SUPREME COURT OF QUEENSLAND

CITATION:	*R v Buchanan* [2016] QCA 33
PARTIES:	**R** **v** **BUCHANAN, Patrick Ernest** (applicant)
FILE NO/S:	CA No 267 of 2014 CA No 299 of 2014 DC No 272 of 2014 DC No 390 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction) Sentence Application
ORIGINATING COURT:	District Court at Cairns – Date of Conviction & Sentence: 8 September 2014
DELIVERED ON:	23 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	30 September 2015
JUDGES:	Margaret McMurdo P and Morrison JA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for an extension of time within which to appeal against conviction is refused.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where the applicant pleaded guilty and was sentenced to four years imprisonment for burglary, three years imprisonment for unlawful wounding, 13 years imprisonment for rape, and one month's imprisonment for two summary offences of public nuisance and obstructing a police officer – where the matter proceeded by way of full hand-up committal – where the application for an extension of time was filed 12 days late – where the reason advanced was that the applicant was ignorant of what he had to do – where the applicant seeks leave to withdraw guilty plea he entered – where the proposed application to withdraw the plea of guilty confronts overwhelming difficulties – whether the application for an extension of time should be granted

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty and was sentenced to four years imprisonment for burglary, three years imprisonment for unlawful wounding, 13 years imprisonment for rape, and one month's imprisonment for two summary offences of public nuisance and obstructing a police officer – where the applicant entered the complainant's house while she was reading on the verandah – where the applicant confronted the complainant with a rock in his hand – where the applicant demanded the complainant submit to various sexual acts and when she refused he hit her with the rock three times on the head – where the complainant fought back and pushed the applicant through a window, smashing the glass – where the applicant used a shard of glass to inflict a severe wound on the complainant's forearm, which was bleeding profusely – where the applicant ignored the complainant's pleas to stop so she could go to a hospital – where the applicant forced the complainant to submit to sexual intercourse, threatening to kill her – where the applicant left the premises and told passers-by that he had "just raped someone" – where this was a particularly vicious and prolonged attack, on a vulnerable but courageous woman – where the applicant showed not the slightest consideration for the complainant's welfare, in the face of a serious wound, and blows to her head, let alone the indignity of being forced into non-consensual acts – where usually the plea of guilty is taken to indicate some remorse and cooperation with authorities, however that is difficult to accept here – where the applicant's explanation to this Court that he was tricked into pleading guilty substantially destroy the mitigating aspect of the plea – where comparable cases reveals that where rape is accompanied by serious violence or prolonged criminality, or both, sentences at the upper end of the 10 to 14 year range may be warranted – whether the sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 159A

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
R v Benjamin (2012) 224 A Crim R 40; [2012] QCA 188, considered
R v DAQ [2008] QCA 75, cited
R v EJ [2009] QCA 378, followed
R v Gadaloff [1999] QCA 286, cited
R v Newman (2007) 172 A Crim R 171; [2007] QCA 198, considered
R v Newton [2008] QCA 248, considered
R v Price [2004] QCA 10, considered
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited

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

[1] **MARGARET McMURDO P:** I agree with Morrison JA's reasons for refusing both this application for an extension of time within which to appeal against conviction and this application for leave to appeal against sentence.

[2] **MORRISON JA:** Some time about midday on 10 November 2013 the applicant (**Buchanan**) entered the house of T while she was reading on the verandah. He confronted her, holding a rock in his hand. When she resisted his demands for various sexual acts he hit her with the rock, three times on the head. T fought back, pushing him through a lounge-room window, smashing the glass. Buchanan used a shard of glass to inflict a severe wound on her forearm, which was bleeding profusely. Ignoring her pleas to stop so that she could go to the hospital, Buchanan forced her to submit to sexual intercourse, threatening to kill her. She eventually escaped.

[3] On 8 September 2014 Buchanan pleaded guilty to several charges arising out of those events, and was sentenced as follows:

(a) Count 1 – burglary – 4 years' imprisonment;

(b) Count 2 – unlawful wounding – 3 years' imprisonment;

(c) Count 3 – rape – 13 years' imprisonment;

(d) on Counts 1-3, a period of 240 days of pre-sentence custody was declared as time served under s 159A of the *Penalties and Sentences Act* 1992 (Qld).

[4] In addition there were two summary offences to which Buchanan pleaded guilty, and was sentenced. One was public nuisance and the other obstructing a police officer. Each was committed on 9 September 2013. The sentence was one month's imprisonment, with 239 days pre-sentence custody declared.

[5] Buchanan seeks to challenge the sentences imposed, advancing the single ground that they were manifestly excessive in the circumstances.[1]

[6] Buchanan also seeks an extension of time to appeal against his conviction on all counts. That application was filed on 18 November 2014, about six weeks out of time. The grounds for the proposed appeal against conviction are that:

(a) he wishes to withdraw his plea of guilty, so that he can plead not guilty and contest the charges at a trial; and

(b) "[He] feel[s] as though [he] was misled by [his] former legal representative regarding the nature of the DNA evidence against [him]".

[7] The issues raised by his application for an extension of time are: (i) whether there is any good reason shown to account for the delay, and (ii) whether it is in the interests of justice to grant the extension.

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1 That application was filed within the relevant time limit.

Circumstances of the offences

[8] A short synopsis of the events is in paragraph [2] above. Consideration of both applications requires greater detail to be explored. The following is largely taken from a schedule of facts tendered by consent at the sentencing hearing.[2]

[9] Buchanan was aged 30 at the time of the offence and T was also aged 30. They had not previously met.

[10] T's house was somewhat isolated. At midday T was reading on a couch on her balcony. The balcony was exposed, slightly elevated and without rails. T was dressed in a nightie and underwear. She heard rustling from inside the house and went to investigate. She did not see anyone, but identified that the front screen was open and two beers were missing from the fridge.[3] The inference was that Buchanan entered the home, took the beers and drank them while T continued to read on the balcony.[4]

[11] Some time later Buchanan appeared on the balcony. T told him to leave but he did not. He approached her and stood in front of her. T could see that he had a rock, approximately the size of his palm, in his hand. Buchanan was mumbling and at first T could not understand what he said. He then said "spread your legs open". Immediately after that he used his left hand to push on her thighs, forcefully spreading her legs.

[12] T said "no, please no", and Buchanan replied "if you don't, I'm gonna kill you". He held out the rock in a threatening manner, and repeated the threats to kill her. T repeatedly pleaded with him to stop.

[13] Buchanan said "will you suck it" and grabbed his penis on the outside of his shorts. T refused, and kneed him in the genitals. Immediately after that Buchanan struck her, twice over the left ear, with the rock. He then struck a further blow to the top of the head.

[14] T was staggered by the blows, but managed to pick up a small coffee table. She struck out at Buchanan with the table, but he grabbed it from her before he could be struck. Buchanan then struck T on the head with the coffee table, knocking her backwards, and causing her to fall to the ground.

[15] T regained her feet and charged at Buchanan, pushing him through the lounge-room window, and smashing the glass. She then tried to push him back into the glass, but couldn't do so. Buchanan pushed her away by pushing both her forearms with his hands. He had a shard of glass from the broken window which caused her a significant wound to her forearm.[5]

[16] T was bleeding profusely. Again she asked him to stop because of the severity of the wound and so she could go to hospital. Buchanan responded by saying "are you going to do what I want now". Fearful and injured, and unable to resist him through her previous attempts, T acquiesced. She lay down on the balcony and he took her underpants off. He made her pull his pants down and his penis was exposed.

[17] Buchanan initially tried to penetrate her vagina but was unsuccessful. Therefore he demanded that T do it. She did so, placing his penis inside her vagina. He then pushed his penis in and out of her vagina. On four or five occasions his penis fell out, and T was made to put it back in. Buchanan did not use a condom.

[18] T repeated her pleas for him to stop. She feared she was losing a lot of blood. She screamed for help, and as she did so, Buchanan threated to kill her.

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2 AB 47-49. Some facts have been added from the prosecutor's recitation of the events.

3 The beer cans were later found beside the house.

4 This was the basis of count 1, burglary.

5 This was the basis of count 2, unlawful wounding.

[19] After a period of penetration on the ground Buchanan stood up. He took off all his clothes. He said "get over to the couch. I want you to ride me on it". He pushed her over to the couch, grabbed her wrists and pulled her on top of him so she was forced to straddle his lap. At that point there was no penetration. He said "ride me like you've never ridden anyone before". T did not move and at a moment when he let go of her wrists, she stood up and ran from the property.

[20] Having run some hundreds of metres to the road, T managed to flag down a road user, and the police were called.

[21] Following these events Buchanan went back to the area of the Mossman Gorge Community. He made admissions of the offence to two cousins. He stated to one cousin that he "just raped someone", and to another cousin that "I was with a white woman. I did rape her. I went down to the river and washed myself". The two cousins observed that his shirt was bloodstained.

[22] The police located Buchanan's bloodstained shirt during the course of the investigation. T's DNA was discovered on the shirt. There was further DNA testing, and Buchanan's DNA was located on the deck of the home, on T's nightie and swabs taken from her nipple. When Buchanan was approached by police, they said to him, "You're under arrest," and he essentially finished their sentence, by stating, "For rape".[6]

[23] Buchanan was identified on a photo board.

[24] T received immediate medical treatment. She sustained the following injuries:

(a) the left ear was swollen and significantly bruised (an auricular haematoma), with a small laceration along the anterior outer ear; the haematoma was drained;

(b) two bruises at the front of the head, just below the hairline (5 cm each);

(c) a slightly bleeding laceration to her left fourth finger;

(d) bruising above and below the knees;

(e) a superficial abrasion to the labia majora;

(f) a V-shaped right forearm laceration that was 5 cm x 4 cm in length; the wound cut through all layers of skin and the underlying fascia into the muscle bed; there was no obvious bone, tendon, arterial or nerve involvement; the wound was washed out, explored and closed.

[25] The matter proceeded by way of a full hand-up committal. Buchanan's counsel told the learned sentencing judge that Buchanan had "indicated his pleas of guilty to those on the indictment on its presentation".[7]

[26] As to the events on the day, Buchanan's counsel told the learned sentencing judge:[8]

> "He doesn't remember very much about his offending on this occasion. He says that he began drinking the day before; he was drinking cask wine. And he says that his intention in entering the house was to find more alcohol to drink."

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6 The facts in this paragraph are at AB 17.
7 AB 25 line 30.
8 AB 26 lines 9-11.

Buchanan's antecedents and criminal history

[27] Buchanan, an Indigenous man, was born on 1 July 1983; he was 30 at the time of the offences and 31 at the sentence hearing. He finished High School at Mossman, but did not have much in the way of a work history. He had worked for periods of time doing landscape and labouring work.

[28] He had a significant alcohol problem, abusing it from when he was about 16. His counsel told the learned sentencing judge that his criminal history was explained, in large part, by his attempts to source alcohol.[9] That seems to be confirmed by Buchanan who told this Court:[10]

> "I've got a history of break and enter, you know, enter dwelling. I support myself by break and enter just to get my alcohol, a bit o money."

[29] Buchanan's criminal history[11] reveals a significant number of offences: 20 occasions of burglary or entering private homes, though none with an intention other than theft; three occasions of entering business premises; one offence of riot; and four assaults occasioning bodily harm.

[30] Some entries in his criminal history should be noted. First, on 9 July 2003 he was sentenced to six months' imprisonment and 18 months' probation for two offences of assault occasioning bodily harm, and some other offences. He breached that probation and was sentenced to further imprisonment.

[31] Secondly, on 18 May 2005 he was convicted of assault occasioning bodily harm, and received a six month term of imprisonment, wholly suspended. A domestic violence order was made at the same time. The learned sentencing judge was told that this offence involved violence against a female cousin. The cousin chastised Buchanan for pushing a child, and he kicked her to the jaw, causing a tooth to fall out.

[32] Thirdly, on 18 June 2007 he received a two months term of imprisonment for threatening a female with a knife. At about the same time he committed the offence of riot.

[33] Fourthly, on 22 October 2008 he was sentenced for various offences including one assault occasioning bodily harm and two burglaries. He was sentenced to nine months' imprisonment with parole release after six months.

[34] The present offences were committed whilst Buchanan was on parole for a burglary and stealing offence, for which he was sentenced to four months' imprisonment with a parole release date of 31 October 2013. Therefore, only 10 days had passed since he was released on parole. As well, Buchanan was on bail for the summary offences.

[35] Buchanan's counsel at the sentencing hearing agreed that the criminal history was significant but submitted:[12]

> "He certainly has a significant history, your Honour. But it's not a history of significant violence, although there are entries for violence. There's no sexual violence involved in any of his offending and no other offences of a sexual nature."

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9 AB 25 lines 43-45.
10 Appeal transcript T 1-13 lines 29-30.
11 AB 34.
12 AB 26 lines 17-19.

Application for extension of time

[36] The test to be applied is that set out in *R v Tait*:[13]

> "… the Court will examine whether there is any good reason shown to account for the delay and consider overall whether it is in the interests of justice to grant the extension. That may involve some assessment of whether the appeal seems to be a viable one. It is not to be expected that in all such cases the Court will be able to assess whether the prospective appeal is viable or not, but when it is feasible to do so, the Court will often find it appropriate to make some provisional assessment of the strength of the applicant's appeal[14], and take that into account in deciding whether it is a fit case for granting the extension. Other factors include prejudice to the respondent, but in the case of criminal appeals this is not often a live issue. Another factor is the length of the delay it being much easier to excuse a short than a long delay."

[37] Buchanan gave a reason for the delay in filing his application. It was that at the time his application to challenge the sentence was filed he was unaware that he would need to appeal against his conviction if he wished to argue that his plea of "guilty" should be withdrawn. Further, he only discovered on 6 November 2014, when he spoke to a solicitor from Legal Aid, that to seek to have his guilty plea withdrawn, he would have to appeal against his conviction. The application was filed 12 days later.

[38] The reason advanced is basically that Buchanan was ignorant of what he had to do. The period of delay is not long, and the respondent does not suggest any prejudice.

[39] In *R v DAQ*[15] this Court referred to the issue of delay and the proposition that statutory time limitations on appeals should yield to the concern that the judicial process may have operated imperfectly in a particular case where there is no real prejudice to the public interest in the finality of litigation. Keane JA said:[16]

> "For that reason, an applicant for an extension of time who has failed to observe statutory time limits by reason of ignorance or inadvertence or even incompetence, and who is obliged, because of a short period of unintentional delay, to seek an extension of time in order to institute an appeal, can expect to be given the benefit of an extension where there is an arguable case that an appeal may succeed."

[40] Assuming that the explanation was sufficient to show good reason to account for the delay, the next hurdle Buchanan faces is to show that it is in the interests of justice that the extension be granted. That involves an assessment of whether the appeal is viable, that is, whether there is an arguable case that the appeal may succeed.

[41] At the heart of Buchanan's contention is that he seeks leave to withdraw the guilty plea he entered. He faces a considerable hurdle given that he was represented by solicitor and counsel at the sentencing hearing where the plea was entered, and he told this Court that he did so on advice from them. As was said in *Meissner v The Queen*:[17]

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13 [1999] 2 Qd R 667 at 668.

14 Compare *Kolalich v Director of Public Prosecutions (NSW)* (1991) 173 CLR 222, 228; *Gallo v Dawson* (1992) 66 ALJR 859, 860.

15 [2008] QCA 75.

16 *DAQ* at [10], Fraser JA and Mackenzie AJA concurring.

17 (1995) 184 CLR 132 at 141 per Brennan, Toohey and McHugh JJ. (***Meissner***) Internal footnotes omitted.

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence."

[42] As is apparent from that passage, even innocence will not necessarily serve to set aside a plea of guilty.

[43] Buchanan appeared on his own behalf before this Court. He articulated the grounds upon which he relied to contend that he should be allowed to withdraw his plea of guilty and contest the charges at a trial:

(a) he was tricked into pleading guilty by a lawyer who didn't want to represent him because the lawyer was a racist;[18] the lawyer tricked him by telling him that his DNA was "all over, everywhere in the house";[19] that was a trick because "there wasn't any strong sperm of mine inside of her";[20] the trickery was that the lawyer said "there was DNA of mine inside of her";[21]

(b) he queried the presence of DNA, saying the police could have taken some of his sweat (he was kept in a paddy wagon for 40 minutes) and placed it on items;[22] or they could have taken his shirt back to the house and used it to put DNA there;[23] the police must have put his DNA on his shirt because they took the shirt from him;[24]

(c) there could not have been DNA on T's nightie or nipple because "I never touch her. I wasn't even near her nightie or anything";[25]

(d) an explanation as to why his DNA may have been in the house was that a couple of years before there was a couple staying there and Buchanan had broken in to get alcohol;[26]

(e) he didn't match the description of the offender, and T said it was not him when the police showed her his photo ID;[27] and

(f) the cousins told lies to the police, "talking to the detective and telling lies to them about me, saying those things".[28]

[44] In so far as it might be suggested that Buchanan's lawyers strongly said he should plead guilty because of the weight of DNA and identification evidence, combined with his own absence of any real memory of the events, the authorities establish that will not be enough to withdraw a plea. This Court in *R v EJ*[29] adopted two passages from *Meissner*:

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18 Appeal transcript T1-3 lines 20-24.
19 Appeal transcript T 1-5 lines 36-38.
20 Appeal transcript T 1-5 line 43; T 1-9 lines 28-47.
21 Appeal transcript T 1-9 lines 19-23.
22 Appeal transcript T 1-5 line 15.
23 Appeal transcript T 1-14 lines 16-34.
24 Appeal transcript T 1-8 lines 30-41.
25 Appeal transcript T 1-6 lines 15-19.
26 Appeal transcript T 1-7 lines 5-7.
27 Appeal transcript T 1-10 lines 29-36.
28 Appeal transcript T 1-11 lines 29-35.
29 [2009] QCA 378, at [16]-[17]. Internal footnotes omitted.

> "[16] In *Meissner v The Queen* Brennan, Toohey and McHugh JJ said conduct:
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> "… that merely seeks to persuade the accused to plead guilty is not improper conduct for this purpose, no matter how strongly the argument or advice is put. Reasoned argument or advice does not involve the use of improper means and does not have the tendency to prevent the accused from making a free and voluntary choice concerning his or her plea to the charge."
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> [17] The same proposition was expressed by Dawson J as follows:
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> "… merely to reason with the accused, pointing out the advantages of pleading guilty and the disadvantages of pleading not guilty – even if the advantages or disadvantages extend beyond the legal consequences – will not amount to an attempt to pervert the course of justice."

[45] *R v EJ* also affirmed that if an application is made to withdraw a plea, the onus is on the applicant to establish that a miscarriage of justice took place when the Court accepted and acted on his guilty plea.[30] The Court there adopted a passage from *R v Gadaloff*,[31] the full text of which reads:

> "… the applicant, having pleaded guilty to the charges against him, now requires leave of the court to withdraw his pleas to those charges; and that, coming as the appeal does after his conviction on such pleas, the onus lies on him to establish that a miscarriage of justice took place when the court accepted and acted on his pleas by convicting him at the hearing on 26 October 1998. The essential question, as Lee J said in *R v Chiron* [1980] 1 NSWLR 218, 241, is whether the entering of the plea of guilty should be regarded, in all the circumstances, as attended by such unfairness as to warrant a new trial."

[46] In my view, the proposed application to withdraw the plea confronts overwhelming difficulties. Not least of those is the difficulty of showing that there was such unfairness in his entering the plea that a new trial is warranted. Others are set out below.

[47] First, there was DNA evidence as part of the proof available if the matter went to trial. T's DNA was on Buchanan's shirt. Buchanan's DNA was on the deck at T's home, on her nightie, and on swabs taken from her nipple. The proposition that the police might have taken his sweaty shirt back to the house to falsely place his DNA there, as well as convincing T to let them put his DNA on her nipple, is preposterous.

[48] Secondly, the police evidently had statements from the two cousins, as to the admissions made by Buchanan, that he had just raped a white woman. Also they observed his shirt to be bloodstained.

[49] Thirdly, the police evidence was that when they arrested Buchanan it was he who nominated why he was being arrested, namely "rape".

[50] Fourthly, the evidence included that T identified Buchanan from a photo board, as being the offender.

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30 *R v EJ* at [19], adopting *R v Gadaloff* [1999] QCA 286, at 4.

31 [1999] QCA 286, at 4.

[51] Fifthly, Buchanan's own counsel said, as part of his submissions to the learned sentencing judge, that Buchanan did not remember much about the events, as he had been drinking since the day before.[32]

[52] Sixthly, Buchanan accepted that his lawyer had told him that there was DNA evidence,[33] that "they have strong things about you",[34] and that he should plead guilty.[35]

[53] That combination of facts serves to demonstrate the hopelessness of suggestions that Buchanan was tricked into pleading guilty, or that he ever had any realistic prospect of successfully resisting a verdict of guilty if he went to trial. In the face of all that evidence the advice from his lawyers was the obvious advice to give in order to keep the sentence as low as possible. Had the matter gone to trial and the verdict was guilty (as seems inevitable) the sentence would have been higher than that actually imposed, which took into account the guilty plea.

[54] In my view, the prospects of withdrawing the plea and successfully defending the charges are illusory. The application for an extension of time should be refused.

Sentence manifestly excessive

[55] At the sentencing hearing, and in this Court, the Crown relied upon *R v Newman*,[36] *R v Newton*,[37] *R v Price*[38] and *R v Benjamin*,[39] contending that those were comparable cases indicating sentences between 10 to 14 years. Counsel for Buchanan at the sentencing hearing accepted that *Newman* was "the most closely comparable".[40]

[56] The learned sentencing judge's remarks set out the matters he took into account:[41]

(a) the age of Buchanan;

(b) his criminal history which his Honour rightly described as "atrocious"; the fact that there were no convictions for offences of a sexual nature; the history revealed that Buchanan had shown no respect for the privacy of people's homes;

(c) his problems with alcohol and the link between that and the criminal history;

(d) the fact that he was on bail and on parole at the time, and that it was only 10 days after his release;

(e) the nature of the attacks on T, describing them (again, rightly) as "vicious and unrelenting"; the attack took advantage of T's vulnerability "in a particularly nasty way"; that he had at least three obvious opportunities to desist but did not; that the conduct created an "obviously terrifying situation" for T; the attack was one of "sheer persistent violence";

(f) that Buchanan had demonstrated no regard whatsoever for T;

(g) the injuries sustained by T;

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32 AB 26 lines 9-11.
33 Appeal transcript T 1-5 lines 36-38; T1-8 lines 16-47.
34 Appeal transcript T1-6 line 35.
35 Appeal transcript T 1-7 line 40 to T1-8 line 14; T 1-9 lines 9-17.
36 [2007] QCA 198. (***Newman***)
37 [2008] QCA 248. (***Newton***)
38 [2004] QCA 10. (***Price***)
39 [2012] QCA 188. (***Benjamin***)
40 AB 26 line 20.
41 AB 29-32.

(h) the fact that "this is probably the most serious [rape] I have ever had to deal with … because of the sheer persistence and the sheer violence on your part"; it was made all the more serious by being committed while on parole;

(i) the fact that the only positive thing that could be said for Buchanan was the timely guilty plea;

(j) the need for considerable weight to be placed on the deterrent aspect, because of the sheer violence and persistence of the attack; personal deterrence also loomed large because of the "nasty and vicious assault"; and

(k) that *Newman* was the most relevant comparable case, but his Honour had regard to *Benjamin* as well.

[57] The learned sentencing judge concluded his remarks, referring to *Newman*:[42]

> "In your case, you do not have the benefit of youth, and you do not have the limited criminal history that the defendant had in that case. It seems to me that against the background of your criminal history, and allowing for the quite significant violence and the sheer persistence on your part, that an appropriate sentence is one in the same range as the one of R v Newman."

[58] I respectfully agree with the learned sentencing judge's characterisation of Buchanan's offending conduct. This was a particularly vicious and prolonged attack, on a vulnerable but courageous woman. She was subjected to assaults with several weapons (the rock, the coffee table and the shard of glass) and one cannot help but think that T was lucky to survive.

[59] Further, Buchanan showed not the slightest consideration for T's welfare, in the face of a serious wound, and blows to her head, let alone the indignity of being forced into non-consensual sexual acts.

[60] Usually the plea of guilty is taken to indicate some remorse, and cooperation with the authorities. That is difficult to accept here. The assaults on T were callous and remorseless, as was Buchanan's admissions to the cousins afterwards. Likewise, Buchanan's explanations to this Court, that he was tricked into pleading guilty when he was not involved and never touched T, substantially destroy the mitigating aspect of the plea.

[61] T's victim impact statement reveals,[43] as one might expect from the nature of the assaults, the deep and abiding scars left on T. Her life irrevocably changed and her nature has changed to one who lives by caution, mistrust and suspicion. That change has been reflected in her house arrangements (security, fences and guard dogs) and her lifestyle.

[62] T's relationship with her partner has been affected. T firmly believes that Buchanan would have taken her life that day. She now lives a life altered by fear and torture, with feelings of terror at night and nightmares. She has developed a post-traumatic stress disorder, and is constantly tired.

[63] I now turn to the comparable cases advanced.

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42 AB 31.
43 AB 50-51.

[64] *Newman* involved a plea of guilty to rape, grievous bodily harm, robbery with violence, burglary and deprivation of liberty. The offender was 17 at the time, and the victim was 60. He was sentenced to 13 years' imprisonment on the rape, and lesser terms on the other charges. The offender was coming down off ecstasy when he saw the victim go into her house and decided to rob her. He entered her house, held his hand over her mouth, and dragged her into the hallway despite her pleading with him to stop. Throwing her to the ground, which caused severe pain in her back, the offender punched her in the face, and then punched her four more times.

[65] He ignored her pleas about her back, saying he didn't care, saying the same thing when she pleaded not to be hit in one eye which may mean she lost her eyesight. The offender dragged her dress off and removed her bra. He then dragged her to the bedroom, where, after putting on a condom, he raped her. He then robbed her of $40 in her purse and left.

[66] The victim had extensive bruising around the left temple, right cheek, right eye and lower jaw. She had a broken jaw and a fractured rib. There was other bruising on her buttocks and inside her cheek. There was extensive tenderness along the lumbar spine. She developed a profoundly depressed mood and was visibly distressed. Her jaw was wired and she was in hospital for about 10 days. She received regular psychiatric care afterwards.

[67] Having reviewed comparable cases, the Court refused to interfere with the sentence, concluding that while it was at the top of the range for such a youthful offender, it was not manifestly excessive. Williams JA said:[44]

> "When all of those factors are brought into account a head sentence of 13 years imprisonment could be said to be at the top of the range for an offender of this applicant's age, and a slightly lower sentence could not have been held to have been manifestly inadequate. But I am not persuaded that a sentence of 13 years imprisonment for this offender and for the degree and extent of the offending involved, is manifestly excessive. Seventeen year olds who regularly ingest dangerous drugs such as ecstasy cannot expect extreme leniency when their first offence is an horrendous crime such as was committed by this applicant."

[68] White J said:[45]

> "As Williams JA's description of the offences demonstrates, this was criminal conduct of an appalling and callous kind deserving of severe punishment. It has had prolonged and probably lasting adverse consequences for the complainant and for her husband. Their apparently contented life together has been seriously impaired and the applicant must bear responsibility for those consequences, see *R v Amituanai* (1995) 78 A Crim R 588."

[69] There are distinguishing features in *Newman* which, in my view, have the result that 13 years cannot be said to be outside the range of applicable sentences for Buchanan. *Newman* involved a much younger offender, and an attack which did not feature any weapons whereas Buchanan used several; the offender committed the one act of rape whereas Buchanan persisted in multiple sexual acts, and was intending to continue

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44 *Newman* at [45].
45 *Newman* at [58].

when T escaped; in *Newman* the offender desisted voluntarily, whereas Buchanan was interrupted by T's escape; the offender in *Newman*, whilst totally callous, did not inflict harm that was likely to cause life threatening injury as was the case with the profusely bleeding forearm.

[70] *Newton* involved a plea of guilty to eight charges including four of rape, for which a sentence to an effective term of 12 years' imprisonment was imposed. The victim was 64 and the offender 39. He had a lengthy criminal history, including six burglaries and violent offences, but no sexual offences. He broke into her house (count 1, burglary), and put his hand over her mouth, telling her not to cry. He said "once I've done it I cut", which the victim took to mean he had a knife (count 2, assault with intent to rape). He then licked her vagina and inserted his fingers in her vagina (count 3, sexual assault).

[71] He then straddled her and pushed his penis in her mouth (count 4, first rape). He told her to turn on her side, and inserted his finger in her anus, at which time she suffered an involuntary bowel movement (count 5, second rape). He then blindfolded her with a pillowcase, and licked her vagina while masturbating. He forced her to masturbate. He then penetrated her vagina with his penis, moving it in and out forcefully and causing pain (count 6, third rape).

[72] He then ejaculated over her stomach and breasts, telling her to "Put it in your mouth and make sure you swallow". He then put his penis in her mouth and ejaculated into her mouth (count 7, fourth rape). She swallowed as ordered.

[73] He then forced her into the shower, telling her to have a good scrub. He said he was going to take the sheets because he didn't want to leave any evidence. She showered and was left blindfolded on the bed.

[74] The sentences included 12 years on the burglary, 12 years on the last two counts of rape, 10 years on the first count of rape and six years on the second count of rape. The Court referred to *Newman*, and the acceptance by the offender in *Newton* that it suggests 10 to 14 years as the appropriate range for offending of this type. The Court did not conclude that the sentence was manifestly excessive. Keane JA said:[46]

> "[31] In my respectful opinion, in this case it was open to the learned sentencing judge to regard the applicant's calculated, persistent and prolonged attack on an elderly victim in her own home as warranting a sentence which was distinctly not at the very bottom of the appropriate range. It was important that his Honour give the applicant full credit for his plea of guilty; but it must be borne in mind that the range of sentences referred to in *R v Newman* itself reflects the benefit to an offender of a plea of guilty.
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> [32] It was open to his Honour to conclude that a proper sentence for the serious rapes committed by the applicant should not be less than 12 [years] imprisonment. It must be borne in mind that the learned sentencing judge was entitled to regard the applicant's failure to accept responsibility for his crime by feigning a lack of recollection of his offending as matters of special concern. That concern warranted sentencing the applicant on a footing which will afford adequate protection to the community against

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46 *Newton* at [31]-[32], Fraser JA and Fryberg J concurring.

> an offender whose failure to acknowledge his responsibility gives no reason for optimism as to his prospects of rehabilitation."

[75] In my view, Buchanan's conduct was worse than that in *Newton*: Buchanan used weapons and inflicted serious injuries, the offender in *Newton* desisted voluntarily whereas Buchanan did not and intended to continue, the offender in *Newton* showed some form of consideration for the victim (albeit odd) whereas Buchanan was callous and remorseless. I do not consider that *Newton* suggests that Buchanan's sentence was manifestly excessive at all, but rather, supports it.

[76] *Price* involved a 12 year sentence imposed on a 29 year old offender (32 at sentence) for raping a 66 year old victim. The charges were burglary in the night with violence, rape, serious assault and stealing. The offender broke into the victim's house at night, put his hand over her mouth and punched her with his closed fist to the left side of the face, about four or five times, with great force. He straddled her, pulled her underwear away from her vagina, pushed her legs apart and tried to insert his penis. He was unable to effect complete penetration. He then got off, seemingly disgusted with himself, and left. The victim suffered severe bruising to the left side of her face and on the left upper arm, and had some reddening and bruises in the genital area. The trauma forced her to leave her home and she suffered adverse psychological consequences.

[77] The offender had a criminal history which included imprisonment for assaults on police, assaults occasioning bodily harm, some street offences and drug offences. He had no prior sexual offences. He had shown some remorse, and cooperated with the authorities once DNA evidence revealed his connection with the offences. The Court concluded that 12 years was not manifestly excessive and was within range. McPherson JA added: "I do not regard the sentence as manifestly excessive in any circumstance".[47]

[78] *Price* supports the sentence given to Buchanan. The sentence was 12 years' imprisonment, but the violence was less in that case, the injuries were less severe, there was only the one act of rape as opposed to multiple sexual acts, the offences were not committed while the offender was on bail or parole, and some remorse was shown.

[79] *Benjamin* involved a 25 year old offender who attacked a 19 year old as she was jogging. He pleaded guilty to one count of rape and was sentenced to 11 years' imprisonment. He evidently struck her causing cuts and bruises to her face, neck and elbows, as well as swelling to her cheekbones, a split lip with a piece missing, and abrasions and soreness to much of her upper body. The offender had a criminal history which included imprisonment for breach of a domestic violence order and common assault. He had a good work history and a partner with a child.

[80] That recitation is sufficient to demonstrate that *Benjamin* was a less serious case than the present one. Henry J reviewed a number of cases, concluding as to *Newman*:[48]

> "That matter is of a different type than the present and objectively more serious however it is relevant by reason of Williams JA's observation of past pronouncements to the effect that the range for an offence of such seriousness was 10 to 14 years:
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> > "In my view ... that is the appropriate range particularly where rape and grievous bodily harm are involved.""

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47 *Price* at page 8.

48 With whom the President and North J agreed on this point.

[81] The review of comparable cases by Henry J in *Benjamin* reveals that where rape is accompanied by serious violence or prolonged criminality, or both, sentences at the upper end of the 10 to 14 year range may be warranted. Such examples reviewed by Henry J are:[49]

(a) *R v Wark*,[50] 12 years imprisonment where the victim (in her 30's) was walking along a highway and accepted a lift from the offender, who persuaded her to go to his home promising he would drive her to her destination after he had some tea. When she tried to leave he struck her about the head with a piece of wood, dragged her inside and forced her on the bed, removing her clothes. He thereafter tied her up and subjected her to a violent array of sexual degradation. She managed to escape around daybreak. She had lacerations and swelling on the head, bite marks on her chest, abrasions to the wrists consistent with rope burns, multiple abrasions and bruises to her arms, knees and buttocks and a small tear to her perianal region. The offender was 51 and had a minor drug related criminal history.[51]

(e) *R v Costello*,[52] 13 years imprisonment where the offender (24) raped a 14 year old who was walking home, tackling her from behind. He suffocated her for a substantial period, punched her in the face several times and told her he had a knife. He performed oral sex on her, inserted his fingers into her vagina, forced her to rub his penis and fellate him, and then raped her. He had a lengthy criminal history and was on parole for robbery with personal violence whilst armed.[53]

[82] I do not consider that it can be demonstrated that the sentence imposed was manifestly excessive.

Conclusion

[83] For the reasons expressed above I would refuse the application to extend time within which to appeal against conviction, and refuse the application for leave to appeal against the sentence.

[84] I propose the following orders:

1. The application for an extension of time within which to appeal against conviction is refused.

2. The application for leave to appeal against sentence is refused.

[85] **PETER LYONS J:** I have had the advantage of reading in draft the reasons for judgment of Morrison JA in this matter. In substance I agree with those reasons, subject to what follows.

[86] In support of his application for an extension of time to appeal against his convictions, the applicant relies upon matters which he asserted from the bar table, apparently without notice. At least on the present state of the record, these matters should not be relied upon to determine the application in his favour.

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49 With some slight alterations I gratefully adopt the words of Henry J.
50 [2008] QCA 172.
51 *Benjamin* at [60].
52 [1997] QCA 93.
53 *Benjamin* at [46].

[87] Nevertheless, the applicant is self-represented, and in custody. He said that he is unable to read[54]; and did not appear to have any significant education[55]. In those circumstances, it seems appropriate to give some consideration to the matters he has raised, in case some step should be taken to enable him to present evidence.

[88] The applicant alleged he had been tricked into pleading guilty because he was falsely told that there was evidence of the applicant's DNA "everywhere in that house" and in the complainant's body[56]. This was said to have been done by a lawyer, presumably a solicitor, other than the barrister who represented the applicant at the sentence[57].

[89] There are some difficulties with this allegation. It is serious; and would not lightly be accepted as true, if evidence were advanced in support of it. There is nothing in the record to support the allegation. On the other hand, the prosecution case against the applicant was strong; and there is no reason why a lawyer seeking to convince his client to plead guilty would see any need to add to it.

[90] It is apparent that the applicant accepts that there was DNA evidence pointing to his guilt of the offences. Thus he sought to explain the presence of his DNA at the house where the offences were committed by the fact that he had been there on a previous occasion (when he had broken in to get alcohol); and the police could have taken his sweat from the paddy wagon where he was detained for 40 minutes, and placed it somewhere incriminating (apparently on the complainant's nipples)[58]. The applicant does not suggest that he could lead evidence which would positively support the latter two allegations, and the last of them borders on the incredible.

[91] The first of these allegations resonates with what the applicant's Counsel told the Court on the sentence, namely, that he did not "remember very much about his offending on this occasion"; he had been drinking; and "his intention in entering the house was to find more alcohol to drink"[59]. The fact that the applicant, on any version, had been to the complainant's house, which is in a remote location, for the purpose of committing an offence, casts some doubt on his credit. The statement relating to the applicant's intention is consistent with the complainant's version, recorded in the Schedule of Facts, which was tendered without objection, namely, that shortly before the attack, she heard noises inside the house, and found two beers were missing from the fridge (two empty beer cans were later found at the side of the house)[60]. On the hearing of the application, the applicant made no reference to the statement by his Counsel about his intention on entering the house, although he was asked about related statements[61].

[92] In the course of the investigation, the police located a shirt of the applicant's which was blood stained, and on which DNA of the complainant was found. People, described as cousins of the applicant, said that they each saw him at a time which was shortly after the offences were committed, wearing a blood stained shirt. He told one of them that he had "just raped someone", and the other that, "I was with a white woman. I did rape her. I went down to the river and washed myself."[62] Each of these

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54 Appeal Transcript (*AT*) 1-2/35.
55 Though see the Application Record Book (*AB*) at p 25/40.
56 AT 1-5/37, 1-9/23-45.
57 AT 1-3/20-45.
58 AT 1-5/5-18.
59 AB 26/10.
60 AB 47.
61 AT 1-3/45 to 1-4/10.
62 AB 17.

persons saw him to be wearing a blood stained shirt. The applicant contends that these people were lying.

[93] In addition to these matters, the applicant faces the difficulty that he has pleaded guilty to these offences; and done so at a time when he was represented by both Counsel and a solicitor.

[94] The matters raised by the applicant appear to be without substance; and do not warrant the taking of any course other than dismissing his application for an extension of time within which to appeal against his convictions.

[95] Substantially for the reasons stated by Morrison JA, I agree that the application for leave to appeal against sentence should also be refused.