SUPREME COURT OF QUEENSLAND

CITATION:	*R v West* [2007] QCA 347
PARTIES:	**R** **v** **WEST, Paul Anthony** (applicant)
FILE NO/S:	CA No 143 of 2007 DC No 2189 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2007
JUDGES:	Keane JA, Dutney and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application 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 – GENERALLY – where applicant sentenced to four and a half years imprisonment for torture and lesser concurrent sentences for related offences – where applicant will become eligible for parole after serving half his sentence – whether order should have been made to suspend sentence at that point *Penalties and Sentences Act 1992* (Qld) s 160C(5)
COUNSEL:	P J Callaghan SC for the applicant D R Mackenzie for the respondent
SOLICITORS:	Robertson O'Gorman for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** On 18 August 2006, the applicant was convicted on his own plea of one count of assault occasioning bodily harm, one count of common assault, one count of threatening violence, one count of unlawful wounding, one count of rape, one count of torture and one count of attempting to pervert the course of justice. He

was not sentenced until 8 June 2007. On that date, a sentence of four and a half years imprisonment was imposed in respect of the torture count. Lesser concurrent sentences were imposed in respect of the other offences.

[2] The applicant seeks leave to appeal against this sentence on the following grounds:

> "Ground 1: Her Honour the learned sentencing Judge erred when she failed to consider the availability of s 144 of the *Penalties and Sentences Act* 1992.
>
> Ground 2: Her Honour erred when she failed to suspend part of the term of imprisonment to which the applicant was sentenced."

[3] I will set out the circumstances of the offences and the essential aspects of the approach of the learned sentencing judge before turning to a discussion of the arguments advanced on behalf of the applicant.

The circumstances of the offences

[4] The offences in question, save the applicant's attempt to pervert the course of justice, all occurred on 22 February 2004 at a property outside Thargomindah. The applicant, who was then 36 years old, was the manager of the property and the complainant was his wife. They lived on the property with their three children who were aged 10, 14 and 16. The family relationship had been a troubled one. The applicant, a regular drinker, subjected the complainant and the children to outbreaks of personal violence over the years. It is said that he was under particular stress because of prolonged drought.

[5] On the evening of 22 February 2004, the applicant had been drinking since the early afternoon. While the complainant was cleaning up after the evening meal, the applicant came into the kitchen and said to her that all her lies were creeping up on her.

[6] The applicant then beat her with his fists before dragging her into the main bedroom. The complainant broke free and hid under the bed in her daughter's room. The applicant then threatened to shoot their daughter with a loaded .22 Magnum rifle which he was holding unless the complainant came out of hiding. She came out and he pushed her outside saying that he did not want to get blood all over the carpet. He then pushed her to the ground. This incident was the subject of the first count on the indictment.

[7] The applicant then placed both hands around the complainant's neck and started to choke her. She felt that she was dying as she began to feel dizzy and lose consciousness. These facts were the subject of the second count.

[8] The applicant then picked up the rifle and placed it near the complainant's head. When she turned her head away, he told her not to be a coward and to take her punishment. He told her to look at the gun and to look where his finger was on the trigger. At this stage, the gun was pointed at her forehead. The complainant was terrified and genuinely in fear of being shot. He told her not to move; if she moved, he would shoot their daughter. He then obtained a set of crutching shears from the house. He told the complainant that he had telephoned the police and told them that he had done a silly thing and killed his wife. He told the complainant that she would see the lights from town heading out soon. He forced her to look towards town and traced the crutching shears across her eyes and nose while threatening to

cut her breasts and private parts. He told her that he would do it when she saw the police coming, and that he would then kill their daughter and then himself. These were the facts involved in the third count.

[9] The applicant then rolled the complainant on her back and sat on her chest while pinning her arms. He then used the shears to cut off her jeans and underwear. He then cut off some of her pubic hair. He then cut her on her private parts causing a wound one centimetre by one centimetre. This incident was the subject of the fourth count.

[10] The applicant then placed a finger inside her vagina and then in her mouth telling her to taste her own first blood. He then told her that he was going to cut out her clitoris. He then squeezed her in that area causing her to suffer excruciating pain. This was the incident which was the subject of the fifth count.

[11] The facts the subject of the first five counts were relied on by the Crown in relation to the sixth count.

[12] The daughter came out of the house, and, at that point, the complainant was able to escape; she ran away dressed only in her blouse and bra. The applicant yelled after her and started to use a spotlight to try to find her. She hid in the bush in fear of him and eventually made her way into town on foot. She went to the hospital where she was seen to be in a distraught and severely distressed state.

[13] The applicant was arrested on 23 February 2004. He was held in custody for a period of 394 days before he was released on bail on 21 March 2005. His bail was subject to conditions which, understandably, were more than usually stringent.

[14] A preliminary hearing occurred in May 2004. The indictment on the first six counts was presented on 8 October 2004. A trial scheduled for May 2005 was delisted because of the applicant's difficulties in arranging legal representation. A plea of not guilty to the first six counts was entered on 20 October 2005.

[15] While the matter was awaiting trial, the applicant asked his niece to pass on to the complainant a message that, unless she dropped the charges, some embarrassing photographs of her would be published. It appears that these were photographs of the complainant taken by the applicant on an occasion when he forced her to allow his dog to lick her breasts and vagina. This threat was the subject of the seventh count.

The sentence

[16] The Crown submitted that the appropriate sentence on the torture count was five to seven years imprisonment with a declaration that it was a serious violent offence, the effect of that declaration being that the applicant would be obliged to serve 80 per cent of the term imposed before becoming eligible to be considered as a candidate for parole.

[17] On the applicant's behalf, it was submitted that the appropriate range of imprisonment was four to five years without the imposition of a serious violent offence declaration taking into account the period already served in custody, the delay in progressing the matter, the lengthy period on bail subject to unusually stringent curtailment of his liberty and the steps taken by the applicant towards

rehabilitation, any sentence of imprisonment should be suspended after the applicant had served 394 days, ie forthwith.

[18] The effect of the sentence imposed by the learned sentencing judge was that the applicant will become eligible for parole automatically at the halfway mark of his sentence through the operation of s 160C(5) of the *Penalties and Sentences Act 1992* (Qld) and s 184(2) of the *Corrective Services Act 2006* (Qld).

[19] It will have been seen that the progress of these proceedings to final determination was characterised by considerable delays. Before the learned sentencing judge, the Crown accepted that any delay between October 2005 and August 2006 was its responsibility, and not that of the applicant. Her Honour was also prepared to accept that the delay between August 2006, when the applicant pleaded guilty, and the date of his sentence was not attributable to the applicant.

[20] The learned sentencing judge took into account the applicant's plea of guilty, the fact that the 10 month delay between plea and sentence was attributable to the Crown, the fact that he was 39 years old at the date of sentence and had no previous convictions, the fact that he was subject to stringent bail conditions to which he adhered for nearly two years, the fact that he had been in promising employment for about 16 months, the fact that he himself had suffered an abusive childhood, and the facts that he was no longer drinking and had formed what appears to be a harmonious relationship with a new partner. Her Honour accepted that the applicant had made real efforts towards rehabilitation.

[21] Her Honour took the view that the appropriate head sentence for the torture count was six years. She declined to make a serious violent offence declaration on the basis that the sentence ultimately imposed would "adequately reflect the seriousness of [the applicant's] overall offending behaviour on that day and shall provide as an appropriate deterrence [sic] in all the circumstances."

[22] In relation to the attempt to pervert the course of justice, the learned sentencing judge decided to make the sentence imposed in respect of that count concurrent. Her Honour recognised that there was a strong argument for making the sentence for this offence cumulative. Her Honour's decision to make the sentence on this count run concurrently with the other sentences was distinctly lenient.

[23] The learned sentencing judge concluded that, in order to reflect the matters of mitigation to which she referred, it was appropriate to reduce the notional head sentence of six years on the torture count to four and a half years imprisonment. Her Honour then stated:

> "In light of the concessions that I have made, that is no imposition of the declaration of a serious violent offender as well as no cumulative term, I consider it not appropriate to make any recommendation for parole eligibility."

The applicant's arguments

[24] In this Court, the applicant does not suggest that the learned sentencing judge erred in concluding, as her Honour obviously did, that it was inappropriate for the applicant to serve less than half of the term of four and a half years in actual imprisonment. Rather, the applicant argues that her Honour erred in failing to suspend his sentence after half the term had been served.

[25] In this regard, the applicant seizes upon the passage cited above at paragraph [23] of these reasons as indicating that the sentencing process was "tainted by error" in that, by virtue of s 160C(5) of the *Penalties and Sentences Act*, no question of a **recommendation** for parole arose: the question which arose under this provision was whether her Honour was disposed to **fix** a parole eligibility date. The argument for the applicant builds on this foundation to assert that the passage quoted demonstrates that the learned sentencing judge "unnecessarily circumscribed her discretion" by "her omission, at this point, to even refer to the possibility of a partially suspended sentence". The applicant suggests that her Honour's error may have resulted in part from the two-step method by which her Honour arrived at the sentence of four and a half years by commencing with a notional head sentence of six years, a level at which the possibility of an order partially suspending the sentence actually imposed is foreclosed by the terms of s 144(1) of the *Penalties and Sentences Act* which authorises the making of an order that a term of imprisonment be suspended where the term is five years or less.

Discussion

[26] The first difficulty with the applicant's submission is that the learned sentencing judge clearly did advert to the option of a suspended sentence. Her Honour said in her sentencing remarks:

> "your counsel … further submitted that the delay which has occurred in this case together with the stringent bail conditions imposed upon you - were over a period of some nearly two years - taking into account the time you had already served in custody, 394 days, and the steps you have taken yourself towards rehabilitation would justify that any sentence of imprisonment imposed now ought to be suspended after you have served 394 days."

[27] The second difficulty with the argument advanced on the applicant's behalf is that it assumes that the applicant has, in fact, achieved a level of rehabilitation which enables, and indeed requires, the judgment to be made now that no further rehabilitation is necessary before the applicant can safely be returned to the community. The proposition that the applicant's level of proven rehabilitation is such that neither he, nor the community, would benefit from supervision if he were to be granted parole is simply not demonstrated. The learned sentencing judge, while recognising the applicant's efforts to rehabilitate himself, stopped short of finding that these efforts had been crowned with success.

[28] This Court is not in a position to take a more optimistic view of the progress of the applicant's rehabilitation. To do so would be to fail to recognise that the appalling events of 22 February 2004 revealed a man with very serious problems which manifest themselves in irrational violence. At the time that these events occurred, the applicant was a mature man with a history of domestic violence. That the applicant did not have a criminal history was due, it would seem, only to the failure of his long-suffering family to seek help from the authorities at an earlier point in time. That the applicant's behavioural problems did not lead to more serious injury or even loss of life was not due to the exercise of any restraint on the applicant's part. As it is, even though the complainant did not suffer permanent physical injury, she has been left with serious emotional scars and a dread of the applicant. It must be said that, although the applicant has performed well in his efforts towards rehabilitation to this time, those efforts occurred in a context where breach of his bail conditions could have been expected to result in his return to custody, and

where the prospect of a substantial term of imprisonment loomed ahead of him as a strong incentive to curb his long ingrained tendency to irrational violence. To conclude that the applicant is now fully rehabilitated and no longer a danger to others, and to his family in particular, would be premature.

[29] The victim impact statements which were tendered before the learned sentencing judge show that the applicant's family was, and remains, terrified of him and of the possibility that he will, one day, come after them. Their attitude is not unreasonable. The complainant, her children, and the rest of the community are entitled to be protected against the applicant's irrational violence. Whether or not the applicant should be at liberty halfway through his sentence is a decision which should be made on the basis of the best information as to the extent of the applicant's rehabilitation, and any continuing risk to the complainant and her children. Better information will be available at the time when the applicant becomes eligible for consideration for parole than was available at the time of sentence. Further, it is, in any event, clearly desirable in the interests of protecting the complainant and the community that, when the applicant is at liberty, he should be supervised and subject to the constraints of parole.[1]

[30] The learned sentencing judge's reference to the possibility of making a recommendation as to early parole as opposed to fixing a parole date was, in truth, a harmless slip of the tongue. It is abundantly clear that the point which her Honour was making was that, having extended very substantial leniency to the applicant, there was no occasion to afford him any further leniency by way of early parole.

[31] In any event, this slip of the tongue does not suggest that her Honour did not advert to a partially suspended sentence as a sentencing option at least in theory. That her Honour did advert to this option is clear given her Honour's response to the suggestion by the applicant's counsel proposing a suspended sentence. In truth, the possibility of a sentence suspended, whether immediately or at the halfway mark, was no more than a theoretical possibility: it was an option so far removed from the realm of practical possibilities that it was hardly remarkable that her Honour did not expressly advert to it merely in order to reject it.

Conclusion and order

[32] It has not been shown that the sentence imposed on the applicant was affected by error.

[33] The application for leave to appeal against sentence should be refused.

[34] **DUTNEY J:** I agree.

[35] **DOUGLAS J:** I agree with the reasons and the order proposed by Keane JA.

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1 *R v Ross* [2004] QCA 21 at [6].