

SUPREME COURT OF QUEENSLAND

CITATION: *R v W* [2003] QCA 387

PARTIES: **R**
v
W
(applicant)

FILE NO/S: CA No 229 of 2003
DC No 194 of 2001

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court Ipswich

DELIVERED EX TEMPORE ON: 3 September 2003

DELIVERED AT: Brisbane

HEARING DATE: 3 September 2003

JUDGES: McMurdo P, Dutney and Philippides JJ
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal against sentence refused**

CATCHWORDS: CRIMINAL LAW – SENTENCING – where applicant convicted of two counts of rape – where applicant and complainant intellectually impaired – where applicant’s co-offender received same sentence – where co-offender was not intellectually impaired, younger, had no relevant criminal history and did not have sexual intercourse with the complainant - whether lack of parity between applicant’s and co-offender’s sentence

COUNSEL: K M McGinness for the applicant
DA Holliday for the respondent

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

DUTNEY J: The applicant is a 23 year old man convicted after a trial in Ipswich on 4 June 2003 of two counts of rape

committed on 19 December 2000 when the applicant was 20 years of age. On each count the applicant was sentenced to seven years' imprisonment to be served concurrently. At the time of the commission of the offences the applicant was in a relationship with the complainant. They had been residing together for some weeks before the offences. Both the complainant and the applicant were intellectually impaired.

The offences occurred at about 9.30 p.m. The applicant and his brother, a co-offender, had been drinking. The complainant went to bed with her clothes on. The applicant came into the bedroom and lay down beside the complainant. The applicant was naked. The applicant's brother entered the bedroom. With encouragement from the brother the applicant removed the complainant's clothing despite protests from her that she did not wish to have sexual intercourse and her trying to keep her shorts on. The applicant got on top of the complainant and had sexual intercourse with her without her consent. The complainant tried to stop the applicant by kicking and screaming. The applicant's brother held the complainant down.

The applicant's brother obtained a beer bottle and inserted it in the complainant's anus. The applicant then moved the beer bottle further into the complainant's anus and moved it in and out causing both pain and an anal tear.

The applicant's brother was sentenced on 4 June 2002 to the same period of imprisonment as the applicant. At the time of

the commission of the offences the applicant's brother was only 18 years of age and had no relevant criminal history. He was subsequently convicted of armed robbery in company, that offence being committed on 10 March 2001. On 17 August 2001 the applicant's brother was sentenced to two years' imprisonment suspended after six months. The actual period in custody had already been served when the applicant's brother was sentenced in relation to the rape charges. He was sentenced as a first offender.

In sentencing the applicant the sentencing Judge had regard to the applicant's intellectual impairment and the impairment of the complainant. He took account of the fact that the applicant did not take advantage of the intellectual impairment of the complainant. The applicant had a problem with alcohol and marijuana and had no previous convictions. The applicant had had a disadvantaged childhood and his comprehension of the offences was limited as appears from reports from a psychologist and social worker which were tendered during the proceedings. He was also heavily influenced by his brother.

The applicant's main complaint is that there was a lack of parity between the sentence he received and the sentence given to his brother. I cannot see that there is any such lack of parity as would justify this Court interfering. The applicant's brother was younger and his previous criminal history was modest at the time of the commission of the offences. The applicant's brother did not have sexual

intercourse with the complainant although he produced the beer bottle which gave rise to the second count and on one version inserted it in the complainant's anus. It was the applicant who pushed it further in and moved it in and out.

The attack seems to have been initiated by urging from the brother. The applicant also relies on his brother's subsequent offending as showing that the offences are not out of character for him as the criminal history suggests they are for the applicant. Despite this, I do not think there is any legitimate basis for complaint that a similar offence was given to each offender. The more active involvement of the applicant weighed against his intellectual impairment does not cause me to find that his culpability in the offences should be treated more leniently than that of his brother.

Bearing in mind the degree of harm and humiliation suffered by the complainant in the course of the commission of these offences I do not regard the sentences imposed as excessive nor is such a submission made on behalf of the applicant. I would refuse the application for leave to appeal against sentence.

THE PRESIDENT: I agree.

PHILIPPIDES J: I agree.

THE PRESIDENT: The order is the application for leave to appeal is refused.

