# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Baxter* [2010] QCA 235 |
| PARTIES: | **R**<br>**v**<br>**BAXTER, Mathew Charles**<br>(applicant) |
| FILE NO/S: | CA No 69 of 2010<br>DC No 3522 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Application |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 3 September 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 23 August 2010 |
| JUDGES: | McMurdo P, Chesterman JA and Mullins J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. The application for leave to appeal against sentence is granted.**<br>**2. The appeal is allowed.**<br>**3. The sentence imposed on count 2 of six years' imprisonment and the order fixing the applicant's parole eligibility date as 14 February 2012 are set aside.**<br>**4. In lieu, the applicant is sentenced on count 2 to five years' imprisonment and the date the applicant is eligible for parole is fixed at 14 October 2011.**<br>**5. The sentences imposed for count 1 and 3 and the pre-sentence custody declaration made on 16 March 2010 are confirmed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count rape, one count sexual assault and one count unlawfully entering a vehicle with intent to commit an indictable offence while armed – where the applicant was sentenced to six years' imprisonment with parole eligibility after serving two years of the sentence – where the applicant had a prior criminal history – where the applicant entered an |

early plea of guilty – where the offences were committed whilst the applicant was on parole – where the applicant was returned to custody upon being charged with the offences – where applicant served the balance of 13 months of the prior sentence of imprisonment – where the sentencing judge intended to sentence for count 2 at "the bottom of the range" to recognise totality issues – whether sentence of six years' imprisonment gave effect to totality issues – whether sentence was manifestly excessive

*Penalties and Sentences Act* 1992 (Qld), s 156A

*R v Basic* (2000) 115 A Crim R 456; [2000] QCA 155, considered
*R v Colless* [2010] QCA 26, considered
*R v Dowden* [2010] QCA 125, considered
*R v HX* [2005] QCA 91, considered
*R v Keevers; R v Filewood* [2004] QCA 207, considered
*R v Libke* [2006] QCA 242, considered
*R v Shillingsworth* [2002] 1 Qd R 527; (2001) 121 A Crim R 245; [2001] QCA 172, followed
*R v Viliafi* [2005] QCA 12, considered

COUNSEL: J M Sharp for the applicant
B J Power for the respondent

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

[1] **McMURDO P:** I agree with Mullins J**.**

[2] **CHESTERMAN JA:** I agree with the orders proposed by Mullins J for the reasons given by her Honour.

[3] **MULLINS J:** The applicant pleaded guilty on 16 March 2010 to one count of sexual assault (count 1), one count of rape (count 2), and one count of unlawfully entering a vehicle with intent to commit an indictable offence while armed (count 3). The applicant was sentenced to six years' imprisonment for the most serious of the offences which was the rape. He was given concurrent sentences of three years' imprisonment for the sexual assault and two years' imprisonment for the carjacking. He was ordered to be eligible for parole on 14 February 2012 (after serving two years of the sentences), as a pre-sentence custody declaration was made in respect of the period of his imprisonment between 15 February and 16 March 2010.

[4] The applicant applies for leave to appeal against his sentence on the ground that the sentence was manifestly excessive. He also relies on an additional ground that the learned sentencing judge erred in concluding that six years' imprisonment was at the bottom of the range of appropriate sentences for the applicant's offending.

**Circumstances of the offences**

[5] The three offences were committed over a period of about one hour in the early morning of Christmas Day 2008. The complainant for counts 1 and 2 was a 16 year old girl who was walking home from her boyfriend's house. The applicant walked past her and then turned back and asked the complainant a question which she answered. He then asked her for a cigarette which the complainant gave him. They talked a little further and the complainant then started to walk off. The applicant followed her. When they reached a convenience store, the complainant offered to call the applicant's ex-girlfriend for him, but there was no answer to the call. The complainant gave the applicant some change, so that he could keep trying to call and walked off. She walked through a nearby park. The applicant followed her and asked for another cigarette. When the complainant stopped to give him a cigarette and then tried to walk away, the applicant stepped in front of her and blocked her path. He grabbed the top of the complainant's arms and moved her into a nearby shelter. When the complainant went to move away, he reached out, grabbed hold of her arm and pulled her close and locked his legs around the top of her legs, with his arms around her waist. The complainant pushed against the applicant's chest with her arms and said "no" and "please don't". The applicant put his hand under the complainant's shirt on her stomach. She told him to stop. She then managed to get away, but he said to her "come back or I swear to God you'll be walking home naked." The complainant stopped and was panicking. The applicant walked to her, grabbed her arm and pulled her back into the shelter.

[6] The complainant remembers lying on the ground behind the table with the applicant on top of her and the applicant put one hand under her shirt and touched her breast and the other hand went into her pants and on top of her vagina. The complainant told the applicant to stop. He got off the complainant and she was able to stand up, but while she was standing the applicant again put his hand down her pants and his finger went inside her vagina. The complainant was on the ground again with the applicant on top of her. She was moving from side to side to try and stop him from touching her, but he continued trying to reach into her pants and under her shirt. He then suddenly stopped and got up and walked away. The complainant left and saw a garbage truck. She was in a distressed state and asked the driver for help. The police were contacted.

[7] Count 3 was committed shortly after. A second complainant was driving her vehicle along the road on her way to work, when the applicant appeared on the road in front of her. She braked heavily. He got into the passenger side of her car and told the complainant to take him to Ipswich. He told her that he had smashed his car. As they were driving, the applicant said to her "you have to take me to Ipswich, I have a gun." The complainant saw the applicant's left hand wrapped in a T-shirt and it appeared that he was holding something. The complainant kept driving, but then stopped and pulled over and told the applicant to get out of her car which he did. The complainant reported the incident to the police.

[8] The applicant was located by police on 7 January 2009. He told police that the sexual contact he had with the complainant for counts 1 and 2 was consensual

and denied penetrating her vagina. In relation to count 3, the applicant admitted getting into the complainant's car, but denied threatening her in any way or telling her he had a gun.

**The applicant's antecedents**

[9] The applicant was 24 years old when these offences were committed. His criminal history (which did not include any prior sexual offending) commenced in January 2006 when he was sentenced for two counts of robbery with actual violence whilst armed that were committed in August 2005. He was sentenced to 152 days' imprisonment followed by two years' probation. He was sentenced in August 2007 for two counts of robbery with actual violence whilst armed and in company committed on 27 September 2006 and 4 February 2007, one count of enter premises and commit indictable offence, two counts of stealing, one count of dangerous operation of a motor vehicle, two counts of assault occasioning bodily harm, one count of wilful damage, breach of probation and a number of summary offences for which he was given an effective sentence of three years' imprisonment with a parole release date fixed at 15 February 2008.

[10] After the applicant had been released to the community on parole on 15 February 2008, he was charged on 23 June 2008 with commit public nuisance. That charge was dealt with on 20 August 2008, when no conviction was recorded, but the applicant was fined $150. He committed two offences of wilful damage on 16 August 2008 for which he was convicted in the Ipswich Magistrates Court on 25 August 2008 and was fined $1,200 and ordered to pay restitution of $300. His parole was suspended for a period of 28 days. He was taken into custody at the Ipswich Magistrates Court on 25 August 2008 and released to the community on 26 September 2008. The applicant was charged with driving offences in November 2008. His parole was suspended for a period of 28 days on 17 November 2008. He was released to the community on 19 December 2008. He was returned to custody on 7 January 2009 and served the balance of the sentence of imprisonment of three years that had been imposed on 31 August 2007. That sentence was completed on 14 February 2010.

[11] The applicant relied on a letter written by him to the sentencing judge to explain his personal circumstances. He claimed to have stopped using illicit drugs from February 2007, but acknowledged that he had developed an excessive alcohol problem. He claimed that he could not access appropriate alcohol counselling through the parole service and that his application to transfer his parole interstate, so he could live on the family farm, was unsuccessful. He claimed to have committed the offences when he was "highly intoxicated." He expressed shame for his offending.

**The sentencing**

[12] The sentencing judge identified as relevant features of the offending that counts 1 and 2 were committed against a stranger on Christmas Day as she was walking in a public area and the complainant was of a young age. It was an aggravating feature that the applicant was on parole at the time the offences were committed. The sentencing judge described count 3 as a serious offence, because it involved the applicant's taking a woman away in her own motor

vehicle with the threat of a gun. The sentencing judge noted that the applicant had pleaded guilty to the offences at an early time and neither complainant was required to give evidence.

[13] The sentencing judge referred to the applicant's criminal history and stated:

> "There are totality issues involved because obviously you have been held in custody since January of 2009. Those are lessened in some way because the legislation now requires that if offences are committed whilst on parole, certain types of offences, which these form part of, any penalty imposed must be made cumulative on the sentence being served. So if you were, in fact, serving the remainder of this sentence at the present time any penalty I impose would need to be served cumulatively. That, of course, then involves totality issues.
>
> I intend to sentence you at the bottom of the range to recognise that issue but it seems to me an appropriate head sentence to recognise all of this offending behaviour should be six years' imprisonment.
>
> To recognise your plea of guilty at an early stage I intend setting a parole eligibility date after you have served two years. It seems to me that you require supervision in the community particularly if substance abuse is your problem."

**Comparable sentences**

[14] In *R v Keevers; R v Filewood* [2004] QCA 207, Filewood was convicted after trial of one count of rape (which involved digital penetration) and sentenced to imprisonment for 2½ years suspended after nine months for an operational period of three years. Filewood and Keevers were staying in the same unit in which the complainant was sleeping with her partner. The complainant was asleep when she became aware of kissing on her neck and fondling of her breast and that she was "getting punched in the vagina." She awoke to find Keevers seated near her upper body and Filewood at the bottom of the bed removing his right hand from her vaginal area. Filewood had no prior criminal history and was 24 years old at the date of the offence. The Chief Justice observed at [44] that the sentence was "quite moderate" and Filewood's application for leave to appeal against sentence was dismissed.

[15] In *R v Viliafi* [2005] QCA 12, the applicant had pleaded guilty to burglary by breaking in the night time with violence and while armed with an offensive weapon and rape (consisting of digital penetration) of a woman in the house which he had entered. He was sentenced to seven years' imprisonment with a recommendation for parole after 2½ years. The applicant had been in a relationship with the woman which she had ended and she had taken out a domestic violence order against him five days prior to the offences. The woman was asleep in her bed when she was woken by the applicant jumping on top of her, and he held her down and held a knife with a 10cms to 14cms blade in front of her face. He put it to her throat and threatened to kill her. He demanded that the woman hug him and he put his hand between her legs and, when she resisted, he threatened her again with the knife. He then forced her legs apart and inserted his fingers into her vagina. The events were interrupted by the arrival of the applicant's wife. The applicant left with his wife and

subsequently stabbed himself in the chest and cut one of his wrists and suffered persisting nerve damage to his wrist as a consequence. At the time of sentence the applicant was 41 years of age. His application for leave to appeal against his sentence was dismissed.

[16] *R v HX* [2005] QCA 91 was an appeal against conviction and sentence. The appellant followed the complainant when she left a nightclub, after he had kissed her. He tried to kiss her again and she pushed him off and told him to stop it. When she arrived at her car, she was pushed in the upper back and fell into the car and felt the appellant crawling over the top of her. The appellant restrained the complainant and locked the driver's door from the inside. He took off her clothing and inserted his tongue into her vagina (which resulted in the first count of rape) and then put a finger into her vagina and then two fingers (which resulted in the second count of rape). The appellant was 27 years old and had no prior convictions. He was sentenced to imprisonment for three years for each count of rape to be served concurrently. That was held to be within the range of sentence appropriate for those offences and the circumstances and manner in which they were committed.

[17] The appellant in *R v Libke* [2006] QCA 242 was convicted after trial of one count of rape (involving digital penetration), two counts of unlawful carnal knowledge of an intellectually impaired person, one count of wilful and unlawful exposure of an intellectually impaired person to an indecent act and one count of unlawful and indecent dealing with an intellectually impaired person. The appellant had met the complainant, who was 18 years old and had a mild intellectual impairment, in a park. The appellant was 39 years old. On their second meeting, they were sitting on a bench in the park when the appellant put his hand in the complainant's shorts and put his finger in her vagina which constituted the offence of rape. The complainant then invited him to her home a couple of days later where the other offences were committed. For each of the offences of rape and unlawful carnal knowledge the appellant was originally sentenced to eight years' imprisonment. He was sentenced to a concurrent sentence of three years' imprisonment for each of the other offences. On appeal, a sentence of five years' imprisonment was substituted as the sentence for each of the rape and unlawful carnal knowledge offences. The sentence for the rape was fixed by taking into account the persistence of the appellant's conduct in taking advantage of the complainant and committing the other four offences.

[18] The respondent relied on *R v Dowden* [2010] QCA 125 on the basis that the applicant's offending fell into the category of a rape committed upon a stranger in a public place, although the respondent did acknowledge that *Dowden* involved rape by penile penetration and a greater degree of violence than the present case. In *Dowden*, the appellant was convicted after trial of one count of rape. He was originally sentenced to nine years' imprisonment that was reduced on appeal to eight years. The appellant was 19 years old at the time he committed the offence in 1998, but was 31 years old when sentenced. About six months prior to the commission of the offence, the appellant had completed a sentence of six months' imprisonment for property offences. After committing the offence, he served a further sentence of imprisonment of two years and six months for break and enter with intent. The complainant was 30 years old when the offence was committed. She left a nightclub to walk

home. She had a conversation with the appellant and continued on her way. The appellant followed her and she tried to get away from him, but he intercepted her and pulled her to the ground. The appellant told the complainant that he had a knife and held a cold object to her temple. He pulled her shirt up over her head and pulled down her jeans, made her roll over onto her hands and knees, and vaginally penetrated her. He asked her if she would call the police and she said she would not, as she was anxious to avoid further harm. Holmes JA referred at [35] to the aggravating features of that case as the attack being committed by the appellant against a stranger in a public place at night and the use of some form of weapon, although it was a relatively harmless one, and noted it was not accompanied by the significant degree of violence that was used in other cases such as *R v Basic* (2000) 115 A Crim R 456 and was not a protracted and repeated assault with no explicit threat of harm or of retribution.

**Was the sentence at "the bottom of the range"?**

[19] As was noted during the sentencing hearing, the range of sentences appropriate to the applicant's offending had to reflect the nature of the offence, in that the rape was committed by digital penetration. The observation was made by the Court of Appeal in *R v Colless* [2010] QCA 26 at [17]:

> "While the *Criminal Code* establishes the same maximum penalty, whether the rape be accomplished by penetration by the penis or digitally, it is reasonable to observe that, without additional aggravating features (weapons, extra brutality, threats of serious harm, premeditation, residual injury etc) a rape accomplished digitally may generally be seen as somewhat less grave than a rape accomplished by penile penetration. See *R v Wark* [2008] QCA 172. That is because it may be less invasive, would not carry a risk of pregnancy, and would ordinarily carry substantially reduced risk of infection."

[20] None of the additional aggravating features identified in that observation were present in the applicant's offence.

[21] As was also recognised by the sentencing judge, it was appropriate to fix the sentence for count 2 to reflect the overall criminality of the applicant in committing the three offences on 25 December 2008.

[22] By seeking to sentence the applicant for count 2 at "the bottom of the range" of the sentences that were appropriate to the applicant's offending and his circumstances, it was the sentencing judge's intention to give effect to the totality principle.

[23] The immediate practical consequence for the applicant of being charged with the offences that he committed on 25 December 2008 was that he went into custody on 7 January 2009 and served the balance remaining of about 13 months of the sentence of three years' imprisonment that had been imposed in August 2007. If he had not completed that sentence by the time he came to be sentenced for the subject offences, any sentence that was imposed for the subject offences would have been cumulative on his existing sentence: s 156A *Penalties and Sentences Act* 1992. Despite the mandatory requirement of that

provision, any sentencing for offences committed during a parole period must still take account of the overall effect of the sentences: *R v Shillingsworth* [2002] 1 Qd R 527 at [3], [26]. The same approach must apply to the sentencing of the applicant for the offences committed whilst on parole, after he completed serving the sentence in custody for which he had been on parole.

[24] The contention advanced on behalf of the applicant is that decisions such as *Viliafi* put the head sentence of six years' imprisonment for count 2 towards the top, rather than the bottom, of the range of appropriate sentence for the applicant's conduct. This is on the basis that, even allowing for the sentence on count 2 to reflect the applicant's overall criminality, the additional offending against the second complainant was one of a series of offences and was over in a short time without any physical harm caused to that complainant (largely due to her presence of mind). It is also argued that the head sentence of six years that immediately follows the imprisonment of about 13 months that was served in respect of the prior sentence is crushing for the applicant in the circumstances.

[25] A consideration of the comparable sentences set out above shows that none are directly comparable to the applicant's offending. *Filewood* was a less serious offence of rape by digital penetration. Although there was some similarity to the present case in the circumstances in which the rapes were committed in *HX*, the offender had no prior criminal history. *Viliafi* involved greater violence than the present case, a threat to kill and the use of a knife. Although *Libke* concerned a digital rape, the gravamen of the criminal offending was the taking advantage of the intellectually impaired complainant. *Dowden* is not truly comparable.

[26] The analysis of the cases does support the applicant's contention that the sentence of six years was not at the bottom of the range applicable to the applicant's offending and circumstances, but was at the top of the range. In any case, the effect of that sentence, even with the eligibility for parole date fixed after the applicant has served two years' imprisonment from the effective commencement date of the sentence of 14 February 2010 that immediately followed his imprisonment from 7 January 2009 did not sufficiently take into account the overall effect of the sentence for the applicant in a way that gave actual recognition to the totality principle.

[27] Whether the matter is analysed in terms that the sentencing judge did not impose a sentence in accordance with the approach he articulated in his sentencing remarks or in terms of the sentence being manifestly excessive in the circumstances, I have concluded that to give effect to the totality principle, in addition to the other considerations that were relevant to sentencing the applicant for the serious offences he committed, the sentence for count 2 should be reduced to five years with the eligibility for parole date fixed after serving one-third of the sentence from the effective commencement date of the sentence of 14 February 2010.

**Orders**

[28] I would therefore order:

1. The application for leave to appeal against sentence is granted.
2. The appeal is allowed.

3. The sentence imposed on count 2 of six years' imprisonment and the order fixing the applicant's parole eligibility date as 14 February 2012 are set aside.
4. In lieu, the applicant is sentenced on count 2 to five years' imprisonment and the date the applicant is eligible for parole is fixed at 14 October 2011.
5. The sentences imposed for count 1 and 3 and the pre-sentence custody declaration made on 16 March 2010 are confirmed.