SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAI* [2016] QCA 150
PARTIES:	**R** **v** **FAI** (applicant)
FILE NO/S:	CA No 203 of 2015 DC No 59 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Mackay – Date of Sentence: 7 August 2015
DELIVERED ON:	10 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2016
JUDGE:	Morrison and Philippides JJA and Henry 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 sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own plea of guilty to one count of burglary and three counts of rape – where the applicant was sentenced to eight years imprisonment with a serious violent offence declaration – where the court held the offending was very serious involving violence and premeditation – whether the sentencing judge erred in making a serious violent offence declaration – whether the sentence imposed was manifestly excessive *Corrective Services Act* 2006 (Qld), s 182, s 184 *Penalties and Sentences Act* 1992 (Qld), s 161A, s 161B *Penalties and Sentences Act (Serious Violent Offences) Amendment Act* 1997 (Qld) *R v Benjamin* (2012) 224 A Crim R 40; [2012] QCA 188, cited *R v Bojovic* [2000] 2 Qd R 183; [1999] QCA 206, cited *R v Mallie* [2000] QCA 188, cited *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365, explained *R v Q* [1994] QCA 390, cited

R v Richards [2008] QCA 211, explained
R v Rix [2014] QCA 278, cited

COUNSEL: G Lynham for the applicant
N Crane for the respondent

SOLICITORS: Purcell Taylor Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have had the advantage of reading the reasons of Henry J. I agree with those reasons and the order his Honour proposes.

[2] **PHILIPPIDES JA:** I agree with the order proposed by Henry J for the reasons given by his Honour.

[3] **HENRY J:** A masked and gloved man broke into the home of a 63 year old woman, bound her wrists behind her back and committed penile and digital rape upon her. He now complains his sentence of eight years' imprisonment with a serious violent offence declaration is manifestly excessive.

Facts

The offences

[4] The complainant lived on a farm. On the Friday morning of the offence her husband left home to begin his farm work shortly before 7 o'clock, as was his habit. At 7.50 am the complainant was sitting in the lounge, still in her nightdress, when she heard the unlocked back screen door open and someone walk in. She assumed it was her husband but soon saw it was an apparently younger man wearing a black hoodie, black gloves and a cotton mask with eye holes cut in it.

[5] He grabbed her by the forearm, pulled her off her chair and dragged her along the hallway. In doing so he was pulling her nightdress over her head. She vigorously resisted, kicking and punching at him and trying to strike him with a ceramic ornament. He pushed her onto the floor on her stomach, completely removed her nightdress and sat on her back. She was screaming. He started to stuff a cloth into her mouth but desisted after she begged him not to hurt her. He pulled her arms behind her and bound her wrists together with duct tape.

[6] Still wearing gloves he groped her breast and then dismounted from her back and removed her panties. He pushed her head onto the floor when she tried to look around. He applied some form of lubricant near her vagina and pushed his fingers a few times into her vagina.

[7] He then pulled her hips upwards towards his groin so that she was on her knees and he pushed his penis into her vagina. It felt to her that he had a condom on. He moved his penis in and out for a couple of minutes but she did not feel him ejaculate.

[8] He withdrew his penis and then inserted his fingers again, moving them in and out for another minute.

[9] He desisted, bent down to her and said something, part of which included the word rape. As he then left she noticed he was carrying duct tape. He momentarily returned, apparently searching for something underneath her, before leaving again.

[10] The complainant eventually managed to separate her wrists and call 000. The ambulance and police attended and she was taken to hospital.

Victim impact

[11] The complainant's wrists were blue where the duct tape had impaired circulation. She had abrasions to the wrists, the left shoulder, the forearms, an armpit, the right knee and the back. There were multiple abrasions to the abdomen. Blood, redness and some liquid were noted on examination of her vagina. There were also abrasions to her lower and upper vagina and around her cervix.

[12] This terrifying ordeal also had a very serious psychological impact on the complainant. Her victim impact statement spoke of the shock, degradation and humiliation occasioned to her. She attended counselling to try to help her come to terms with what occurred but she no longer feels safe in her own home or when out walking. She is less trusting and patient towards others. She is distressed by her occasional abruptness towards her husband, behaviour that was not a feature of their relationship before the offences.

The strong case against the applicant

[13] At the time of the offences upon the complainant the applicant lived with his parents on their farm. It adjoined the complainant's property. In making their inevitable inquiries of nearby farms on the day of the offence police spoke with the applicant, who happened to be at another adjoining farm where his older sister lived. He told them he had seen a blue commodore utility drive from near the complainant's property that morning and that the driver was wearing a black hoodie.

[14] He repeated this false account and a fabricated account of his own movements in a subsequent witness statement to police. His account was inconsistent with other evidence. The police investigation, which then focussed more closely upon him, gathered overwhelming evidence that he was the offender.

[15] A dark hoodie and cream bandage with eye holes cut in it were found in his car. DNA on the bandage matched his profile. A mixed profile of DNA on the hoodie matched his profile and that of the complainant. Duct tape found at his residence matched not merely the type but the ripped end of the duct tape from the complainant's wrists. One of the soles of his shoes was found to be a direct match of a shoe print left in the complainant's house by the offender.

[16] Further to that powerful evidence, once in custody he admitted committing the offence during covertly recorded conversations with an undercover agent of police. In the course of those admissions he claimed that at the time of the offending he had been "coming down" from the effects of methylamphetamine he consumed the night before. He explained he had shaved his pubic hair before the offences, the latter fact being consistent with his appearance on examination by a government medical officer. He said he had showered at his sister's after the offending and had also told her the false story about the blue utility and its driver. He said his vehicle was well hidden during the offending.

[17] In the face of such an overwhelming case it is hardly surprising the applicant pleaded guilty before the Mackay District Court to an indictment charging him with one count of burglary and three counts of rape.

Antecedents

[18] The applicant was 21 at the time of his offending and 22 by the time of sentence.

[19] He left high school after year ten. He worked as an apprentice boilermaker for some years and then worked on the family farm. His only criminal history prior to the offences was for an offence of stealing for which he was fined and no conviction was recorded. Some references tendered on his behalf spoke favourably of him and of the offences being at odds with his known character.

[20] He was a recreational drug user, having started on cannabis when 15 and methylamphetamine when 19. By the time of the offences he was smoking methylamphetamine bought in crystal form every weekend and on some week days.

[21] About two weeks before the offences the applicant's parents separated after 22 years of marriage. Two days before the offences he learnt the reason behind the marital breakdown was said to be his father's infidelity, a matter about which he and his father argued the day before the offences. His counsel told the court the applicant did not return home or sleep between that argument and committing the offences. In the interim he visited a number of relatives and socialised with friends. He is also said to have consumed alcohol, methylamphetamine, synthetic cannabis and two pills of unknown content. Whatever the actual extent of his drug use may have been its effects were evidently not so great as to prevent him engaging in obviously premeditated behaviour, shaving his pubic hair and equipping himself with a mask, gloves, duct tape and lubricant.

[22] On the day of his arrest he was charged with possessing a dangerous drug, an offence for which he was subsequently fined and no conviction was recorded. He spent nine days in pre-sentence custody before being released on bail conditions requiring him to live in Townsville, report regularly to police and comply with a curfew. He was twice charged and sentenced for breaching those conditions.

[23] A psychologist's report[1] was tendered on his behalf at sentence, apparently for the purpose of confirming the applicant had at least attended counselling about "the matters that were operating on him around the time of the offences, including the effect on him of his parent's separation".[2] However the report's qualified assessment the applicant had a low risk of recidivism was rendered valueless by the applicant lying to the psychologist, claiming he had no memory of the offences, apparently because of the drugs he consumed. It was suggested he had taken that false position because of his mother's inability to accept her son had committed the offences. At sentence his counsel acknowledged he did remember committing the offences.[3]

The sentence below

[24] The learned sentencing judge noted the strength of the prosecution case but also had regard to the applicant's pleas of guilty and that they were entered at an early stage.

---

1 AR 37-45.
2 AR 13 LL 5, 23.
3 AR 13 L9.

He noted the references suggested the offending was out of character and that the applicant's criminal history was irrelevant for the purposes of the sentence. Importantly, he noted the applicant was only 21 at the time of the offending.

[25] His Honour considered the applicant's lies rendered the psychological report of little use. He noted the applicant's grief over his parents' separation might have been the catalyst for his consumption of intoxicating substances the evening before the offences, which in turn may provide a partial explanation, but no excuse, for his criminal behaviour.

[26] While acknowledging the offences involved no gratuitous violence the sentencing judge expressed concern at the premeditation and physical violence involved, including the restraint of the complainant's hands. He noted the complainant's injuries included injury to the genitalia but also acknowledged the physical injuries to the complainant were towards the lower end of the scale of seriousness encountered in rape cases. He took account of the terrifying and protracted nature of the offence, the fact it was upon an older, physically weaker person in her own home and its adverse psychological impact upon her.

[27] His Honour concluded it was appropriate to make a serious violent offence declaration, referring to the premeditation, the degree of violence, the tying of the complainant's hands behind her back, the extraordinarily vulnerable and helpless position that placed her in, the fact there were three acts of penetration and the applicant's ensuing lies to police and his psychologist. His Honour considered that but for the making of the declaration a sentence of nine and a half years imprisonment with parole eligibility after serving 50 per cent thereof would have been appropriate.

[28] On the most serious of the rape offences, count 3, the penile rape, the applicant was sentenced to eight years' imprisonment. That offence was declared a serious violent offence in the exercise of the judge's discretion under s 161B *Penalties and Sentences Act* 1992 (Qld), with the consequence under s 182 *Corrective Services Act* 2006 (Qld) the applicant must serve 80 per cent of the term of imprisonment in actual custody. The applicant received sentences of four years' imprisonment on each of the remaining counts.

Discussion

[29] The applicant seeks leave to appeal the sentence imposed in respect of count 3 on the ground the learned sentencing judge erred by imposing a sentence that was manifestly excessive in all the circumstances.

[30] Counsel for the applicant argues the learned sentencing judge erred in making a serious violent offence declaration. He submits that in the absence of a serious violent offence declaration the head sentence should not have exceeded nine years. Placing particular emphasis on the applicant's youth, minor criminal history and plea of guilty he also submits a parole eligibility date should have been set earlier than the half way point.

[31] The argument as to error in the making of a serious violent offence declaration centred principally upon the absence of particular aggravating features sometimes found in other cases involving rapes committed during burglaries. It was highlighted there was no gratuitous violence, no weapon was used, no grievous bodily harm was inflicted and no threat to kill was made. Thus, it was submitted, the case was not out of the "norm" for offending of this kind.

[32] In advancing that argument the applicant relied heavily upon this court's observations in *R v McDougall and Collas*,[4] particularly:

> "where the circumstances of the offence do not take it out of the 'norm' for that type, and where the sentencing judge does not identify matters otherwise justifying the exercise of discretion, it is likely that the overall result will be a sentence which is manifestly excessive, and in which the sentencing discretion has miscarried; probably because of an incorrect exercise of the declaration discretion."[5]

[33] Two points should be made about those observations. First, they do not mandate that the exercise of the discretion to make a declaration is dependent upon a finding the circumstances of the offence take it out of the norm. The reference in those observations to "matters otherwise justifying the exercise of the discretion" makes it clear there may be other considerations justifying the exercise of the discretion.

[34] Second, the reference to the norm in those observations is to the norm for the type of offence, for example rape. It is not a reference to the norm for factually similar examples of that offence, for example rapes by burglars upon women in their homes. If it were the latter then even gravely serious cases could be categorised down to being within the norm merely by reason that there have been other instances of offending involving similarly grave circumstances. The circumstance that a rape is committed upon a woman in the sanctity of her own home by a burglar is regrettably not unknown to the criminal law. Nonetheless it is a circumstance so serious it may support the exercise of the discretion to make a declaration.

[35] The gravity inherent in that circumstance here was elevated by the purpose of the burglary being the rape of the lone female occupant of the house. This was not a case of a thief making a spontaneous decision to rape a woman unexpectedly encountered after entering a house intending to steal property from it. That is very serious offending in its own right but the fact of and level of premeditation here is an additionally concerning factor. The applicant apparently shaved his pubic hair and equipped himself with a mask, gloves, duct tape and lubricant. He concealed his vehicle and obviously timed his entry so the complainant's husband would be absent from the house.

[36] Furthermore he executed his pre-determined purpose with unwavering determination and force. He wore his mask, with doubtless terrifying effect. He dragged the complainant, overcame her resistance, pressed her body and head to the floor, taped her hands tightly behind her back and by his conduct threatened to gag her. He protracted his sexual violence upon her, penetrating her, moving her and penetrating her twice more. His violence caused abrasions to many parts of the complainant's body, including within her vagina. His determination, in chilling disregard of his conduct's effect upon the complainant, extended to brazenly re-entering the property and moving the complainant, apparently searching for evidence he left behind.

[37] Those features of the case provided ample justification for the learned sentencing judge's conclusion that the matter was beyond the norm for rape offences and for his conclusion this was an appropriate case in which to exercise the discretion to make a declaration.

---

4 [2007] 2 Qd R 87.
5 [2007] 2 Qd R 87, 96-97.

[38] Features also alluded to by his Honour were the applicant's subsequent lies to police and the psychologist. The applicant's lies to the police and indeed to his sister, about seeing a suspect in a blue utility, was simply further evidence of his deliberation in trying to avoid detection.

[39] The applicant's lies to the psychologist demonstrate a failure to come to terms with and take responsibility for his appalling conduct. Had there been positive psychological evidence of insight and rehabilitative progress that may have weighed in the applicant's favour. It may have supported an argument that community protection was better served by preserving the option of a substantial proportion of the sentence being able to be served on parole.

[40] There is some force to such an argument where an offender is still young and has no material criminal history. In such a case there may be little relevant evidence of past life pattern to draw upon in predicting future dangerousness. There may therefore be utility in the court's order not having the effect of increasing or decreasing the statutorily imposed requirement that an offender must serve fifty per cent of a term of imprisonment before being eligible for parole.[6] Those managing the offender's sentence would by that point in the term be better placed than the court at sentence to assess rehabilitative progress and future dangerousness.

[41] The force of the above argument might in this case have caused a different judge to decline to exercise the discretion to make a declaration. But that is no basis for appellate intervention. No error has been demonstrated in the learned sentence judge's conclusion this was an appropriate case in which to exercise the discretion to make the declaration.

[42] The only question remaining is whether the length of the sentence imposed was manifestly excessive. Because he was making a serious violent offence declaration the learned sentencing judge expressly reduced the sentence he would otherwise have imposed to eight years from nine and a half years. The approach, when making a declaration, of moderating the sentence towards the lower end of the otherwise available range of sentences is consistent with authority and is not complained of by the applicant.[7] The applicant does not submit the proportion of moderation downwards was of itself inadequate. Rather the effect of the applicant's argument is that the judge must have adopted too high a range as a starting point for that moderating process. The applicant argues the range is not greater than nine years. That is only six months less than the nine and half years referred to by the sentencing judge. Such a relatively minor difference does not bode well for the applicant's argument.

[43] The applicant placed particular reliance upon *R v Richards*.[8] Richards broke into the unit of the 27 year old complainant and her infant child. He cut the unit's telephone line, was disguised with a stocking over his head and was armed with a knife. He raped the complainant after threatening to use the knife. He desisted and departed when the complainant's child entered the bedroom. He was 23. He had previous convictions for dishonesty, breaching a domestic violence order and stalking. A psychologist's report opined he suffered from a number of mental disorders. He had full time care of his disabled son. At first instance the sentencing judge accepted a prosecution submission that the appropriate sentence was nine years imprisonment

---

6 Section 184 *Corrective Services Act* 2006 (Qld).

7 *R v Bojovic* [2000] Qd R 183, 191-192; *R v McDougall and Collas* [2007] 2 Qd R 87, 96.

8 [2008] QCA 211.

but declined to make a serious offence declaration. On account of Richards having served almost a year in non-declarable custody the judge sentenced him to eight years imprisonment without setting a parole eligibility date. This had the unintended effect, with the statutory parole eligibility date arising half way into the sentence, after four years, that Richards would actually spend about five years in custody before being eligible for parole.

[44] The Court of Appeal in *Richards* only granted leave to the extent of fixing a parole eligibility date after three years, with the practical effect Richards would spend about four years in custody before being eligible for parole. Dutney J, with whom Fraser JA and McKenzie AJA agreed, noted the authorities support a range of nine to 11 years when someone is raped by a stranger in their home, with higher terms where there are significant acts of violence. He observed of the effectively nine years imposed on Richards that "a higher sentence may have been sought and may have been within range". *Richards* is merely an example of an offender in a case of a broadly similar category to the present receiving an effectively lighter sentence than that imposed upon the applicant here. It does not demonstrate the nine and a half years identified by the learned sentencing judge was beyond range as the appropriate sentence but for the declaration.

[45] None of the other cases referred to in oral submissions, briefly discussed hereunder, were of material assistance to the applicant.

[46] *R v Mallie*[9] concerned an applicant who was sentenced on his pleas of guilty to ten years imprisonment for rape and lesser concurrent terms for associated offences including burglary. This had the effect the rape offence was a serious violent offence, that being an automatic event where such an offence attracts a sentence of ten years or more.[10] Mallie broke into a suburban home at night, entered the complainant's bedroom and punched her repeatedly. He forced her to masturbate him and then raped her. He repeatedly punched her again before leaving. The complainant suffered bruising, gross swelling and a cut to the vicinity of one eye, a cut lip, an abrasion to the shoulder and bruising to the thumb. The psychological impact of the offence upon her was severe. Mallie was 20 and affected by alcohol and amphetamines at the time of his offending. He had some criminal history, including for assault occasioning bodily harm, but references suggested the offending was out of character and his prospects of rehabilitation were said to be relatively good. His application for leave to appeal was refused. That materially heavier sentence outcome, in a case involving a broadly similar level of criminality to the present, provides powerful support for the conclusion the present sentence is not manifestly excessive.

[47] In *R v Rix*[11] the offender resided in a unit at the same apartment complex as the 19 year old complainant. Rix had consumed wine with her and another man earlier on the night of the offending. He later broke into the complainant's unit and knocked the phone from her hand when she tried to call 000. He told her he had a gun, making her compliant. He made her fellate him and raped her, penetrating her vagina and anus. He lingered in the unit and she eventually fled. She had some injuries to her lip and vaginal area and a scratch to her leg. There was evidence of serious psychological impact upon her. Rix pleaded guilty. He was 26 and drunk at the time of the offending and had some minor criminal history. He had served in the army and there was substantial evidence on sentence that he suffered from undiagnosed post

---

9 [2000] QCA 188.
10 Section 161A *Penalties and Sentences Act*.
11 [2014] QCA 278.

traumatic stress disorder at the time of offending. His drunkenness on the night of the offending was an instance of alcohol abuse causally linked to his disorder. The Court of Appeal considered the sentencing judge erred by not taking that into account. It reduced the eleven year head sentence to nine years imprisonment with a serious violent offence declaration. It is unlikely there would have been such a marked reduction but for the novel relevance of Rix's undiagnosed post traumatic stress disorder. In any event it was still a more severe sentence than the present applicant's, which is unremarkable given Rix's conduct was more protracted and invasive.

[48] Finally, the respondent placed some reliance on *R v Benjamin*[12] where there was also a reduction of sentence by the Court of Appeal to nine years imprisonment with a serious violent offence declaration. That involved the violent rape of a woman jogging in a public place, a different factual scenario than in the above discussed cases of burglary rapes. It is unnecessary to venture a view as whether the level of criminality in that matter was less than in the present case. However it could hardly be regarded as markedly higher than the present case and the present sentence is less severe than the sentence imposed there.

[49] The above discussed cases[13] provide no support for the applicant's argument that the learned sentencing judge adopted a range which was too high. To the contrary, they suggest a sound exercise of the sentencing discretion was undertaken in this case.

Conclusion

[50] The sentence imposed was not manifestly excessive. The application for leave to appeal sentence should be refused.

Order

[51] I would order:

1. The application for leave to appeal sentence is refused.

---

12 [2012] QCA 188.

13 The applicant also referred to *R v Q* [1994] QCA 390 in oral submissions but it is of limited utility because it was determined in 1994, before the *Penalties and Sentences (Serious Violent Offences) Amendment Act* 1997 (Qld) amended s 9 *Penalties and Sentences Act* to require that primary regard be had to the community protection and safety when sentencing an offender for offences of violence (the same amending act also introduced the regime for serious violent offence declarations).