SUPREME COURT OF QUEENSLAND

CITATION:	*R v Robinson* [2007] QCA 349
PARTIES:	**R** **v** **ROBINSON, Richard Lawrence** (appellant/applicant)
FILE NO/S:	CA No 124 of 2007 DC No 2250 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2007
JUDGES:	Keane and Holmes JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – CIRCUMSTANCES NOT INVOLVING MISCARRIAGE OR IN WHICH MISCARRIAGE NOT SUBSTANTIAL – OTHER IRREGULARITIES – where appellant convicted of rape – where appellant's DNA established intercourse had occurred – where forensic testing of bedding revealed presence of unidentified semen – whether late disclosure of evidence by Crown caused miscarriage of justice – whether verdicts unsafe and unsatisfactory 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 – where appellant sentenced to 16 years imprisonment for each of three counts of rape – whether sentence manifestly excessive *Criminal Code Act 1899* (Qld), s 590AB

R v Coghlan [1998] 2 Qd R 498; [1997] QCA 270, cited
R v Edwards [2004] QCA 20; CA No 357 of 2003, 11 February 2004, cited
R v Mason [1997] QCA 067; CA No 360 of 1996, 19 March 1997, cited

COUNSEL: D R Kent for the appellant/applicant
T A Fuller for the respondent

SOLICITORS: Legal Aid Queensland for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** On 10 May 2007, the appellant was convicted upon the verdict of a jury of six counts of rape, one count of burglary, one count of deprivation of liberty and one count of stealing. On 28 May 2007, he was sentenced to concurrent terms of imprisonment as follows:

Counts 4, 6 and 7 (rape)	:	16 years imprisonment
Counts 2, 3 and 5 (rape)	:	10 years imprisonment
Count 1 (burglary)	:	10 years imprisonment
Count 8 (deprivation of liberty)	:	two years imprisonment
Count 9 (stealing)	:	12 months imprisonment

[2] The appellant seeks to appeal against his conviction and his 16 year sentence. The grounds of appeal against the convictions overlap somewhat. They are that the verdicts were unsafe and unsatisfactory, and that there was a miscarriage of justice because of the late disclosure by the Crown of forensic testing of bedding in an upstairs bedroom of the complainant's house. It was there that the final act of intercourse had occurred and where the appellant had ejaculated. The forensic testing revealed the presence of semen stains which were not referable to the appellant.

[3] The appellant also seeks to appeal against the sentences imposed in respect of counts 4, 6 and 7 on the ground that they were manifestly excessive.

The case at trial

[4] The case for the Crown was that, on 28 February 2005, the appellant entered the complainant's townhouse in the early hours of the morning and raped her several times, initially in her lounge room and later in the upstairs bedroom. He raped her digitally, orally and through penile-vaginal intercourse. The most serious counts of rape involved unprotected sexual intercourse. The appellant was a carrier of Hepatitis C. Fortunately, the complainant did not contract the disease.

[5] According to the complainant, her assailant, in an apparent attempt to remove forensic evidence so as to conceal his identity, forced the complainant to take a shower to wash herself including her vagina. Notwithstanding these precautions, a high vaginal swab found the appellant's DNA.

[6] The complainant said that her assailant directed her to wait in the bedroom as he left. She then found that her mobile phone and charger were missing. Shortly thereafter, the complainant made a 000 call and reported the rape.

[7] The complainant did not suffer any significant physical injuries in the attack.

[8] The appellant gave evidence that he and the complainant had consensual intercourse on their first meeting on the afternoon of the previous day at the nearby house of a mutual acquaintance who had since died. When this suggestion was put to the complainant in cross-examination, she denied that this had occurred.

[9] It was also suggested to the complainant that she had mistaken the appellant for another, unknown, assailant. In this regard, the complainant's original description of her assailant to police was that he was Caucasian but tanned. She did not refer to the appellant's prominent tattoos or to his deformed hand. The complainant's opportunity to observe her assailant had been, on her account, limited by reason of the fact that the attack occurred during the hours of darkness where the only light came from the television and exterior street lighting. Further, the complainant's evidence was that her assailant had placed a rag over her face during the incident.

[10] On the afternoon of 8 May 2007, the first day of the trial, the complainant had completed her evidence and left the court. Only then was counsel for the appellant made aware of the forensic evidence from the testing of the bedding in the complainant's upstairs room.

[11] The appellant did not seek any time to consider the significance of this evidence after it emerged. The jury were, however, informed of the results of this forensic testing, ie that residue from the semen of an unknown man had been found upon the bedding where the last act of rape alleged by the complainant had occurred.

The grounds of appeal against the convictions

[12] On the appellant's behalf, it is said that this material should have been disclosed to the defence pursuant to s 590AB of the *Criminal Code 1899* (Qld) at a much earlier point in time. Some of the results of the forensic testing of the bedding had been communicated to the investigating police on 17 April 2007. It is said on the appellant's behalf that the prosecution's failure to make timely disclosure of the forensic material relating to the testing of the bedding prejudiced the defence in that it meant that the defence did not have the opportunity "to explore the matter with the complainant such as, for example, to exclude the possibility that the stains were from the complainant's boyfriend". As a result, so it is said, the appellant may have been deprived of a real prospect of an acquittal.

[13] On the appellant's behalf, it is also said that, having regard to the evidence of sexual contact with another male in the location where the last offence of rape occurred, the jury could not have been satisfied beyond reasonable doubt that the appellant was the assailant.[1]

Discussion

[14] As to the late disclosure of the forensic testing, it may well be that the fact that the testing was going on, and its results, should have been disclosed earlier. The problem which has given rise to this appeal could have been avoided if the prosecution had taken the sensible course of keeping the appellant's legal representatives informed of the further testing which was being conducted. It may be that that course was not required by the strict terms of s 590AB(2)(b) of the *Criminal Code*; but the interest of the Crown in the pursuit of justice and in ensuring a fair trial of the accused means that such a course would have been

---

1 *MFA v The Queen* (2002) 193 ALR 184.

desirable.[2] That having been said, I am of the firm view that the Crown's failure to follow this course in this case did not prejudice the appellant's prospects of an acquittal so as to give rise to a miscarriage of justice.[3]

[15] The defence case was that there had been consensual intercourse between the complainant and the appellant, and that the rape of which the complainant testified had not been committed by the appellant. The forensic tests of which the jury were made aware suggested the possibility that the complainant had also had sexual intercourse with a man who was not the appellant. The first point to be made here is that, in most cases of rape, it would not detract from the Crown case, or advance the defence case, to suggest that the complainant had had consensual sexual intercourse with someone other than the accused. In this case, it was never part of the defence case to suggest that the complainant had been raped by someone who was known to her and that, for some bizarre reason, she had chosen to blame the complainant. In this Court, counsel for the appellant accepted that such a suggestion was not made, and would, indeed, have been quite silly.

[16] To the extent that the central thesis of the defence case was that someone unknown to the complainant, other than the appellant, raped the complainant, the appellant's defence was not prejudiced by the late emergence of the evidence of the semen stains. That this is so is confirmed, in my view, by the circumstance that, at trial, the appellant's counsel made no application for a mistrial or adjournment or to have the complainant recalled.

[17] The course taken by the appellant's counsel at trial suggests that a forensic judgment was made by the appellant's counsel that any doubt as to whether rape had occurred or as to the identity of the complainant's rapist created by the presence of unexplained semen on the bedding where the last act of rape occurred would not be increased by further questioning of the complainant; and that, in truth, the appellant gained a real forensic advantage, so far as the central thesis of the defence case was concerned, from the jury being informed of the entirely unexplained presence of the semen of an unidentified man at the site of the last act of rape.

[18] The appellant's counsel could have had the complainant recalled to enquire of her on a *voir dire* about the presence of the semen on the bedding.[4] Had the complainant been pressed about the presence of semen on the bedding she may have acknowledged having sex with someone other than the appellant, or she may have denied having sex on the bedding with anyone and then been forced to acknowledge that she was unable to explain the existence of the semen stains. The first of these possible responses would not have added anything to the defence case or detracted in any way from the Crown case bearing in mind that it was common ground that sexual intercourse did occur. As to the second of these responses, it may be that it would have detracted from the complainant's credibility if she could not explain the presence of semen stains on the bedding. The appellant's counsel had the opportunity to ascertain what the complainant's response would be by asking these questions of her on a *voir dire*. There can be no doubt that the learned trial judge would have permitted this course having regard to the late emergence from the Crown of the evidence of the forensic testing. But that course was not taken. In my opinion, the course taken by the appellant's counsel represents a reasonable forensic

---

2 *R v Szabo* [2001] 2 Qd R 214 at 215 [14].

3 Cf *R v Szabo* [2001] 2 Qd R 214 at 225 – 227 [50] – [55].

4 *R v Basha* (1989) 39 A Crim R 337 at 338 – 339.

judgment, to say the least. It simply cannot be said that the late disclosure of the forensic evidence placed the appellant in a position of disadvantage from which the appellant could not be extricated. In truth, however, the emergence of the forensic evidence of the semen stains in the way it did, and the circumstances in which that evidence was left to the jury, were, serendipitously perhaps, distinctly advantageous to the appellant.

[19] As to the reasonableness of the jury's verdict, the evidence of the forensic testing did not, however, preclude the jury being satisfied beyond reasonable doubt of the appellant's guilt. There was no doubt that sexual intercourse had occurred between the appellant and the complainant: it was the appellant's case that sexual intercourse with the complainant had occurred consensually. The jury may well have regarded the appellant's evidence that the complainant had agreed to have unprotected sex with him on their first meeting the previous afternoon as incredible. That would be a perfectly reasonable view. The jury may also have thought that, if the complainant had consensual sex with the appellant but wished falsely to accuse him of rape, she would readily have identified him by his tattoos and deformed hand.

[20] The grounds of appeal against conviction should be rejected.

Sentence

[21] The appellant was 33 years of age at the date of the offences, and 36 years of age when he came to be sentenced.

[22] The complainant was a 57 year old woman at the time of the offences. She was living alone.

[23] The appellant has a bad criminal history. In January 1989, he broke into the house of a 16 year old girl who had rejected his sexual advances. She awoke to find that he had removed her clothing. When she started to scream he punched her a number of times. In February 1989, he dragged a woman off the street into an abandoned house where he raped her. In May 1989, the appellant was sentenced to 12 years imprisonment for these offences. He served the whole of this sentence.

[24] In 1994 he was convicted of assault while in prison for which he received a sentence cumulative upon the sentence imposed in May 1989. His criminal history also includes street offences and property offences. He returned to custody in 2003 as a result of offences of dishonesty and breaching court orders.

[25] The learned sentencing judge noted as matters of concern that the appellant's record involved similar offending, and the fact that the appellant knew that he suffered from Hepatitis C.

[26] In cases such as this, the sentence must be such as to afford real protection to the community from the offender's predatory sexual behaviour: there was no remorse and no evident prospect of rehabilitation. Moreover, in this case, there was no occasion to give the appellant the benefit of a discount for the utilitarian value of a plea of guilty.

[27] The decision of this Court in *R v Edwards*[5] provides support for the view that a mature adult offender, with a history of serious sexual violence which has resulted

---

5 [2004] QCA 20.

in lengthy terms of imprisonment, who is found guilty after a trial of multiple rapes must expect a sentence in the range between 15 and 20 years in order to protect the community from him. In this case, the appellant's sentence fell at the lower end of the range; that may be because the learned sentencing judge took the view that the level of actual violence used upon the complainant was less than in otherwise comparable cases and the appellant did not use a weapon to facilitate the commission of the crime.

[28] On the appellant's behalf, it is said that his previous offence of rape was committed 18 years ago when the appellant was only 18 years of age. To the extent that the appellant has since spent most of his adult life in prison, his most recent re-offending serves to put beyond argument the failure of the earlier sentence in terms of personal deterrence and to confirm that a very lengthy sentence is necessary in the interests of protecting the community.

[29] It is also said on the appellant's behalf that decisions of this Court do not support a range of sentence beyond 14 years imprisonment, and that a sentence of 13 years imprisonment should have been imposed. The difficulty with this submission is that, in decisions of this Court in cases of rape, such as *R v Coghlan*[6] and *R v Mason*,[7] sentences of 14 years imprisonment have been upheld even though the offender had pleaded guilty and so was entitled to the substantial discount which reflects the offender's cooperation with the administration of justice. It may be said that the level of violence used on the complainant in this case was less than that used in these earlier cases; but here there is the serious aggravating factor that the appellant suffered from Hepatitis C which could easily have been transmitted to the complainant.

[30] In my respectful opinion, the sentence imposed was not manifestly excessive.

Orders

[31] The appeal against conviction should be dismissed.

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

[33] **HOLMES JA:** I agree with the reasons of Justice Keane and the orders he proposes.

[34] **JONES J:** I have read the judgment of Keane JA and I agree with his reasons and I concur with the orders proposed.

---

6 [1998] 2 Qd R 498.

7 [1997] QCA 067.