SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBU* [2012] QCA 349
PARTIES:	**R** **v** **MBU** (applicant)
FILE NO/S:	CA No 157 of 2012 DC No 40 of 2011 DC No 41 of 2011 DC No 8 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Cairns
DELIVERED ON:	11 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2012
JUDGES:	Muir and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of rape, one count of deprivation of liberty, one count of stealing, one count of grievous bodily harm, one count of assault occasioning bodily harm and one count of assault with intent to rape – where applicant received a head sentence of eight years detention – where applicant aged between 15 and 16 years at the time of the offending – where applicant made limited expressions of remorse during police interview – where expressions of remorse significantly motivated by legal consequences of offending – where early plea of guilty entered – where applicant undertook educational and recreational activities in custody – where applicant submitted head sentence manifestly excessive – where applicant submitted learned sentencing judge erred in his application of s 227 *Youth Justice Act* 1992 by not finding the combination of mitigating circumstances to amount to "special circumstances" – whether sentence manifestly excessive

Youth Justice Act 1992 (Qld), s 227

R v Basic (2000) 115 A Crim R 456; [2000] QCA 155, cited
R v CAJ [2009] QCA 37, cited
R v DAU; ex parte A-G (Qld) [2009] QCA 244, distinguished
R v IC [2012] QCA 148, distinguished

COUNSEL: D R Kent for the applicant (pro bono)
S J Farnden for the respondent

SOLICITORS: No appearance for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA**: I agree that the application for leave to appeal against sentence should be refused for the reasons given by Daubney J.

[2] **GOTTERSON JA**: I agree with the order proposed by Daubney J and with the reasons given by his Honour.

[3] **DAUBNEY J:** On 15 June 2012 the applicant was sentenced in the Childrens Court at Cairns to the following terms of detention for having committed the following offences:

(a) Rape – eight years detention;

(b) Deprivation of liberty – one year detention;

(c) Stealing – six months detention;

(d) Grievous bodily harm – two years detention;

(e) Assault occasioning bodily harm – 18 months detention;

(f) Assault with intent to rape – three years detention.

It was ordered that all sentences be served concurrently, and further ordered that, in the absence of a contrary order, the applicant was to serve 70 per cent of the period of detention before release.

[4] The applicant had previously pleaded guilty to each of these counts. The sentencing hearing was adjourned to enable pre-sentence reports to be obtained. The applicant, who was born on 25 October 1994 was, clearly enough, a juvenile at the time of the offending and when sentenced. He now seeks leave to appeal against sentence.

Background

[5] The offences covered three sets of offending conduct.

10 April 2010

[6] The offences of rape and deprivation of liberty were committed in the early hours of 10 April 2010. At about 2.30 am, the female complainant left a hotel and began walking home. The applicant grabbed her by the hair and dragged her to the ground. He then pulled down her pants and pulled her shirt up over her face. He choked her, punched her a number of times to the face, and told her, "You'd better let me fuck you otherwise I'm going to murder you". He repeatedly told her "I'm going to kill you".

[7] The applicant used his body weight to hold the complainant on the ground and put his hand over her mouth to prevent her from screaming. He then forced his penis into her vagina, and moved it in and out of her vagina. The complainant continued to try to scream for help, but was prevented by the applicant holding his hand over her mouth. She was eventually able to scream out for help. Her scream was heard by people at the hotel who came to her assistance. The applicant immediately stopped raping her, and ran away. He was subsequently apprehended as a consequence of DNA testing on samples taken from the complainant and from a cap that the applicant was wearing at the time of the offending and which he had left behind at the scene.

[8] In the course of sentencing in respect of these particular offences, the learned sentencing judge said:

> "I have seen photographs of the injuries [the complainant] has sustained and it's obvious that she has been beaten about the face, her lips were badly swollen, and I have read her victim impact statement, and needless to say this was a terrifying incident for her, an Aboriginal mother who was merely minding her own business and going home and who was so viciously assaulted and raped by you, and it's clear from what she says that her life will never be the same."

28-29 October 2011

[9] Late in the evening of 28 October 2011, the applicant stole a bicycle.

[10] At about 6.30 am on 29 October 2011, the complainant in respect of the count of grievous bodily harm was out for a morning walk. The complainant was 75 years old. She walked past the applicant, who was sitting on a bicycle. After she had walked past him, the applicant grabbed her from behind, and put one of his hands over her mouth. The complainant screamed, "Help, please help, somebody help". She lost consciousness briefly. When she regained consciousness she was lying on the ground. The applicant punched her a number of times to the face while she was on the ground and kicked her in the back. The complainant screamed throughout the assault. After a period of time, the applicant stopped the assault and cycled away, leaving her on the ground. As a result of the assault, the complainant spent seven days in hospital, having sustained the following injuries:

- Soreness to the face;
- Cut to upper lip requiring four stitches;
- Fractures to cheekbones and nose;
- Bruising to the eyes.

[11] In his sentencing remarks in respect of these offences, the learned sentencing judge said:

> "The next set of offending occurred on the 28th and 29th of October 2011, just after your 16th birthday, and this involved a very elderly complainant who was minding her own business in a park. You had stolen a pushbike and you came across her in the park and you viciously and savagely beat her. I have seen the photographs of her injuries and it's quite chilling just to see how badly beaten up that elderly woman was, for no reason at all. She did nothing wrong. She was going about her own life and minding her own business and it's one of the nastiest attacks of that type that I have ever had the misfortune to see."

7 November 2010

[12] The third set of offences involved an attack by the applicant on a 19 year old female tourist. The attack occurred at about 1.45 am on 7 November 2010. The complainant had been out drinking with some friends, and left the group she was with to return to her accommodation. As she was walking down the street, she heard running footsteps behind her. She turned to see who was coming, and when she turned she was punched once to the face. This caused her to fall into bushes. The applicant then stood over her and punched her another six or seven times again to the face. The complainant began screaming, and the applicant said to her, "Shut up or I will kill you". The applicant then put his hands around her throat and began to strangle her. He pushed his thumb against the base of her throat. She told him that she could not breathe and he released his grip. She began to scream again, and the applicant then began to press his thumb against her throat again.

[13] The applicant then released his grip on her throat and rubbed his hand over her left breast, moving it down to her pants and then trying to push her pants down. The complainant said to the applicant that she had AIDS and that he would die too. He stopped touching her briefly, and she began to scream again. The applicant started to strangle her again, and said, "I have protection I don't care". The complainant's screams attracted the attention of some other people. The applicant was told to let the complainant go. The applicant then fled the scene.

[14] In respect of this offending, the learned sentencing judge said:

> "You decided you were going to have sex with [the complainant] and you then viciously beat her up. Her face, as shown in the photographs, is a complete and utter mess from where you savagely got stuck into her.
>
> You told her very bluntly in the course of that incident that you were going to "fuck" her. Fortunately, she was able to scream and, fortunately, some other people heard that and were able to come down and force you to run away. Had it not been for that, there seems little doubt that you were so single-minded that you would have gone ahead and proceeded with your intentions."

Further observations by the sentencing judge

[15] After describing the three incidents to which I have just referred, the learned sentencing judge said:

> "I have sentenced a lot of people for offending when a juvenile and I'm sad to say that yours is far and away the worst series of offending that I have had the misfortune of dealing with since I took up this position in Cairns, and when you consider some of the material that I've had to deal with, that is really saying something, and by no means ... is it anything to be proud of."

Pre-sentence reports

[16] The learned sentencing judge had the benefit of, and referred to, a number of pre-sentence reports, including a psychological report dated 29 May 2012 by Ms Dimity Smith, Senior Clinician (Psychologist), with the Griffith Youth Forensic Service and a report dated 25 April 2012 by Dr David Hartman, consultant psychiatrist.

[17] Ms Smith provided a lengthy and comprehensive report which set out details of the applicant's personal background, noting that the applicant came from a stable and caring family. He had, however, fallen in with a "gang" which engaged in multifarious antisocial behaviour. Ms Smith gave details of the applicant's psychosexual history and analysed the detail of the applicant's offending and his response to that offending. She also described the diagnostic tools she administered for the purposes of making a risk assessment. She concluded:

> "59. MBU is assessed as a high risk of sexual recidivism and is also assessed as a risk of future violence (sexual and non-sexual). MBU is diagnosed with *Conduct Disorder* and he holds antisocial attitudes, as well as specific beliefs and cognitions supporting male entitlement, the use of force within sexual acts and lack of consent within sexual behaviours. Limited supervision and accountability to adults, a highly antisocial peer group (gang affiliation), and access to vulnerable victims are likely to further increase his risk in community settings."

[18] Dr Hartman also described the applicant's personal background and his account of the offending conduct and his response to having committed the offences. Dr Hartman concluded that the applicant did not suffer from any mental illness, but at the time of the offending he would have met the criteria for an alcohol use disorder and a cannabis use disorder. Dr Hartman's conclusions included:

> "12.2 My understanding of the causation of MBU's offences is as follows. MBU had an immature but sociable personality and was vulnerable to peer influences including influences which validated antisocial behaviour such as risk taking, theft, physical expression of anger, displacement of anger onto vulnerable victims, and sexual objectification of women. His early exposure to pornography would have contributed to his developing an objectification of women as objects for sexual gratification. His binge drinking with peers created a context in which the disinhibiting effects of alcohol allowed him to opportunistically act out his sexual impulses (offences on 10.4.2010 and 27.11.2010) and violent impulses (offence on 29.10.2010).
>
> 12.3 MBU's stable family background and sound relationships with his parents probably underpin his inherent sociability, respect for authority and eagerness to please authority figures. His regret for his action seems to be motivated primarily by the legal consequences, and I was not convinced that he has highly developed capacity for remorse and empathy. Conversely I did think he was socially skilled and able to manage the way he is seen by people around him. These qualities point toward possible antisocial traits but on the basis of the evidence available to me, he cannot be diagnosed as having an 'antisocial' or 'psychopathic' personality."

[19] Dr Hartman gave the following risk assessment:

> "13. Conclusion: Risk Assessment
>
> 13.1 In considering the risk of further violent and sexual offences I am taking into account the serious nature of his offences

> which involved a gratuitous level of violence and which (despite his assertion that the offences were impulsive) had a consistent pattern which suggests a degree of prior intent and planning.
>
> 13.2 I am also taking into account that these incidents took place over a relatively brief period of six months, that he does not show a pattern of pervasive violent behaviour, he has shown good behaviour over an extended period in remand in Cleveland Youth Detention Centre, he has engaged and benefited from therapeutic interventions while in detention, he has demonstrated a lack of denial or minimization of his offences, and he has a declared intention to not re-offend.
>
> 13.3 Furthermore I take into account that his offences were committed in a very specific context of intoxication with alcohol.
>
> 13.4 My assessment therefore is that MBU presents a moderate risk of re-offending after release, and that the risk of offending depends on whether he can abstain from binge-drinking, and whether he can engage in offence-specific therapy provided by a specialized service.
>
> 13.5 It should be recognized that adolescents are in a state of rapid change and development, are very susceptible to environmental influences and often respond very well to therapeutic interventions (Vitacco 2009). Therefore this risk assessment should be regarded as valid only for a period of six months and should be subject to periodic review."

Other matters referred to by the sentencing judge

[20] The learned sentencing judge also referred to the victim impact statements that had been provided in respect of the first two sets of incidents. No victim impact statement had been provided by the complainant in the third incident. His Honour referred to the pre-sentence reports, noting in particular the observations made by Ms Smith. The learned sentencing judge expressly referred to the necessity to have regard to issues of both general and personal deterrence. His Honour said:

> "There are also issues that arise in your case about the protection of the community because of the way you have behaved, and because of the risk that you do pose, and that is something that I also take into account on sentence. I take into account your age, and it is sad to see someone so young in such a terribly serious situation. I take into account your pleas of guilty. They are consistent to some extent with remorse, although it was quite obvious that your remorse in this case was limited. Ms Smith deals with that and seemed to think that the greatest aspect of your remorse was the fact that you were going to be punished."

[21] His Honour described the process of reasoning for imposing a head sentence of eight years detention as follows:

> "What I'm going to do is impose a period of detention of eight years on the most serious of the charges and lesser periods on all of the

> other matters, which means that the effective sentence that I impose today will be eight years detention.
>
> As to how I arrived at that, it is useful to put it on the record in case that becomes relevant. The first rape with the violence was quite a vicious offence and had I been dealing with that in isolation I would've sentenced you at least to four years detention.
>
> The offences involving the elderly lady were particularly vicious, although there were not necessarily any sexual overtones there. They would've attracted a sentence of at least two years detention, and similarly, there would've been a very lengthy period on the final one of assault with intent to commit rape. That would've attracted a sentence of at least three years.
>
> I have to weigh up, however, what I believe would be a reasonable sentence overall, and after using those assessments as a guide I have settled on eight years detention as the appropriate period of detention in your case."

[22] His Honour also noted the effect of s 227 of the *Youth Justice Act* 1992 (Qld), saying:

> "You will be serving 70 per cent of any sentence that I do impose today. That is the normal effect of any sentence on someone who is sentenced as a child. There is provision under section 227 of the Youth Justice Act for the Court to reduce that to 50 per cent in special circumstances, but there is no evidence whatsoever of any special circumstances in your case, and in fairness to your counsel, none of have been advanced [sic]."

Applicant's submissions

[23] Counsel for the applicant submitted that the head sentence of eight years was manifestly excessive. It was submitted that the following factors would lead to that conclusion:

(a) The applicant's youth – he was 15.5 years old at the time of the first offending and 16 years old at the time of the later offences;

(b) He made admissions in a police interview on 2 November 2010 which included statements of remorse;

(c) He entered early pleas of guilty;

(d) During the time he was remanded in custody (since 29 November 2010) the applicant undertook numerous educational and recreational activities and programs.

[24] As to the first of these matters, the learned sentencing judge was clearly cognisant of the applicant's age at the time of the offending. Indeed, in the course of sentencing he noted that had he been sentencing the applicant as a adult, the sentences imposed would be far more severe than those which he imposed on the applicant.[1]

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1 Appeal Record 77.10.

[25] As to the second point, it is correct that the applicant made limited expressions of remorse during a police interview conducted on 2 November 2010. There are however two things to be said in respect of that statement of remorse. The first is that it is clear from the expert reports that, in making those expressions of remorse, the applicant was significantly motivated by the legal consequences of his offending conduct. The second is that any expression of remorse on 2 November 2010 was short-lived – within a matter of weeks, the applicant committed the third tranche of offences.

[26] The third and fourth matters relied on by Counsel for the applicant are matters which are appropriate to be taken into account in mitigation of the penalty imposed. Having regard to the sentencing remarks of the learned sentencing judge, there is no suggestion that he was not properly cognisant of those matters when passing sentence.

[27] Most of the cases referred to in the course of argument by Counsel for the applicant were not at all comparable with the circumstances of the present offending, as they did not involve rapes of penile penetration, nor did they involve savage attacks such as characterised the applicant's offending in this case. The cases referred to by the applicant in that regard were *R v DAU; ex parte A-G (Qld)*[2] and *R v IC*[3].

[28] Of much more assistance for present purposes is reference to *R v CAJ*.[4] In that case, the applicant was convicted on his own plea of guilty, including one count of deprivation of liberty and three counts of rape which had occurred in 2003, and three counts of rape which had occurred in 2007. Relevantly, the applicant in that case was sentenced to ten years for each of the rape offences committed in 2007. The 2003 offending occurred when the applicant was 15 years old. It involved one incident involving two counts of penile penetration and one count of penetrating her with a bottle. The applicant had threatened to kill the complainant if she told anyone of the offending. The 2007 rapes were committed against two girls, at a time when the applicant was 19 years old. The complainants were aged 15 and 13. The applicant's conduct involved threats of violence, threats to kill, and penile penetration of the vagina and the anus. A third rape offence was committed some three weeks later on a 13 year old child.

[29] Fraser JA, with whom the other members of the Court agreed, noted that the sentence of ten years imposed on the applicant in that case was at the top end of the range of seven to ten years said in *R v Basic*[5] to be the appropriate range for a rape offence which was not in the most violent category, where the complainant's physical injuries were not serious, no weapon was used, and there was an early plea of guilty. His Honour continued:

> "[22] The applicant was of course much younger than Basic. That is a significant point of distinction, and the issues of the applicant's youthfulness and rehabilitation were here important ones for the sentencing judge. But the applicant's offending itself was notably more serious and persistent than the offending in Basic, involving as it did repeated offences in the form of the brutal anal and vaginal rapes of a 15 year old

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2 [2009] QCA 244.
3 [2012] QCA 148.
4 [2009] QCA 37.
5 [2000] QCA 155.

> girl and his subsequent digital rape of a girl as young as 13 years old."

[30] The ten year head sentence in that case was not disturbed.

[31] In the present case, it was appropriate to moderate the sentence imposed, having regard to the applicant's youth, pleas of guilty and efforts at rehabilitation. The fact remained, however, that his offending conduct comprised a series of brutal attacks on women who were seemingly chosen at random and solely for the purpose of satisfying the applicant's own desires. He inflicted serious injuries on each of these women. His conduct warranted serious punishment. I do not consider that the sentence imposed by the learned sentencing judge was manifestly excessive in all the circumstances.

[32] The applicant's further submission was that the sentence was excessive because the learned sentencing judge did not order a minimum period of detention of less than 70 per cent. Section 227 of the *Youth Justice Act* provides:

> "**227 Release of child after service of period of detention**
>
> (1) Unless a court makes an order under subsection (2), a child sentenced to serve a period of detention must be released from detention after serving 70% of the period of detention.
>
> (2) A court may order a child to be released from detention after serving 50% or more, and less than 70%, of a period of detention if it considers that there are special circumstances, for example to ensure parity of sentence with that imposed on a person involved in the same or related offence.
>
> (3) If the child is entitled under section 218 to have a period of custody pending the proceeding (the ***custody period***) treated as detention on sentence, the period before the child is released under this section must be reduced by the custody period.
>
> Example –
>
> C is sentenced to 10 weeks detention. C spent 2 weeks on remand before sentence. The chief executive must make a supervised release order releasing the child 5 weeks after sentence, which is 70% of 10 weeks with a further reduction of 2 weeks."

[33] Before this Court it was argued that the learned sentencing judge "undervalued" the combination of mitigating factors, which he ought have viewed as "special circumstances" for the purpose of s 227(2). It is, however, not surprising that the learned sentencing judge did not consider that there were special circumstances warranting the exercise of the discretion under s 227(2). Not only were no special circumstances urged on him, counsel for the applicant below expressly disclaimed reliance on that subsection. It is sufficient to refer to the following exchange between counsel and his Honour:

> "Your Honour, we're not pushing for anything other than a 70 per cent to be served. There doesn't appear to be -----
>
> HIS HONOUR: No. There are no special circumstances, I agree with that."

[34] Before this Court, Counsel for the applicant pointed only to the same matters on which he had relied to advance the argument that the head sentence was manifestly excessive. No other factors were relied on as constituting "special circumstances".

[35] It is clear that the learned sentencing judge committed no error in his application of s 227 of the *Youth Justice Act*.

Conclusion

[36] The application for leave to appeal against sentence should be refused.