SUPREME COURT OF QUEENSLAND

CITATION:	*R v TK* [2004] QCA 394
PARTIES:	**R** **v** **TK** (applicant)
FILE NO/S:	CA No 304 of 2003 DC No 622 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2004
JUDGES:	McMurdo P, Jerrard JA and Helman J 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 – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – applicant convicted on guilty plea of assault occasioning bodily harm with a circumstance of aggravation and two counts of rape – originally charged with torture but entered into plea bargain – victim was 21 month old daughter of his partner – admitted to burning child with cigarette – sentenced on basis that he had inserted his penis into victim's vagina and anus – victim sustained serious injury – applicant sentenced to 16 years imprisonment and offences declared to be serious violent offences – where sentencing adjourned to obtain psychiatric report but no such report tendered at sentence – where applicant claims he had significantly increased his drug usage at time of offence and was diagnosed with schizophrenia – where applicant claims he told his solicitor that he inserted a finger or fingers, but not his penis, into child's vagina and anus – whether evidence of psychiatric report not tendered before learned sentencing

judge should be received on application for leave to appeal – whether legal representatives were incompetent in not having psychiatric report prepared and in not contesting factual basis of sentence – whether sentence was manifestly excessive

Gallagher v The Queen (1986) 160 CLR 392, followed
Mickelberg v The Queen (1989) 167 CLR 259, followed
R v C [1998] QCA 207; CA No 479 of 1997, 27 May 1998, considered
R v Daphney [1999] QCA 69; CA No 328 of 1998, 16 March 1999, considered
R v Eather (1994) 71 A Crim R 305, considered
R v Luke [1987] CCA 9; CCA No 342 of 1986, 4 March 1987, considered
TKWJ v The Queen (2002) 212 CLR 124, followed

COUNSEL: S R Lewis for the applicant
M R Byrne for the respondent

SOLICITORS: Ryan & Bosscher for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The applicant was originally indicted on one count of torture on 28 February 2002, alternatively assault occasioning bodily harm with a circumstance of aggravation and two counts of rape on 1 March 2002, all concerning the same child complainant. On 23 May 2003, he pleaded guilty in the District Court at Brisbane to assault occasioning bodily harm with a circumstance of aggravation and two counts of rape. His plea was accepted in discharge of the indictment. The sentence was adjourned for his lawyers to obtain a psychiatric report. On 22 August 2003 he was sentenced to five years imprisonment for the assault and to 16 years imprisonment on the counts of rape to be served concurrently. Those convictions were declared to be serious violent offences. Such a declaration was automatic under Part 9A *Penalties & Sentences Act* 1992 (Qld). The applicant contends the sentence was manifestly excessive and that his legal representation at sentence was incompetent, leading the learned sentencing judge into error.

[2] Since 27 October 2000, the definition of "rape" in the *Criminal Code* has been widened to include not only the traditional concept of carnal knowledge without the victim's consent but also non-consensual penetration of the vulva, vagina or anus with a thing or part of the offender's body that is not a penis and penetration of the mouth of the victim with the offender's penis: see s 349(2)(b) and (c) *Criminal Code*.

[3] The facts placed before the sentencing court by the prosecutor were as follows.

[4] The applicant was 24 at sentence and 22 at the time of the offences. He was the boyfriend of the complainant's mother. He had some criminal history but none for like offences. In 1996, he was placed on two years probation for property and drug offences and ordered to perform community service. In 1997, he was convicted of unauthorised dealing with shop goods and fined. Later that year, he had further convictions for possession of utensil or pipes used in connection with drugs. In 1998, he was dealt with for breaching his community service order. In 1999 and

2000, he was convicted of further drug offences. All his previous offending was dealt with in the Magistrates Court where non-custodial sentences were imposed.

[5] The victim was 21 months old. She lived mainly with her father and his mother and step-father but spent some days each week with her mother, the applicant's girlfriend. The applicant did not live with his girlfriend but spent time in her home where she lived with her mother. On 28 February, the victim's grandmother left for work. Later she met her daughter and grandchild at a local shopping centre. Her daughter said that the applicant was at Redcliffe. The grandmother noticed the child had a fresh white-coloured dressing on her left forearm near the crook of her elbow. The mother said she accidentally burnt the child with a cigarette. The grandmother insisted they visit a chemist where the dressing was removed. She noticed a white weeping round mark on the forearm and two other round red marks near the crease of the elbow. The mother said one mark was a mosquito bite and the other was caused by ash from her cigarette.

[6] During the evening the applicant phoned to say he was returning to the mother's home because he had no work the next day. The grandmother went to bed after the baby had fallen asleep on the floor in her daughter's room. The grandmother woke up at 5am the next morning when the baby called out from the bedroom. The baby seemed happy when the grandmother left for work at 6am.

[7] The mother claimed that she had an unexceptional morning with the baby. She put her to sleep in the grandmother's room. She then had a shower, and had sexual intercourse with the applicant. She had a second shower and made lunch while the applicant had a shower. She heard the baby crying in a distressed way. She saw the applicant in the rocking chair wearing only a towel and carrying the child's favourite book. She was surprised the baby was awake because she usually slept for a couple of hours. The applicant said he was trying to read her a book. She returned to making lunch and left the applicant with the child. Five minutes later the child again called out in a distressed way. The applicant was lying at the top of the bed in his towel, the baby was on her knees at the other end of the bed about a metre and a half away crying. She gave the child some toys and she seemed to settle. Three or four minutes later the child again started to cry out. She saw the child and the applicant in the same positions as before. The child had big tears in her eyes and was red and sweaty.

[8] She took the child out of the bedroom to play in the lounge. The applicant dressed and all three went into the backyard and played with the hose. She needed cigarettes and because it was quicker if she went to the shop alone, she left the child with the applicant. She was away about 20 minutes. When she returned the applicant and the child were playing with the hose. She removed the child's pants and nappy and wrapped her in a maroon towel. The child fell over whilst wrapped in the towel and landed on her bottom. She then saw blood on the child's thighs. She discussed this with the applicant, who sat with his head in his hands and said, "oh, no" a few times. She and the applicant looked at the child and the applicant pointed out a small cut to her vagina. He then jumped on his bike and rode off for five or ten minutes. The child was not crying and did not seem to be in pain. They put the child into a nappy and clothes and walked for about half an hour to the newsagents and back. The child walked some of the way. The mother saw blood on the outside of the nappy. When she undid the nappy she saw quite a deal of blood, including clots and saw a piece of skin hanging out of the vagina. The

grandmother rang. The mother told her that the child had fallen over and was bleeding. The grandmother was suspicious and returned home as quickly as she could. Meanwhile, the mother tried to wash the blood away from the child's vagina and became concerned at the amount of blood loss. The child did not seem to be in pain but was continuing to lose a great deal of blood, although less than initially.

[9] The paternal step-grandfather phoned to speak to the child and realised that something was wrong. The child's maternal grandmother arrived home and immediately organised for the child to be taken to hospital. There was a large quantity of blood on the carpet. The mother carried the child to the hospital and the applicant rode his bike beside them whilst the grandmother tried to clean up the house. On the way to the hospital, the applicant told the mother that he had put the child on the bike seat and was pushing her around and that she injured herself on the seat.

[10] At the hospital the child was anaesthetised and examined in the operating theatre. Her labium minora and majora were bruised laterally and there was a transection through the posterior vaginal hymen with a tear extending to the vaginal wall and posterior fourchette. Her vagina contained a significant amount of fresh blood. She had a lax anus with a small two to three millimetre tear in the posterior wall of her anus. She had six discrete lesions from half a millimetre to one centimetre in diameter consistent with burns on her left arm. A more thorough examination by the gynaecology Registrar revealed a tear to the right fornix, the upper part of the vagina, approximately one centimetre in length. This was unable to be sutured and firm pressure was applied to stop the haemorrhage. The introitus was sutured. The injuries were consistent with recent forceful penetration with a blunt object to both the vagina and anus by a penis or similar sized object and inconsistent with digital penetration. The tear beside the cervix in the upper part of the vagina was consistent with deep penetration within the vagina. The injuries could not have been caused by a fall or an astride accident. The lesions on the left arm were consistent with cigarette burns and the distribution was not that of accidental injury. It is not presently known whether the child has been permanently injured.

[11] A police search of the crime scene for a blunt object which, rather than a penis, could have caused the injuries to the child was fruitless.

[12] The applicant was interviewed by police on the morning of 2 March. He said he had no idea what had injured the child. He denied being alone with her during the day or penetrating her in any way. He gave a second interview to police on 8 March. He then said that he was responsible for accidentally burning the child whilst carrying her, but made no further admissions. He was charged with torture on 8 March. Some time later but before he was charged with rape, the maternal grandmother saw him with his head in his hands saying, "I'm going to be doing 10 to 15 years for this."

[13] The mother said that prior to the injuries occurring the applicant had been "pissed off" with her because he thought she was paying too much attention to the child and that the child was "too clingy". On another occasion when she went outside for a cigarette the applicant was alone with the child whilst the grandmother was asleep and he locked her outside the house for a time. On one occasion the applicant accidentally burnt the child in her presence; because she was worried what her own mother would say she decided to tell everyone that she was responsible.

[14] The applicant did not quibble with the facts placed before the court by the prosecutor.

[15] The child's mother pleaded guilty to the offence of cruelty to the child in failing to seek medical attention. She was placed on probation with some of the proceedings held in closed court by way of s 13A *Penalties and Sentences Act* 1992 (Qld).

[16] Although the sentencing was adjourned in May to obtain a psychiatric report, no psychiatric or psychological report was tendered at the sentence in August. The applicant's counsel at sentence submitted that his parents separated when he was 16 years old and his father died in 2001. He left school in Year 11 and has had a chequered employment history. The offences occurred when the applicant was heavily abusing cannabis. His counsel emphasised that he had no prior convictions for any like offences.

[17] The prosecutor submitted at sentence that a penalty of at least 16 to 18 years imprisonment should be imposed whilst the defence submission was that a 12 year sentence was appropriate.

[18] The learned primary judge stated that these offences were acts of extreme violence done to the child to get back in some way at the child's mother. That conclusion was entirely consistent with the evidence. His Honour said that a sentence of 18 years would have been applicable but for the applicant's age and pleas of guilty.

[19] The applicant has filed an affidavit in which he swears that at the time of the offences he had dramatically increased his drug usage and had become extremely paranoid. His relationship with the child's mother was physically good but she was obsessively jealous of him. He had a good relationship with the child victim and had no feelings of violence or sexual attraction towards her. He engaged the solicitors who acted for him at sentence after he was first charged with the offence of torture in March 2003. He received some medical help for his mental state before he was detained in custody; he was diagnosed with schizophrenia and advised to admit himself to hospital but did not. He told his solicitor about this contact with the Adult Mental Health Service and of the initial diagnosis. His solicitor told him that this "would not hold much weight in Court". Because of the anti-psychotic, anti-anxiety and anti-depressant medication he has taken, his memory of the events is flawed. On 12 April 2003 he was charged with an additional two counts of rape. He was refused bail in part because of his mental state in that he was considered a suicide risk.

[20] There is no sworn or affirmed evidence before this Court that the applicant inserted a finger or fingers and not his penis into the child's vagina and anus but he swears that, in preparation for the committal proceedings, he told his solicitor and his barrister that he did not insert his penis into the child's vagina and anus. The gynaecologist was cross-examined about this issue at the committal. This Court was told in submissions from the Bar table that the doctor conceded the injuries may have been caused by forceful penetration of two or three fingers.

[21] On 16 March 2004 his solicitor visited him in custody and discussed a "plea bargain": the prosecution would not proceed with the offence of torture if he entered guilty pleas to the remaining counts; the prosecution indicated they would ask for 10 to 14 years imprisonment if he pleaded guilty. He did not discuss with his solicitor the factual basis of the plea of guilty. He told his solicitor he would be

happy with that result. On 23 May 2004 he was taken from prison to the District Court at Brisbane and was unaware that he was to be sentenced. His solicitor visited him in the cells for about five minutes and told him that a different prosecutor had been allocated but reassured him that "it would work out". His solicitor gave him a form which he read quickly and signed after being advised that it was required for the solicitor's file. That statement acknowledged that he had been charged with the four counts; that his solicitors had made him aware of the prosecution case; that he had previously instructed his solicitors to plead not guilty and to proceed to trial; that in response to this his solicitors obtained a trial date; that he now wished to plead guilty to assault occasioning bodily harm and two counts of rape; that he made these decisions of his own free will after discussing the charges and procedure with his solicitors, that he had been advised that he would receive a lengthy period of imprisonment and that it was highly probable if not certain that he would receive a serious violent offender declaration which would cause him to serve 80 per cent of his sentence.

[22] The applicant contends that prior to signing this statement he expressed his concern about the allegation of rape by penile rather than digital penetration. His solicitor basically told him, "make your plea and it should work out" and assured him that it was rape whether it was digital or penile penetration. He asked whether there would be any difference in the term of imprisonment and was advised that the difference would be about five years imprisonment but that if they contested the sentence it would be highly prejudicial because of the complainant's age. His solicitor further advised him that they would have little chance of successfully contesting the issue of penile penetration. The solicitor said that if he asked the barrister for his view he would say that the applicant should take the matter to trial because he had nothing to lose.

[23] The applicant pleaded guilty on 23 May 2003 and his sentence was adjourned for his legal representatives to obtain a psychiatric report. Prior to the August sentence, his solicitor visited him in prison. The applicant again raised his concerns about the allegation of penile penetration. On this and on a previous visit, he told his solicitor that he had been the victim of sexual abuse as a child.

[24] On the day the matter was listed for sentence he was taken to the District Court at Brisbane. His solicitor visited him in the cells before the sentence. He was given and read a copy of the victim impact statement. He signed a further set of instructions acknowledging that he had previously entered the pleas; that his matter had been listed for sentence; that he had discussed the charges and court procedure with his solicitors and asked any questions he wished; that he had been advised that a psychiatric or psychological report had not been prepared and that he wished to proceed to sentence without any such report; that the prosecution case would be that there was penile anal and vaginal penetration; that his solicitors should not challenge the prosecution's factual submissions; that he had discussed his "rights to a trial, contested sentence (challenging the facts)" but he wished to proceed to sentence and that he asked for his family not to be present during the sentence. Before signing that statement his solicitor advised him that he had spoken to a number of doctors who had indicated that their reports would not be favourable. He believed that because he had already pleaded guilty he had no further options. He did not understand that he could contest the factual basis for the sentence. His solicitor told him that the prosecutor would now be contending for a sentence of

between 17 years and life imprisonment but not to worry about these submissions requesting a lengthy sentence.

[25] The applicant now contends that his legal representatives were grossly incompetent in not having had prepared a psychiatric or psychological report on his behalf for sentence and in not contesting that the rape was digital rather than penile and that these factors led the sentencing judge into error and caused a miscarriage of justice.

[26] The applicant's present lawyers have recently obtained a psychiatric report from Dr Beech, which they want this Court to now receive. The report states the following. The applicant has long standing depressive symptomatology associated with anxiety and paranoia with marked deterioration following the death of his father in March 2001. This is consistent with a pathological grief reaction in the context of a prejudicial childhood history and an ambivalent and disturbed relationship with his father compounded by childhood sexual abuse. His moods seemed to have deteriorated further following the charges. The applicant appears of average intelligence and was most likely suffering at the time of the offences from polysubstance abuse and dependence and a major depressive episode but there is little available information to confirm this. He was not of unsound mind and was fit for trial. It would be appropriate to refer him for courses in substance use, anger management and an appropriate sexual offender program.

[27] The respondent has obtained and filed an affidavit from the applicant's solicitor at sentence. He swears that he did discuss with the applicant the prospects of successfully contesting the sentence on the basis that the rape was digital rather than penile. He was unaware that the applicant had made repeated attempts at suicide. He spoke to between three and five experts about the applicant's case. They either did not want to take on the case or they did not think their report would be favourable. The applicant told him that prior to the offences he had been smoking cones of marijuana and using speed. He cannot recall his specific conversation with the applicant but it is his usual practice to discuss the effect of drug use at the time of an offence as to mitigating the sentence or as a defence. He discussed the applicant's case with him at length. He advised that the absolute minimum sentence would be ten years imprisonment. The applicant was fundamentally aware for some time that the prosecution allegation was penile penetration and although he initially gave instructions to contest the charges and to proceed to trial, he ultimately gave instructions to plead guilty and that he did not wish to pursue a contested sentence. During conferences, the applicant did not appear upset and was polite, emotionless and quietly spoken so that discussions were calm and considered. The applicant did tell him that he had been the victim of sexual abuse as a child.

[28] Dr Beech's diagnosis is guarded and qualified. His report suggests that the most significant factor in the applicant's offending was his drug abuse. That was obvious to the sentencing judge from the criminal history and from the submissions placed before the court at sentence by his counsel who also referred to the fact that the applicant's parents had separated when he was 16 years old and that his father died in 2001. Child sexual offenders often claim to have been victims themselves and this assertion in itself will not necessarily result in a lesser sentence. Nor will the possibility that an offender was depressed at the time he commits a serious violent sexual attack on a 21 month old child necessarily result in leniency. I am unpersuaded that even had Dr Beech's report been prepared and tendered at sentence, it would have had any additional mitigating effect in the light of the very

serious nature of his offending. This Court should not receive the report of Dr Beech as it does not meet the criteria for admission discussed in *Gallagher v The Queen*[1] and *Mickelberg v The Queen*.[2] For the same reason I am not persuaded that the applicant's lawyers at sentence were flagrantly incompetent in not obtaining such a report: *TKWJ v The Queen*.[3]

[29] The applicant, who is apparently of average intelligence and competence, gave informed written instructions to his solicitor to conduct the sentence on the basis of an acceptance of the prosecution allegations of penile rather than digital rape. There is no evidence before this Court that the prosecution submissions at sentence were untrue. This was a sexual act of extreme violence perpetrated upon a 21 month old in the care of an offender for the purpose of seeking revenge on the mother, with serious injuries to the child. In those circumstances it matters little whether the weapon used was a penis, a finger or fingers or some other object. Had he contested the sentence on this basis he would have had less mitigating benefit for remorse and, in any case, the medical evidence did not suggest his prospects were promising. His legal advice, which he accepted, not to contest the sentence on this basis was sound. He did not dissent in court from the facts placed before the sentencing judge by the prosecutor. The applicant's contention that his legal representation was incompetent in not advising him to contest the sentence leading to a miscarriage of justice is without basis: *TKWJ*.

[30] I turn now to the contention that the sentence was in any case manifestly excessive. This case is comparable to *R v C*[4] where C pleaded guilty to anal rape of a two year old child. C was 25 at the time of the offence and 26 at sentence. He was sentenced to life imprisonment and appealed against that sentence. The child was asleep in bed at her grandmother's house. C looked upon the child as his niece. He entered the room in which she was sleeping, locked the door and savagely anally raped her. The grandmother could hear the child's cries but was unable to enter the room until she found some spare keys. She recognised C. He ran out the window and into the bush. The child was naked, crying and bleeding profusely. She was taken to hospital and found to have substantial injuries to her peritoneum and posterior vaginal wall extending to the rectum. There was a whitish discharge around the vulva, perineal and anal region, a torn rupture of the external sphincter, bruising around the anus and superficial tears inside the wall of the lower part of the rectum. Her vaginal hymen was torn. The injuries were caused by forceful entry, possibly with a male erect penis, through the anal region. The victim will be left with scarring which may limit her sexual functions; she may have faecal incontinence later in life; she will have a permanent scar on her abdomen and could have chronic pelvic and abdominal pain later in life but it is hoped that, other than for her scarring, she will make a complete physical recovery. C initially denied his involvement and his de facto wife provided a false alibi. In a later record of interview, he said he had been drinking heavily before he committed the offence. He entered his plea of guilty only after penile swabs indicated the presence of the complainant's blood. He had a previous history of violent conduct including convictions for assault and firearm offences; his most serious offence was attempting to strike a police officer with a projectile with intent to do grievous

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1 (1986) 160 CLR 392, 397, 399, 407.
2 (1989) 167 CLR 259, 273, 275, 292.
3 (2002) 212 CLR 124, [13]-[17], [107]-[112].
4 [1998] QCA 207; CA No 479 of 1997, 27 May 1998.

bodily harm for which he was sentenced to five years imprisonment. Tendered psychiatric reports stated that when intoxicated he became aggressive and violent and that if he continued to drink further violent antisocial acts could be anticipated. Despite his plea of guilty the sentence of life imprisonment was not found to be manifestly excessive.

[31] In *R v Daphney*[5] Daphney was sentenced to 15 years imprisonment after pleading guilty to breaking and entering a dwelling with intent and rape. He was sentenced to lesser penalties in respect of other property offences. He applied for leave to appeal against his sentence contending that he should have been given a parole recommendation but such recommendation was not open because of Part 9A *Penalties & Sentences Act* 1992 (Qld). He had a lengthy criminal history. He was a young man, 19 at sentence and 18 when he committed the offences. He burgled a home and anally raped a four year old girl sleeping in the home after lubricating her with margarine from the kitchen refrigerator and taking her into a nearby laneway. He returned her to the house before fleeing. The child complained to her mother at 4.30am that a man had been in her room and her bum was sore. Her sister gave a supporting account. She was taken to hospital where dried blood clots within the anal orifice, bruising over the outer perianal skin and a small tear to the entry of the anus and blood stains on her underpants were observed. After initial denials, Daphney admitted his crime. The offending had a dreadful impact on the child victim and her family. He wrote a brief note of apology to the family. This Court found the sentence imposed was not manifestly excessive.

[32] In *R v Luke*[6] a sentence of life imprisonment was imposed on a 25 year old man who pleaded guilty to raping a six year old girl whom he took from the street as she walked past his house. He had no prior convictions for sexual offences but had other convictions for property offences and assaults. The sentence was reduced to 18 years imprisonment.

[33] In *Eather*[7] a 21 year old without previous convictions pleaded guilty to various serious sexual offences, including sodomy, committed on three infant boys whom he was babysitting. The victims developed anal warts and suffered other serious consequences. A sentence of 12 years imprisonment with a recommendation for parole after four years was increased on an Attorney-General's appeal to 16 years imprisonment because this offence was in the worst category of case.

[34] The sentence of 16 years imprisonment, of which the applicant will have to serve 80 per cent is a heavy penalty, especially for a 24 year old man. The comparable matters to which I have referred show it was not, however, manifestly excessive. It adequately reflected the applicant's plea of guilty and comparative youth whilst recognising that the offending involved a dreadful breach of trust and concerned an act of sexual violence committed on a defenceless 21 month old child because of resentment towards her arising out of his relationship with the child's mother. The child was seriously injured with her long term physical and mental prognosis unknown. It seems unlikely the offence would have been committed but for the appellant's abuse of marijuana and speed, but the offences of rape, as in *Eather*, were within the worst category of those offences.

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5 [1999] QCA 69; CA No 328 of 1998, 16 March 1999.
6 [1987] CCA 9; CCA No 342 of 1986, 4 March 1987.
7 (1994) 71 ACrimR 305

[35] I would refuse the application for leave to appeal against sentence.

[36] **JERRARD JA:** In this matter I have read the reasons for judgment of the President and respectfully agree with those and the order Her Honour proposes.

[37] **HELMAN J:** I agree with the order proposed by the President and with her reasons.