority set aside the sentence of nine years imprisonment and substituted one of eight years.

[35] The aggravating features of the present case were the attack on B by the appellant, who was a stranger to her, in a public place at night and the use of some form of weapon, albeit, as it seems, a relatively harmless one. On the other hand, the rape was not accompanied by the significant degree of violence used in *SAN* and *SAS* and in the cases considered in *Basic*; nor was the assault protracted and repeated as in *Basic*, *Kahu* and *SAS*. There was no explicit threat of harm or of retribution for complaint to authorities. The appellant was only 19 years old at the time he committed the rape; and he had not previously committed any sexual offence.

[36] There is, in my view, reason to conclude in this case that the learned sentencing judge erred in accepting the prosecutor's submission that *Basic* established a range of seven to ten years for rape of a stranger without violence. In light of that error, this Court should set aside the sentence imposed and re-sentence. Having regard to the considerations identified in the preceding paragraph, particularly the appellant's youth when he committed the offence, a sentence of eight years imprisonment should be substituted; but, given the absence of any manifestation of remorse or co-operation, without any declaration of parole eligibility.

Orders

[37] I would dismiss the appeal against conviction and allow the application for leave to appeal against sentence. I would set aside the sentence imposed at first instance and substitute one of eight years imprisonment.

[38] **FRYBERG J:** I agree with the reasons of Holmes JA and the orders her Honour proposes.

[39] **APPLEGARTH J**: I have had the advantage of reading the reasons of Holmes JA. I agree with the reasons and the orders proposed by her Honour.