SUPREME COURT OF QUEENSLAND

CITATION:	*R v GAR* [2014] QCA 30
PARTIES:	**R** **v** **GAR** (applicant)
FILE NO/S:	CA No 240 of 2013 DC No 441 of 2012 DC No 272 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	28 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2014
JUDGES:	Muir and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal against sentence is granted.** **2. The appeal be allowed.** **3. The sentences imposed on 4 September 2013 in respect of counts 5, 6, 7 and 8 on the indictment be set aside and that for each such offence the applicant be sentenced to 10 years imprisonment.** **4. Each such offence be declared a serious violent offence.** **5. The other sentences imposed on 4 September 2013 be affirmed and that all sentences be served concurrently except for the summary offence referred to as Charge 9 on the Court order sheet and described as "the Bail Act offence" in the sentencing remarks, the term of which remains cumulative.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of two counts of attempted indecent treatment of a child under 16, one count of unlawfully exposing a child under 16 to an

indecent act, one count of assault occasioning bodily harm and four counts of rape – where the applicant pleaded not guilty – where the applicant was sentenced to 12 years imprisonment for each of the rape offences and to five years imprisonment for each of the other offences – where a serious violent offence declaration was made – where the applicant was also sentenced for 20 summary offences – where all of the sentences imposed, other than a one month term of imprisonment imposed for a *Bail Act* 1980 (Qld) offence, were ordered to be served concurrently – where the applicant was 19 years of age at the time of offending – where the applicant had an extensive criminal history – where the applicant's victim was his 15 year old aunty – where the applicant penetrated his victim's vagina digitally before having vaginal and anal intercourse with her – where the assaults where accompanied by actual and threatened violence – where the applicant demonstrated no remorse – where the applicant had a troubled childhood – where the applicant was a heavy user of drugs and alcohol – whether in all the circumstances the sentence was manifestly excessive

Bail Act 1980 (Qld)

Bugmy v The Queen (2013) 87 ALJR 1022; [2013] HCA 37, considered
R v Basic (2000) 115 A Crim R 456; [2000] QCA 155, followed
R v Benjamin (2012) 224 A Crim R 40; [2012] QCA 188, distinguished
R v Bolton [2005] QCA 335, considered
R v Dowden [2010] QCA 125, distinguished
R v Flew [2008] QCA 290, considered
R v George (unreported, Court of Criminal Appeal, Qld, No 26 of 1991, 13 June 1991), considered
R v Kahu [2006] QCA 413, considered
R v Mallie [2000] QCA 188, considered
R v O'Brien [1998] QCA 80, considered
R v Pini (unreported, Court of Criminal Appeal, Qld, No 67, 196 of 1981, 21 September 1981), considered
R v Purcell [2010] QCA 285, distinguished
R v Q [1994] QCA 390, considered
R v Soper [1994] QCA 254, considered
R v Sorby [1995] QCA 251, considered
R v Wark [2008] QCA 172, considered

COUNSEL: The applicant appeared on his own behalf
V A Loury for the respondent

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

[1] **MUIR JA:** The applicant was convicted after a trial in the District Court at Townsville of two counts of attempted indecent treatment of a child under 16 (counts 1 and 3), one count of unlawfully exposing a child under 16 to an indecent act (count 2), one count of assault occasioning bodily harm (count 4) and four counts of rape (counts 5, 6, 7 and 8). He was sentenced on 4 September 2013 to 12 years imprisonment for each of the rape offences and to five years imprisonment for each of the other offences on the indictment.

[2] The applicant was also sentenced for 20 summary offences including; two offences of assaulting and/or obstructing police, driving under the influence of alcohol, driving without a licence, driving an unregistered vehicle, stealing, breaking and entering and breach of a bail undertaking. All of the sentences imposed, other than a one month term of imprisonment imposed for the *Bail Act* 1980 (Qld) offence, were ordered to be served concurrently.

[3] The applicant seeks leave to appeal against the sentences on the grounds that they are manifestly excessive.

[4] The applicant was 19 years of age at the time of offending. He was then subject to a sentence of three months imprisonment wholly suspended for 12 months imposed for each of two assaults occasioning bodily harm perpetrated on the applicant's then girlfriend and her female friend. On an occasion on which the applicant's girlfriend refused to go home with him, he forced her to the ground and punched and kicked her in the head and body. He was pulled away by bystanders and the two girls fled. However, they were chased and caught by the applicant who punched the other girl on the face and body as she lay on the ground.

[5] The applicant had an extensive criminal history which commenced with a conviction in the Children's Court on 17 May 2005 for entering a dwelling and committing an indictable offence. The applicant's many convictions, whilst a minor, demonstrate a disregard of society's laws and conventions. They include convictions for; unlawful use of a motor vehicle, wilful damage to police property, committing an indecent act in a public place, assaulting or obstructing police officers and failure to appear in accordance with undertakings.

[6] The applicant's victim in this matter was his 15 year old aunty. On 15 and 16 August 2011, the applicant was a guest in the complainant's mother's house. After his attempts to secure another sexual companion were thwarted, his interests in that regard fixed on the complainant. He inveigled her into accompanying him on a walk late on the evening of 15 August or early in the morning of 16 August, took her to the verandah of a nearby school and assaulted her. He attempted to have her fellate him, pushed her to the ground, lay on top of her and bit her on the cheek.

[7] Despite the complainant's evident distress and her pleas to be left alone, he penetrated her vagina digitally before having vaginal and anal intercourse and then penetrating her again vaginally. The assaults, which were painful, were accompanied by actual and threatened violence. The applicant threatened to bash her head in and also to "punch [her] out" if she did not stop moving. The complainant sustained a small tear in the posterior fourchette and two tears to the anus. Fluid was weeping from the tears when the complainant was medically examined at around 4.00 am on 16 August.

[8] The sentencing judge found that the offending had a traumatic effect on the complainant. He also found that the applicant had demonstrated no remorse.

[9] Counsel for the respondent referred the Court to *R v Benjamin*[1] and *R v Purcell*.[2]

[10] In *Purcell*, a sentence of 12 years imprisonment imposed after a trial on the 28 year old offender for the rape of the 36 year old complainant was set aside and a sentence of 10 years imprisonment was substituted. The intoxicated complainant was accosted in the street at approximately 7.00 pm, dragged into a park and raped. On each occasion on which she called out for help she was punched in the face. She sustained bruising and swelling to her right jaw, bruising to her stomach, right elbow and right wrist, and tenderness on a shoulder and right rib area. The offender had a substantial criminal history which included convictions for a number of offences of violence and for an offence of procuring a child under the age of 12 to commit an indecent act.

[11] The complainant in *Purcell* was subjected to significantly greater violence than the applicant's victim but *Purcell* and his victim were much older than the applicant and his victim.

[12] In his reasons in *Purcell*, with which the other members of the Court agreed, Cullinane J referred to *R v Dowden*[3] and *R v Kahu*.[4]

[13] In *Dowden*, the 19 year old offender, who was 31 when sentenced after a trial, followed the 30 year old complainant into the yard of a house where she had gone in an attempt to evade him. He grabbed her around the waist and pushed her to the ground, telling her that he had a knife. She felt a cold object against her temple which did not feel sharp when she grabbed it. She was then raped. The complainant's physical injuries consisted of minor scratches.

[14] Holmes JA, the other members of the Court agreeing, noted that; the offender's weapon was relatively harmless, the assault was not protracted or accompanied by repeated or protracted violence, the degree of violence was less than that employed in cases considered in *R v Basic*,[5] there were no explicit threats of harm or retribution for complaint to authorities and the offender was only 19 at the time of offending.

[15] Dowden's sentence of nine years imprisonment imposed after a trial was reduced to eight years without a serious violent offence declaration. The offender was the same age as the applicant and the degree of violence was not dissimilar but the victim in *Dowden* was much older and there was no familial relationship between the victim and the perpetrator. Even having regard to these differences, *Dowden* does not support the subject sentences.

[16] In *Kahu*, a sentence of eight and a half years ordered to be served cumulatively with the four month balance of a suspended sentence imposed on the 20 year old offender for the rape of a 15 year old girl was undisturbed on appeal. The offender had vaginal and anal intercourse with his victim and forced her to fellate him.

[17] The question for the Court in *Kahu*, of course, was not whether the appropriate sentence had been imposed but whether the sentence imposed was manifestly excessive. The application for leave to appeal against the sentence was heard

---

1 (2012) 224 A Crim R 40.
2 [2010] QCA 285.
3 [2010] QCA 125.
4 [2006] QCA 413.
5 (2000) 115 A Crim R 456.

together with an appeal against conviction. No submissions were made in support of the application for leave to appeal. Consequently, the sentence imposed in *Kahu*, whilst favouring the applicant's argument, offers very limited guidance for present purposes.

[18] In *Benjamin*, a sentence of nine years imprisonment was substituted for a sentence of 11 years imprisonment imposed, after an early guilty plea, on the 25 year old offender, who had been imprisoned previously for offences, including breach of a domestic violence order and common assault. The complainant, a 19 year old student, was jogging in the evening when hit from behind by the offender, knocked to the ground and raped. Unconscious through most of her ordeal, she sustained severe swelling to cheekbones, a bleeding nose, a split lip, abrasions to her hips, general soreness and more than one wound that required suturing.

[19] The sentencing judge remarked that the offender's criminal history was not a matter of great significance and noted his good employment history.

[20] *Benjamin* also provides little support for the subject sentences. The degree of violence was greater in *Benjamin* but was less protracted and was unaccompanied by threats of violence. Nor was it apparent to Benjamin, as it was to the appellant, that his victim was in a distressed state and suffering pain. The young age of the subject complainant, her familial relationship with the applicant, the number of rapes and the fact that penetration was both penile and digital, as well as both vaginal and anal, increased the gravity of the applicant's offending beyond that in *Benjamin*. On the other hand, the applicant was appreciably younger than Benjamin at relevant times.

[21] In *Benjamin*, Henry J, with whose reasons the other members of the Court agreed, discerned in the authorities he reviewed a sentencing range of seven to 10 years for offending in which the violence was no greater than that necessary to enable the offender to achieve his purpose and a range of 10 to 14 years where significant further violence was involved. Henry J referred to cases including *R v Mallie*,[6] *R v Bolton*,[7] *R v Wark*[8] and *R v Flew*,[9] in which sentences for rape had been upheld or imposed on appeal of 10 years, 10 years, 12 years and 10 and a half years respectively. There were guilty pleas in all these cases and the perpetrators had all used violence greatly in excess of that employed by the applicant. A knife was used in *Bolton* and *Flew*.

[22] Henry J referred to the following observation of Keane JA in *Kahu*:[10]

> "In *R v Basic*, McMurdo P, with whom McPherson JA and Mackenzie J agreed, reviewed the decisions of this Court relating to the range of sentences for the rape of a young woman alone in a public place **where there has not been a brutal bashing of the victim**, and where the offender had no like prior convictions. This review of the authorities demonstrated that the range is between seven and 10 years where the offender has pleaded guilty." (emphasis added)

---

6 [2000] QCA 188.
7 [2005] QCA 335.
8 [2008] QCA 172.
9 [2008] QCA 290.
10 *R v Benjamin* (2012) 224 A Crim R 40 at [57].

[23] Williams JA agreed with the reasons of Keane JA. Mackenzie JA stated that the "sentence of eight and a half years … is consistent with the analysis of sentences for this category of rape in *R v Basic*".[11]

[24] The offender in *Basic* was 31 years of age at the time of offending, he had previous convictions for property offences, one for assault and another for trafficking heroin. He grabbed his 19 year old victim from behind early one morning, threatened to hurt her unless she was quiet and dragged her into bushland where he digitally penetrated her vagina, penetrated her anus with his penis causing pain and ejaculated into her. He threatened her with retribution if she complained to authorities. The complainant was severely affected by the incident in her personal relationships and lifestyle. The offender was sentenced to eight years imprisonment after an early guilty plea and a serious violent offence declaration was made. McMurdo P, McPherson JA and Mackenzie J agreeing, concluded that the sentences imposed in; *R v Soper*[12] (11 years imprisonment), *R v Pini*[13] (14 years imprisonment), *R v George*,[14] *R v Sorby*,[15] *R v Q*[16] and *R v O'Brien*[17] demonstrated that the sentence imposed was within the appropriate range of seven to 10 years.

[25] In order to understand the nature of the offending in respect of which a sentence of seven to 10 years was regarded as appropriate, it is necessary to have regard to the comparable cases reviewed by McMurdo P.

[26] *Pini* involved two applications for leave to appeal against sentence. It is only the unsuccessful application in respect of a sentence of 14 years imprisonment imposed after a plea of guilty entered after the commencement of the trial that is relevant for present purposes. The offender raped his victim twice, sodomised her and subjected her to "revolting indignities". She was hospitalised for eight days and required surgery.

[27] A sentence of 11 years imprisonment imposed for rape after a plea of guilty in *Soper* was undisturbed on appeal. The 22 year old offender had a lengthy criminal history which included a conviction for carnal knowledge against the order of nature. The complainant, a 17 year old school girl, was raped in a caravan park shower block, succumbing to the offender after he threatened to kill her if she resisted. He also forced her to fellate him.

[28] The 18 year old offender in *George*, who pleaded guilty and who had a minor criminal history but no previous convictions for sexual offences, succeeded in having his sentence of 11 years imprisonment reduced on appeal to nine years. He raped and sodomised a 27 year old Aboriginal virgin in an isolated area after striking her with a large stone and hitting her on the head with his fist. The victim's shoulder was dislocated and she suffered other relatively minor injuries.

[29] In *Sorby*, the 27 year old offender was sentenced after a trial to nine years imprisonment for raping and sodomising the complainant, whom he had met at a party. The attack caused the victim intense pain. She suffered an injury to her lip,

---

11 *R v Kahu* [2006] QCA 413 at [52].
12 [1994] QCA 254.
13 (unreported, Court of Criminal Appeal, Qld, No 67, 196 of 1981, 21 September 1981).
14 (unreported, Court of Criminal Appeal, Qld, No 26 of 1991, 13 June 1991).
15 [1995] QCA 251.
16 [1994] QCA 390.
17 [1998] QCA 80.

scratches and bruises on her leg and back as well as swollen and tender labia and anal tissues. In giving reasons for dismissing the application for leave to appeal, Ambrose J remarked that "it may well have been open to the sentencing Judge to impose a heavier sentence".[18]

[30] The sentence of nine years imprisonment imposed on the 23 year old offender in *Q* after a plea of guilty was undisturbed on appeal, except to the extent that it was recommended that the offender have parole after three and half years. The offender had a good work history, no previous convictions and demonstrated remorse. The complainant was the sister of the offender's fiancé with whom the offender had a dispute. When the victim, who was a virgin, arrived home from school, the offender terrorised her, raped her and threatened to kill her. She was emotionally disturbed by the rape.

[31] In *O'Brien*, the 28 year old offender was sentenced to 11 years imprisonment after a plea of guilty for the rape of a 33 year old woman whom the offender dragged from a park into a toilet block, where he bashed her head on the ground and punched her a number of times before taking her to a gully where he raped her. The offender had a prior conviction for a sexual offence committed some years before. The sentence was interfered with on appeal only to the extent of the addition of a recommendation for release after four years.

[32] In my view, the sentences of 12 years imprisonment imposed on the applicant, carrying as they do the consequences of serious violent offence declarations, are very severe notwithstanding the age of the complainant and the other matters which added to the gravity of the offending. The applicant had a troubled childhood in Cherbourg and became a heavy user of drugs and alcohol at an early age and was still quite young at the time of his offending. Considerations such as those justified some moderation of the sentence despite the applicant's criminal history.

[33] The above analysis shows that sentences for rape do not tend to exceed 10 or 11 years unless accompanied by substantial violence. Where the violence is not substantial and there is a timely guilty plea, a sentence of less than 10 years is the norm. No rule of thumb, of course, can be applied. The circumstances of each case must be addressed and here the age of the victim and the familial relationship are significant factors.

[34] In his submissions on the sentencing hearing, the applicant's counsel informed the sentencing judge that the applicant: grew up in Cherbourg; was given, at the age of five, by his mother to his grandmother to look after; has had a "lack of mother and father presence"; has had very little direction in his life; commenced drinking at 13 years of age; sniffed volatile substances for about a year; has been a heavy user of marijuana since he was 13; was a witness to violence and domestic violence between other family members; and has three children.

[35] The prosecutor did not challenge any of these assertions and the sentencing judge did not intimate that he would not accept their accuracy. They were thus relevant to the exercise of the sentencing discretion.[19] The above analysis of the comparable authorities does not support the subject sentences when regard is had, in particular, to the matters just mentioned, the appellant's age and the relatively limited degree

---

18 *R v Sorby* [1995] QCA 251 at 6.

19 *Bugmy v The Queen* (2013) 87 ALJR 1022 at [38].

of violence. I conclude that the sentence was manifestly excessive. The exercise of the sentencing discretion thus miscarried and it is now appropriate that this Court re-exercise it.

[36] For the reasons given above, I would grant leave to appeal and order that:

1. Leave to appeal against sentence is granted.

2. The appeal be allowed.

3. The sentences imposed on 4 September 2013 in respect of counts 5, 6, 7 and 8 on the indictment be set aside and that for each such offence the applicant be sentenced to 10 years imprisonment.

4. Each such offence be declared a serious violent offence.

5. The other sentences imposed on 4 September 2013 be affirmed and that all sentences be served concurrently except for the summary offence referred to as Charge 9 on the Court order sheet and described as "the *Bail Act* offence" in the sentencing remarks, the term of which remains cumulative.

[37] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour.

[38] **MORRISON JA:** I have had the advantage of reading the reasons of Muir JA and agree with his Honour and the orders he proposes.