SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBJ* [2010] QCA 211
PARTIES:	**R** **v** **MBJ** (applicant)
FILE NO/S:	CA No 72 of 2010 DC No 73 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	13 August 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2010
JUDGES:	Chief Justice, Muir and Fraser JJA Separate reasons for judgment of each member of the Court, Chief Justice and Fraser JA concurring as to the order made, Muir JA dissenting
ORDER:	**Application refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – applicant sentenced to 13 years imprisonment after pleading guilty to the penile rape of his three year old nephew – complainant suffered injuries – applicant and complainant resided in same household – applicant in position of trust in relation to complainant – applicant submitted early guilty plea – applicant 21 years of age at time of offending – applicant with no relevant criminal history – applicant expressed remorse – whether sentence manifestly excessive *Corrective Services Act* 2006 (Qld), s 182 *Penalties and Sentences Act* 1992 (Qld), s 161A *R v Corr; ex parte A-G (Qld)* [2010] QCA 40, considered *R v D* [2003] QCA 148, considered *R v D* [2003] QCA 88, considered *R v Daphney* [1999] QCA 69, considered *R v Jones* [2010] NSWCCA 108, cited *R v KAC* [2010] QCA 39, considered

R v Lacey; ex parte A-G (Qld) [2009] QCA 274, cited
R v RAC [2008] QCA 185, considered
R v TK [2004] QCA 394, considered
R v Ungvari [2010] QCA 134, cited

COUNSEL: D C Shepherd for the applicant
M B Lehane for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Muir JA. I am grateful for His Honour's recitation of the facts, which I adopt, and for his analysis of the arguably comparable previous decisions.

[2] I regard *R v Daphney* [1999] QCA 69 as of the greatest assistance here.

[3] The sentence affirmed on appeal in *Daphney* was substantial, described by White J (as Her Honour was) as "not a light punishment to have [been] imposed upon … a relatively young man". I respectfully agree with that. But it nevertheless falls within the range of sentences which might be imposed for offending broadly comparable to the present.

[4] In summary, the sentence of 15 years imposed in *Daphney* was substantial, but it was effectively confirmed by the Court of Appeal in 1999, and goes to describe the range applicable in cases of this general character.

[5] While sentences in some other cases, like *R v Corr; ex parte A-G* [2010] QCA 40 and *R v D* [2003] QCA 88, may suggest this one was rigorous, the present object is not to adjust the sentence as necessary so that it sits comfortably with all sentences previously imposed for broadly similar offending. That would be an impossible task, achievable by neither judge nor fortunately even computer, and not the task committed to this court.

[6] The stipulation for parity consequently only applies to the sentences of co-offenders. Otherwise all the court can endeavour to achieve is broad consistency, important though that is.

[7] That is done by ensuring that sentences which are imposed fall within an appropriate "range", wherever within it, provided within the range. If the sentence is within the relevant range, then the appeal court must not interfere. Otherwise there would be a consequent circumscription of the proper discretion of all sentencing judges.

[8] I acknowledge that defining the "range" can itself be difficult, and that impressions may differ. But in this case, it is argued for the respondent that the comparability of *Daphney* defines a reasonably sure outer limit.

[9] How then does the instant situation compare and contrast with that which confronted the court in *Daphney*?

[10] Daphney offended when he was 18 years old. The applicant was somewhat older at 21. Daphney's victim was four years old, the applicant's was three years old. Daphney lubricated his victim prior to raping her: the applicant did not. The

physical injuries to the victims were comparable, possibly somewhat worse in the case of the applicant's victim. Unlike the applicant, Daphney had a lengthy criminal history, but significantly, only for property offending, and none for crimes of violence. While remorseful, Daphney was described by the sentencing Judge as "a danger to the community" because of his past record. But that was a record for offending only in relation to property; this applicant posed (only) some risk of re-offending, substantially because of abuse he himself had suffered as a child.

[11] It seems to me that collection of features weighs roughly comparably.

[12] Then we come to the major points of distinction between the present situation and Daphney's.

[13] In the first place, Daphney broke into his victim's house, but significantly it was only to steal. It was then opportunistically that he raped his victim when he found her inside. The applicant by contrast was already in the house, with his victim, who was well known to the applicant and trusted the applicant. The applicant stood in the position of uncle to his victim. In *Daphney* there was no betrayal of trust in that sense. Betrayal of trust has traditionally been regarded as an exacerbating factor when one comes to penalty.

[14] The second point of distinction is that during his offending, Daphney took his victim out of the house into a nearby laneway during the night time, before returning to the house after a short time (Counsel for the present applicant says "briefly"), and then left. While that put Daphney's victim at greater potential risk, the risk did not materialize, though she may have been more traumatized because of that feature. This applicant did not remove his victim from the house.

[15] The sentencing Judge in this case presumably reflected that latter point of distinction by imposing a sentence of 13 years, two years less than the 15 years imposed upon Daphney, and in selecting that two year differential, may probably also be taken to have allowed something for the circumstance that in *Daphney* there was no breach of trust as in the present case.

[16] On the basis of that analysis, I cannot conclude that the sentence imposed upon the applicant was outside the relevant range, which fell as I say to be defined by taking account of the sentence imposed upon Daphney.

[17] I am accordingly not satisfied that the instant sentence was manifestly excessive.

[18] I would refuse the application.

[19] **MUIR JA:** The applicant, who was 21 years of age at the time of his offending, was sentenced after a plea of guilty to 13 years of imprisonment for the penile anal rape of his three year old nephew. They resided in the same household: the complainant and his family lived in a granny flat rather than the main house in which the applicant resided. The applicant enjoyed the trust of the complainant's parents and often watched television and played with the complainant.

[20] On the afternoon of 25 October 2008, the complainant's father heard the complainant crying in pain. The complainant then came into the granny flat and informed his parents, "[The applicant] put his dick in my bum, my bum". The complainant's parents, on inspecting the complainant, found blood and faeces on his clothing and blood on his buttocks.

[21] The complainant's blood and faeces were found on the sheet of a bed in the applicant's bedroom and on a pair of the applicant's white shorts found hidden under a cupboard. The tearful complainant was taken to the Townsville Hospital where he was examined by a paediatrician who noted fresh blood oozing from four tears radiating from the complainant's anal verge. The applicant initially denied anally raping the complainant. He later asserted that he was under the influence of drugs at the time and had no or little memory of the rape.

[22] The applicant seeks leave to appeal against his sentence on the grounds that it was manifestly excessive. He has a largely irrelevant criminal history consisting of minor drug offences, obstructing and assaulting police, and breach of probation.

[23] There was a hand-up committal and the sentencing judge accepted that the guilty plea was timely. The primary judge also accepted that the applicant was genuinely remorseful but considered that the likelihood of his re-offending "was very much dependant" on his receiving appropriate treatment.

[24] In support of the contention that the sentence was manifestly excessive, counsel for the applicant relied on *R v D*;[1] *R v RAC*;[2] *R v KAC*;[3] *R v TK*;[4] and *R v Corr; ex parte A-G (Qld)*.[5] In *R v D*, the 40 year old applicant's 12 year sentence, after a plea of guilty, for the rape of a five year old girl, was set aside and replaced with a sentence of 10 years imprisonment. The complainant's hymen was found to be bruised and haemorrhaged and her injuries were consistent with digital penetration. Penile penetration was not established. Counsel for the respondent pointed out, accurately, that a significant point of distinction between *R v D* and the present case is the absence of penile penetration in the former. Other distinguishing matters are the slightly older age of the complainant and her lesser injuries.

[25] In *R v RAC*, the applicant, who was 26 and 27 at the time he committed the eight counts of rape and two counts of indecent dealing for which he was sentenced, after pleas of guilty, to 10 years imprisonment, was described as "a father-figure to the complainant". The applicant confessed to police that he had had oral sex with the six year old complainant on five occasions and that on another he had inserted his penis into the child's rectum, removing it after the child complained of pain. The applicant, who had no criminal history, cooperated fully with authorities, and were it not for his admissions, the full extent of his offending would not have become known. He was found to be genuinely remorseful.

[26] In her reasons, McMurdo P observed that had the matter proceeded to trial, a head sentence in the order of 12 years imprisonment would have been appropriate but that the applicant's extensive cooperation with the authorities and other mitigating factors warranted a discount of about one-third, rather than the discount of one-sixth given by the primary judge. The sentences for rape were reduced from 12 years to eight years and a serious violent offence declaration was made.

[27] Plainly, in reducing the offender's sentence, particular regard was had to the offender's cooperation with authorities and his admissions which led to his being

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1 [2003] QCA 88.
2 [2008] QCA 185.
3 [2010] QCA 39.
4 [2004] QCA 394.
5 [2010] QCA 40.

convicted of offences of which he otherwise would not have been charged. The principal victim in *RAC* was also about twice the age of the applicant's victim but, nevertheless, a very young vulnerable child.

[28] In *R v KAC*, the applicant, who was about 43 years of age at the time of offending and who pleaded guilty, applied unsuccessfully for leave to appeal against an overall sentence of 12 years imprisonment for offences which included the rape of his three year old niece over a four day period whilst the child was in his care and the rape of an eight year old complainant who was also left in his care. The rape of the three year old child involved partial penile penetration of the child's vagina. The rape of the eight year old was penile and it was facilitated by the binding and gagging of the victim. Keane JA, with whose reasons the Chief Justice agreed, held that the sentence was not outside the range of a sound exercise of the sentencing discretion.

[29] The offending conduct in that case involved five children, two of whom were raped. The rapes, although serious, did not result in physical injury and, in one case, there was only partial penetration. Holmes JA observed that the sentence was at the high end of an appropriate range.

[30] The term of imprisonment of 16 years imposed on the 24 year old offender in *R v TK* was held not to be manifestly excessive. The victim in that case was only 21 months old and the sexual violence was protracted, motivated by spite and resentment, and accompanied by the deliberate infliction of pain. The victim's injuries were also particularly serious and McMurdo P remarked in her reasons that, "The child was seriously injured with her long term physical and mental prognosis unknown".

[31] The 22 year old applicant in *R v Corr* pleaded guilty to doing grievous bodily harm with intent to disable and to the rape of a two and a half year old child. He was sentenced on each count to nine years imprisonment and serious violent offence declarations were made. On an Attorney-General's appeal, the sentences of nine years imprisonment were set aside and a sentence of 12 years imprisonment on each count was substituted. The complainant was brutally assaulted by the applicant and left unconscious face down in a garden bed. The applicant admitted throwing the complainant onto the ground and hitting his head on a wall, throwing him against the wall, punching him and dropping him. After the complainant was admitted to hospital, his condition deteriorated markedly and it was discovered that he had a perforation of the anterior rectal wall and a laceration to the anus caused by penetration by a sharp object. The injuries required a temporary colostomy. Plainly the offending conduct was singularly reprehensible.

[32] Counsel for the respondent sought to distinguish *R v Corr* on the basis that it was an Attorney-General's appeal in which the most comparable authority had not been referred to the Court at first instance and on the basis that the offending did not involve penile penetration. It does not appear to me that the insertion of a sharp instrument in a child's anus with the obvious risk of grave internal injuries is inherently less serious than penile penetration. The rape was described by McMurdo P in her reasons as "a grave example of the serious offence of rape". Fortunately for the victim and the applicant, the victim sustained no permanent physical injury as a result of the assaults. The fact that the appeal was by the Attorney-General would not, of itself, suggest that the sentence imposed on appeal would be one at the lower end of the appropriate range. However, it is the case that

the way in which the case was presented by the prosecution at first instance may bear on the sentence imposed on appeal.[6]

[33] Counsel for the respondent placed particular reliance on *R v Daphney*[7] and *R v D*.[8] The applicant in *Daphney* was refused leave to appeal against a sentence of 15 years imprisonment imposed after a plea of guilty, for the anal rape of a four year old girl. The 18 year old applicant, who lubricated himself with margarine taken from the refrigerator of the house in which the complainant resided, and into which he entered at night, removed the complainant from the house in the course of the attack and later returned her. The complainant suffered bruising of the outer perianal skin and a small tear at the entry of the anus but, seemingly, no lasting physical injury.

[34] Although the applicant had a substantial criminal history, he had no convictions for violence or for sexual offences. The breaking into of the house and the abduction of the victim from the security of her own home was, however, a serious aggravating feature. The offender was also considered to be likely to continue re-offending and his conduct was not regarded as opportunistic. That conclusion would seem to follow from the use of a lubricant by the offender.

[35] In *R v D*, the applicant was sentenced after a trial to 14 years imprisonment for the penile rape of his four year old daughter. She suffered a tear from her fourchette extending to the apex of her vagina about four centimetres in length and damage to her anal sphincter caused by the internal tearing. The injuries were consistent with forceful penile penetration. The complainant's genitals required surgery; her injuries were tender for at least a month and she may require further surgery. She suffered severe psychological harm. The offender had a criminal history which included an offence of wilfully exposing a child under the age of 16 to an indecent photograph. His conduct had the strong exacerbating feature of being incestuous.

[36] Of the cases discussed, only *R v Daphney* offers support for the sentence imposed but the matters listed in paragraph [34] above indicate why a high sentence was imposed in that case. The 14 year sentence in *R v D*[9] was imposed after a trial and the offending conduct was perpetrated by the victim's father and caused more substantial injuries. The offending conduct in *R v Corr* was also significantly worse. It was potentially life threatening and notably callous.

[37] In order to compare the sentences imposed in *R v D*,[10] *R v RAC, R v KAC* and *R v TK* with the subject sentence, the various factors discussed above must be taken into account. When that is done, particularly having regard to the existence of multiple acts of rape in some cases, one is left with the impression that the term of 13 years imprisonment imposed, after a guilty plea, on a 21 year old offender with no relevant criminal history is manifestly excessive.[11]

[38] It does not appear to me that the applicant's early guilty plea was sufficiently taken into account. It is true that the evidence against the applicant was overwhelming but, nevertheless, appropriate allowance needs to be made for the sparing of the

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6 See *R v Lacey; ex parte A-G (Qld)* [2009] QCA 274.
7 [1999] QCA 69.
8 [2003] QCA 148.
9 [2003] QCA 148.
10 [2003] QCA 88.
11 "… manifest error is fundamentally intuitive." *R v Jones* [2010] NSWCCA 108 at [41].

community of the inconvenience and expense of a trial.[12] It should be appreciated also that the applicant, having been convicted of a "serious violent offence" within the meaning of s 161A of the *Penalties and Sentences Act* 1992 (Qld) will not be eligible for parole until he has served 80 per cent of his term of imprisonment.[13]

[39] For the above reasons, I would order that:

(a) the application for leave to appeal and the appeal be allowed;
(b) the sentence imposed at first instance be set aside and that in lieu thereof, the applicant be sentenced to a term of imprisonment of 11 years;
(c) that the 515 days spent by the applicant in pre-sentence custody from 25 October 2008 to 23 March 2010 be declared to be imprisonment already served under the sentence.

I would also declare that the applicant has been convicted of a serious violent offence.

[40] **FRASER JA:** I would refuse the application for leave to appeal against sentence for the reasons for judgment given by the Chief Justice, which I have had the advantage of reading.

[41] The reasons for judgment of Muir JA, which I have also had the advantage of reading, demonstrate that the sentence imposed upon the applicant was severe in comparison with penalties imposed in some other broadly comparable decisions, particularly bearing in mind that the applicant pleaded guilty, he was only 21 years of age when he committed the offence, and the effect of the legislation is that the applicant must serve 80 per cent of his 13 year sentence of imprisonment before any possibility of parole. The offence was, however, a particularly serious one, involving as it did the applicant's penile anal rape of his three year old nephew, in relation to whom the applicant was in a position of trust, in the circumstances set out in detail in Muir JA's reasons. Consideration of those matters and of this Court's rejection of the contention in *R v Daphney*[14] that the sentence of 15 years imprisonment imposed on that even younger offender was manifestly excessive persuades me that the applicant's sentence fell within the range of penalties which were within the learned sentencing judge's discretion.

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12 See e.g., *R v Ungvari* [2010] QCA 134 at [30] - [31].
13 *Corrective Services Act* 2006 (Qld), s 182.
14 [1999] QCA 69.