SUPREME COURT OF QUEENSLAND

CITATION:	*R v Basacar* [2006] QCA 352
PARTIES:	**R** **v** **BASACAR, Fahri** (applicant)
FILE NO/S:	CA No 76 of 2006 DC No 3000 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2006
JUDGES:	Jerrard and Holmes JJA and Mullins J Separate reasons for judgment of each member of the Court, Holmes JA and Mullins J agreeing as to the order made, Jerrard JA dissenting
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 – SEXUAL OFFENCES – applicant was convicted after a trial of two counts of rape and was sentenced to eight years' imprisonment – applicant was also convicted of entering premises with an intent to commit an indictable offence – stealth rape – applicant appealed against sentence imposed in respect of the rape counts and contended that a sentence of six to eight years' imprisonment was more appropriate – no violence – no prior convictions – no remorse – whether the sentencing discretion miscarried *R v Press* [1997] QCA 7; CA No 489 of 1996, 14 February 1997, considered *R v Q* [2003] QCA 421; CA No 78 of 2003, 26 September 2003, considered *R v Raymond* [1994] QCA 441; CA No 299 of 1994, 12 September 1994, considered

R v SAS [2005] QCA 442; CA No 217 of 2005, 2 December 2005, cited
R v Stirling [1996] QCA 342; CA No 205 of 1996, 17 September 1996, cited
R v Williams [2002] QCA 211; CA No 361 of 2001, 21 June 2002, considered

COUNSEL: A J Glynn SC for the applicant
R G Martin SC for the respondent

SOLICITORS: H Drakos & Company for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA**: In this application I have read the reasons for judgment of Mullins J, with whom Holmes JA agrees. I consider that the eight year head sentence was high, since the applicant did not use any weapon nor threaten physical injury to the victim. The sentence accordingly appears a severe one when contrasted with those described in *R v SAS* [2005] QCA 442.[1] It appears high when compared to that imposed in *R v Stirling* [1996] QCA 342.[2] I consider the sentence therefore exceeds what was proper, and would have allowed the application, and substituted instead a sentence of seven years imprisonment.

[2] **HOLMES JA**: I have read the reasons for judgment of Mullins J and gratefully adopt her Honour's setting out of the background facts. I agree with her Honour that, as a general proposition, sentences for rapes of this type can be expected to fall within seven and nine years imprisonment. There are, of course, a number of factors, identified in the cases, which will bear on the sentence imposed: among others, whether threats or violence are used, whether the victim is harmed and whether there is a weapon involved.

[3] In the present case none of those factors existed, and the applicant might well have received a sentence of less than eight years. But there was the additional feature of his having illicitly entered the room in which the complainant was sleeping; and that, I think, makes it impossible to say that the learned sentencing judge's decision to impose a sentence of eight years imprisonment went beyond a proper exercise of sentencing discretion. Like Mullins J, I would dismiss the application for leave to appeal.

[4] **MULLINS J**: The applicant seeks leave to appeal against the sentence of eight years' imprisonment imposed for each of two counts of rape of which he was found guilty after a trial. He was also found guilty of entering premises with an intent to commit an indictable offence.

[5] The offences were committed on 10 July 2004. The applicant was staying in a room in an accommodation establishment. The complainant and her boyfriend were staying in another room. The room occupied by the complainant and her boyfriend shared kitchen and television facilities with a number of other rooms. The applicant was watching television in this common area while the complainant and her

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1 CA No 217 of 2005, 2 December 2005.
2 CA No 205 of 1996, 17 September 1996.

boyfriend made and ate their dinner in the common area. The complainant's boyfriend retired to their room. The complainant went for a walk and returned to the room. The complainant shut the door, but did not remember locking it. There were double bunks in the room. The complainant's boyfriend went to sleep on the top bunk and the complainant went to sleep on the bottom bunk about 9.45 pm. Both the complainant and her boyfriend wore earplugs to sleep as there was a bar nearby that was noisy.

[6] The applicant entered the room at about 3 am and got into the bottom bunk with the complainant. The complainant described how she was lying on her side facing the wall, when she felt what she thought was her boyfriend on the bunk behind her, leaning up against her and pressing her towards the wall. Digital penetration took place. The complainant described how she became aroused and when she rolled over to face him that "… he gently guided me back towards the wall, so I couldn't – I didn't – I didn't see his face at the time" (AR47 lines 16-17). The complainant described how the man then inserted his penis half way into her vagina twice for about 15 seconds each time, that she rolled back again, then realised that the man was not her boyfriend and pushed the applicant away. The complainant yelled, the applicant ran away and the complainant's boyfriend leapt down from the top bunk and unsuccessfully gave chase. The complainant described how when her boyfriend returned she could remember apologising to him as if she had done something wrong and described how she "… felt really ashamed that I thought it was him and it wasn't" (AR50 lines 45-56).

[7] The applicant was located a short time later and gave police a false story. At trial the applicant gave evidence that he was in the common area when he saw the complainant without clothes standing at the door of her room and he therefore felt that she invited him into the room, but the jury's verdicts indicate that version was not accepted by the jury.

[8] The applicant was born in 1961 and was 42 years old at the date of the offences. He had no previous criminal history. He was married with two young daughters. His wife has physical and mental problems and he was her carer. The applicant had a good work history.

[9] In sentencing, the learned trial judge referred to the evidence of the applicant that at the time of the events he was quite drunk, but the trial judge noted in the light of the applicant's conduct after he left the complainant's room, that he either sobered up very quickly or the applicant was not so affected by alcohol to not know what he was doing at the time.

[10] On this application, counsel for the applicant (who had not appeared at the trial) submits that the sentence range was six to seven years which is at odds with the range of seven to nine years submitted by the applicant's counsel who appeared at the trial. The applicant relies on his lack of prior convictions and that in committing the offences there was no violence, either gratuitous or to overcome resistance, apart from the violence inherent in the nature of the offending. The applicant also points out that, although he was convicted of two counts of rape, there was only one incident.

[11] To support the submission as to the appropriate sentencing range, the applicant relies on *R v Stirling* [1996] QCA 342 ("*Stirling*"); *R v Williams* [2002] QCA 211 ("*Williams*"); and *R v SAS* [2005] QCA 442 ("*SAS*").

[12] In *Stirling* a sentence of nine years for rape that was imposed after trial was reduced on appeal to seven years. Stirling lived in the unit adjacent to the complainant and had been a guest in the complainant's unit with others, consuming alcohol and marijuana. The others left and the complainant went to bed. Stirling said he was leaving. The complainant awoke to find Stirling in her bed, indecently assaulting her. The complainant told him to get out, but he held her down on the bed and said he was not leaving until he finished what he had come for. When the complainant stood up, Stirling tore her underpants down the side, lay her on the bed and had sexual intercourse with her. Stirling was 30 years old, had a criminal history and was on parole in relation to a number of offences including armed robbery at the time of the offence. Thomas J (as his Honour then was), with whom the other members of the Court agreed, stated "…a nine-year sentence seems more appropriate for those cases where specially serious factors operate such as the infliction of injury or the use of serious threats, possession of a weapon or some factor of a particularly aggravating kind."

[13] In *Williams* the complainant was a 16 year old virgin who was raped by Williams who was staying in the same flat. Williams had sought the consent of the complainant to sexual intercourse, but when she refused he fetched a serrated-edged knife from the kitchen. He did not physically threaten the complainant with the knife although he verbally threatened to cut her head off, if she did not comply with his request for sexual intercourse. The complainant resisted and Williams pinned her down with his weight, before raping her. The trial was delayed for eight years, as Williams had left the area. Williams' appeal against a sentence of seven and one-half years after trial was unsuccessful. It was suggested in the judgment of Jones J (with whom the other members of the Court agreed) at paragraph [55] that the penalty range for the offence of rape with similar features to the circumstances of *Williams* was seven to nine years.

[14] In *SAS* the Court, by a majority, reduced the sentence on each of two counts of rape from nine years to eight years. The complainant was 14 years old. SAS pleaded guilty to the two counts of rape and, in addition, three counts of indecent treatment of a child under the age of 16 years and one count of deprivation of liberty. The complainant was living on the streets. She had consumed alcohol with SAS and accompanied him to a clubhouse where she fell asleep. She woke to find him indecently assaulting her. The complainant got up immediately and called the police. She was unable to open the door to leave and SAS refused to let her out. He threatened to assault her with a pool cue if she did not do what he wanted. He penetrated her twice, despite her refusal to have sexual intercourse. The police eventually arrived and SAS claimed that they had had consensual intercourse. Although the majority of the Court acknowledged there were aggravating circumstances in SAS's offending, it was found that the limited force used by him made the case one appropriate for the mid-point of what was accepted as the available range of seven to nine years.

[15] The Crown relies on *R v Raymond* [1994] QCA 441 ("*Raymond*"); *R v Press* [1997] QCA 7 ("Press") and *R v Q* [2003] QCA 421 ("*Q*").

[16] The facts in *Raymond* are similar to this matter in that the complainant was asleep in her house when she was awakened by someone having intercourse with her whom she initially thought was her husband, but it was Raymond. Raymond who was 18 years old had entered through a door that was closed, but not locked. He pleaded guilty to rape. He had no previous convictions, but also pleaded guilty to attempted burglary which occurred earlier the same evening when he had tried to enter another house, but the occupant was awakened by a dog barking and a noise at her bedroom window. His sentence of eight years' imprisonment with a recommendation for release on parole after serving three years' imprisonment was not disturbed on appeal. The persistence which Raymond showed on the night of the offence by entering the complainant's house after he was unsuccessful in entering another house obviously had to be balanced against his youth. In his judgment Davies JA (with whom the other members of the Court agreed) stated:

> "On the other hand, the invasion of the first complainant's home and the substantial emotional and psychological effects on her were serious, aggravating features of the rape offence. Moreover, in the circumstances, the learned sentencing Judge was entitled to conclude that the plea of guilty was not motivated by remorse but rather by a frank recognition of the inevitability of conviction."

[17] *Press* also involved an intruder who had sexual intercourse with a complainant who was sleeping in the unit that she lived with her boyfriend. She had thought that Press was her boyfriend. When she realised that the man in her bed was not, she screamed and her boyfriend apprehended Press. The boyfriend and his stepfather then punched Press, causing him to suffer a residual permanent disability. That factor was taken into account as mitigating the sentence. Press was 34 years old with a good work record. He had a couple of previous convictions, but the only one of consequence arose out of a dispute over property after the break up of his relationship with a woman. On appeal the sentence of nine years that was imposed after Press had pleaded guilty was reduced by the majority of the Court to seven years. The sentence of seven years is explicable because of the injuries inflicted on Press by the complainant's boyfriend and his step-father. The following statement was made in the judgment of the majority:

> "Rape is a serious offence, which ordinarily attracts a heavy penalty. It is plainly more serious when committed against a woman in her own home. In *R. v. Stirling* (C.A. 205 of 1996) Thomas J., with the concurrence of Fitzgerald P. and Davies J.A., said that a nine year sentence seemed more appropriate for cases where there were 'specially serious factors, such as infliction of injury, use of serious threats, possession of a weapon, or some factor of a particularly aggravating kind.' All generalisations in sentencing matters tend in time to be revisited on their authors; but, subject to that perhaps superfluous counsel of caution, his Honour's observation is a useful starting point for the appropriate sentence in this case."

[18] The victim in *Q* was staying in a backpackers' hostel and had been sleeping in her room when she awoke to find Q having sexual intercourse with her. Q admitted to the police that he had been in the room and removed a camera, but denied raping the complainant. He was sentenced after trial to imprisonment for eight years for rape. He was given a concurrent sentence of four years for the burglary involving the camera. He was also sentenced at the same time, after pleading guilty, to six burglaries committed in backpacker establishments, five or which were committed

around the date of the rape. The sentence for rape was cumulative on the sentence of three years for each of those burglaries and that is a relevant matter when using this sentence for comparison. Helman J (with whom the other members of the Court agreed) noted that the eight offences for which he was dealt with at the same time showed that Q "was a persistent predator upon those occupying cheap tourist accommodation at Hervey Bay". Q had a significant criminal history and his offences against the complainant were described as "not isolated incidents but part of a pattern of wrongdoing that deserved substantial punishment". The sentence of eight years for the rape was not disturbed on appeal. In the course of the judgment, Helman J referred to *Raymond* and *Press* and noted at paragraph [29]:

> "Those cases establish a range for offences of the kind in question beginning at imprisonment for seven years."

[19] It is not possible to reconcile with precision each of these authorities with the others, but collectively the authorities support a sentence of at least seven years for a rape committed by an offender who enters a complainant's bedroom uninvited.

[20] Although there was no additional violence involved in the applicant's offending in this matter, he committed an offence by entering the complainant's room uninvited and committed the rapes by allowing the complainant to be deceived that he was her boyfriend. When the complainant tried to face him in the bunk, he manoeuvred her so that he could continue his touching of her and engage in sexual intercourse, without revealing his identity. There was thereafter no remorse shown by the applicant for his offending. Even allowing for the factors which the applicant relies on in his favour, the survey of the authorities supports the conclusion that a sentence of eight years for rape in the circumstance of the applicant's offence was not outside the exercise of a sound sentencing discretion. The application for leave to appeal against sentence should be refused.