SUPREME COURT OF QUEENSLAND

CITATION:	*R v Flew* [2008] QCA 290
PARTIES:	**R** **v** **FLEW, Wayne Laurence** (applicant)
FILE NO/S:	CA No 23 of 2008 DC No 435 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	26 September 2008
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2008
JUDGES:	Keane and Fraser JJA and Atkinson 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 AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – where the applicant was convicted on his own plea of guilty of one count of rape, three counts of sexual assault whilst armed, and one count of deprivation of liberty – where the applicant was sentenced to a head sentence of 10 and a half years imprisonment – whether the sentence imposed was, in all the circumstances, manifestly excessive *Criminal Code Act* 1899 (Qld), s 349 *Penalties and Sentences Act* 1992 (Qld), s 9, s 161B *R v Basic* (2000) 115 A Crim R 456; [2000] QCA 155, applied *R v Bolton* [2005] QCA 335, applied *R v Mallie* [2000] QCA 188, applied *R v Newman* (2007) 172 A Crim R 171; [2007] QCA 198, applied *R v Truong* [2000] 1 Qd R 663; [1999] QCA 21, applied

COUNSEL: The applicant appeared on his own behalf
M B Lehane for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** On 7 January 2008 the applicant was convicted upon his own plea of five offences including rape which occurred many years before on 12 July 1997. He was sentenced to 10 and a half years imprisonment for the offence of rape and concurrent terms of three years imprisonment for the other offences. A period of pre-sentence custody of 353 days was declared to be time already served.

[2] The applicant seeks leave to appeal against the sentence for the offence of rape on the ground that it is said to be "manifestly excessive". This application came on for hearing by this Court on 19 June 2008. On that occasion, the applicant sought, and was granted, an adjournment of the hearing in order to enable him to arrange legal representation. When the matter came on for hearing again on 19 September 2008, it was evidently the case that the applicant had not been able to arrange legal representation. He was, therefore, obliged to represent himself.

[3] I will consider the arguments advanced by the applicant in support of his application after first setting out the circumstances of his offending, his personal circumstances and the considerations taken into account by the learned sentencing judge.

The circumstances of the offending

[4] In the early hours of 12 July 1997, the complainant, a young woman who was then 26 years old, was walking home by herself along the footpath of the Gold Coast Highway at Palm Beach. The applicant, who was a stranger to her, approached her, put his arm around her right shoulder and said: "You're coming with me."

[5] The complainant replied: "I doubt it." The applicant said: "I have a knife, don't make me use it." The applicant produced the knife and put it under her shirt against her torso. The applicant then forced the complainant, who was crying, to walk to an area off the highway near a toilet block. The applicant pushed the complainant, causing her to fall to the ground. He told her to lie down. These were the facts on which count 1 on the indictment, a charge of deprivation of liberty, was based.

[6] The applicant then knelt down in front of the complainant, pushed her face away from him and told her not to look at him. She tried to look at him, and he said: "Oh, well, I'll have to hurt you." He unzipped her jeans and pulled them down. He told her to take her shirt off, and then he used the knife to cut the straps of the complainant's bra. He grabbed her breasts and pushed them together while still armed with the knife. These facts were the basis of count 2, a charge of sexual assault while armed.

[7] The applicant then used the knife to remove the complainant's underpants. He told her to look away from him, and then grabbed her right hand and put it on his erect penis making her masturbate him. These were the facts relating to count 3, another charge of sexual assault while armed.

[8] He then spread the complainant's legs apart, and forced his penis into her vagina. These were the facts relating to count 4, the charge of rape.

[9] The applicant then withdrew his penis and pushed it towards the complainant's mouth and ejaculated, telling her: "Lick it." He then held the back of her head and rubbed his penis around her face and chin. These were the facts relating to count 5 on the indictment, a charge of sexual assault while armed, with a circumstance of aggravation.

[10] The applicant then put his pants back on. He told the complainant: "I was paid to do this. Someone wanted me to hurt you." This statement was untrue. The complainant ran home and told her mother what had happened. The police were called, and DNA was taken during the course of a medical examination.

[11] In 2007 the applicant was arrested in relation to other matters. On this occasion, his DNA was taken, and it was found to match the DNA of the perpetrator of the attack on the complainant in July 1997.

[12] On 17 January 2007 the applicant took part in an electronically recorded interview in which he denied any involvement in the attack on the complainant. He was then arrested and charged.

[13] The matter proceeded to a committal hearing on 12 June 2007 at which the complainant was cross-examined.

[14] An indictment was presented on 27 September 2007.

The applicant's personal circumstances

[15] The applicant was 28 years of age at the time of the offences and 39 years old at the date of sentence.

[16] In 1987 the applicant was imprisoned in New South Wales for offences of breaking and entering and malicious injury. The applicant's criminal history includes three armed robberies in New South Wales committed in 2000. In this regard he was sentenced on 25 January 2001 to four years imprisonment with a non-parole period of 20 months; and on 11 November 2004, he was sentenced to a further term of 16 months and 26 days imprisonment. And on 21 February 2005, he was sentenced to nine months imprisonment for larceny.

The sentence

[17] The learned sentencing judge noted that the incidents of 12 July 1997 had adversely affected the complainant most seriously. She was obliged to seek professional counselling, and to this day has not fully recovered from the trauma of the applicant's attack.

[18] On the applicant's behalf, it was submitted that he was affected by amphetamines at the time of the offences and had no recollection of the offences. Her Honour was prepared to accept that the applicant's use of amphetamines played a part in the offending. Her Honour was also prepared to accept that the applicant had shown some remorse.

[19] Her Honour also accepted that he was entitled to the benefit of his pleas of guilty on the basis that they were timely pleas.

[20] Both the Crown Prosecutor and the applicant's Counsel submitted, after reviewing the authorities, that the sentencing range for the rape was between 10 and 12 years

taking into account the benefit to the applicant of his plea of guilty. Counsel for the applicant submitted that the sentence should be imposed at the lower end of that range.

The application in this Court

[21] The ground of the application for leave to appeal is that the sentence is manifestly excessive. That contention is impossible to sustain.

[22] The sentence imposed was within the range of sentences recognised by this Court in *R v Bolton*[1] as appropriate to a case of a prolonged sexual assault by a stranger involving violence of the level exhibited here.

[23] The applicant asserts that he did not receive sufficient recognition for his plea of guilty. Reference to the earlier decisions of this Court in *R v Basic*[2] and *R v Mallie*[3] shows that this assertion is groundless. Each of these cases was a case where the perpetrator of a violent rape had pleaded guilty and was, therefore, entitled to the benefit of a discount on his sentence. In each of these cases, a sentence of 10 years imprisonment was recognised as being within the proper range. The more recent decision of this Court in *R v Newman*[4] confirms that, in cases of violent rape where the offender is entitled to the benefit of a plea of guilty, the range of appropriate sentences is between 10 and 14 years imprisonment.

[24] The applicant seeks to rely upon the decision in *R v Van Hassell*[5] where a sentence of eight years imprisonment with parole eligibility after serving three years was imposed by a District Court judge for the rape of a 15 year old girl. The rape committed by the applicant in this case was more violent and much more callous than the offence committed by Van Hassell. Importantly, the applicant here used a knife to get his way, whereas Van Hassell did not use a weapon. In any event, the level of the sentence imposed in *R v Van Hassell* does not cast doubt on the proposition that the sentence imposed in this case was within the range of sentences which might properly be imposed by way of a sound exercise of the sentencing discretion in a case of violent and prolonged rape.

[25] The applicant complains that he was sentenced in 2008 for crimes committed more than 10 years before. But in 1997, as now, the maximum sentence for the crime of rape was life imprisonment. While it can be said that the applicant's offences were committed a long time ago, that does not lessen the seriousness of the offences. Importantly, the adverse consequences of the applicant's terrifying assault upon his victim continue to this day. The passage of time does not diminish the importance of denunciation of such crimes. Moreover, the applicant was a mature man when he committed the offences: they cannot be said to be explicable by reason of youthful folly or misjudgement. There was no evidence before the learned sentencing judge which might have required consideration of whether the applicant had so rehabilitated himself that he should be sentenced on the footing that his earlier crimes were now "out of character" so that the sentence did not need to reflect the need to protect women in the community.

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1 [2005] QCA 335 at [17] – [20].
2 [2000] QCA 155; (2000) 115 A Crim R 456.
3 [2000] QCA 188.
4 [2007] QCA 198.
5 Unreported, Judge Britton SC, District Court, Queensland, 31 October 2006.

[26] The applicant also sought to rely upon the sentence imposed in *R v Leon*.[6] In that case a sentence of six and a half years with a serious violent offence declaration was imposed on an offender who was brought to justice seven years after the violent rape of an 18 year old woman in her own home. It is clear, however, that the sentence imposed in that case reflected the circumstance that the offender had been in custody since being apprehended more than three years before he was sentenced. Had this not been the case, the sentence imposed might have been 10 years imprisonment.

[27] Next, it should be noted that the sentence imposed was in accordance with that proposed to the learned sentencing judge by the applicant's Counsel. While it is true that the imposition of a just sentence is the responsibility of the sentencing judge, appeals are available to correct errors on the part of the sentencing judge, not to provide a second hearing on sentence as if the first sentence were merely provisional. When an offender seeks leave to appeal against a sentence on the ground that the sentence is **manifestly** excessive, it must be recognised that the ground of the application is directly contradicted by the conduct of the applicant's case before the sentencing judge by which the applicant is bound.

[28] The circumstance that the sentence which was imposed accorded with the submission put to the sentencing judge on the offender's behalf means that an assertion that the sentence imposed was **manifestly** excessive could be upheld only in circumstances which are sufficiently exceptional to warrant relieving the applicant from responsibility for the conduct of his case at first instance. No such circumstances appear in this case.

[29] In this regard, it is asserted by the applicant that his legal representatives at sentence failed to follow his instructions to inform the sentencing judge that he suffers from a bipolar mental condition. At the hearing of this application, the applicant also asserted that he suffered from paranoid schizophrenia as well. But this Court cannot act upon the mere assertion of such matters as a sufficient basis to set aside the sentence which has been imposed on the applicant. There is no evidence that the applicant's instructions were disregarded. Nor is there any evidence to support the applicant's assertion that he suffers from either of these conditions, or as to how these conditions might mitigate his responsibility for his crime. And, in any event, to the extent that either of these conditions was related to the crimes in question, it might well support a sentence the severity of which reflects poor prospects of rehabilitation. Especially is that so bearing in mind the applicant's criminal history.

Conclusion and order

[30] The sentence imposed in this case was not excessive, much less manifestly so.

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

[32] **FRASER JA:** On 7 January 2008 the applicant was convicted on his plea of guilty of one count of rape, three counts of sexual assault whilst armed and one count of deprivation of liberty. He was sentenced to 10 and a half years imprisonment for the offence of rape and three years imprisonment for the other offences, the sentences to be served concurrently. Because the applicant was convicted of a "serious violent offence" the effect of s 182 of the *Corrective Services Act* 2006 (Qld) is that he must serve 80 percent of the sentence.

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6 Unreported, Judge Griffin SC, District Court, Queensland, 5 September 2008.

[33] The applicant seeks leave to appeal against the head sentence of 10 and a half years imprisonment on the ground that it is manifestly excessive.

The circumstances of the offences

[34] On 12 July 1997 the 26 year old complainant was walking along the footpath of the Gold Coast Highway at Palm Beach when the applicant accosted her, threatened her with a knife which he put under her shirt against her torso, and forced her to walk off the highway to an area near a toilet block. The complainant was crying uncontrollably. In response to her pleas the applicant repeatedly told her to shut up. The applicant pushed the complainant to the ground, told her that he would have to hurt her, and forcibly removed her clothes, cutting her underwear with the knife. He grabbed her breasts and forced the complainant to masturbate him. Subsequently the applicant forcibly raped the complainant, with unprotected penile penetration for about five minutes. After that the applicant sexually assaulted the complainant by ejaculating onto the complainant's mouth and running his penis around her face and chin. The complaint suffered bruising to her cheek, chin and inner thighs.

[35] The applicant told the complainant that he did not want to hurt her. He said, untruthfully, that he was paid to do those things by somebody who wanted to hurt her. The complainant ran home and immediately told her mother what had happened and the police were called. The complainant was medically examined and a DNA sample was obtained.

[36] Some 10 years later, in 2007, a matching DNA sample was taken from the applicant after he was arrested in relation to unrelated matters. Initially the applicant denied any involvement in these offences. The matter proceeded by way of a committal hearing on 12 June 2007 where the complainant was briefly cross-examined about identification of the applicant. There was also cross-examination concerning the DNA evidence. An indictment was presented on 27 September 2007 and, at an early point, the matter was listed for sentence.

The applicant's circumstances

[37] The applicant was 28 years of age at the time of the offence and 39 years at the time of sentence. Prior to these offences, the applicant had been imprisoned in New South Wales for offences involving breaking and entering and stealing, malicious injury, and some other relatively minor offences. In Queensland he had been convicted of possession of property suspected of being stolen and entering a dwelling house with intent, neither of which attracted a term of imprisonment. After the offences relevant to this application, the applicant was sentenced in New South Wales for a variety of offences, including a sentence of four years imprisonment in January 2001 for an armed robbery with an offensive weapon that he perpetrated in April 2000.

The sentence

[38] At the sentence hearing the applicant’s counsel submitted that the appropriate range of sentence was, as the prosecutor had submitted, between 10 and 12 years imprisonment and that the sentence should be at the lower end of the range and no higher than 11 years.

[39] The learned sentencing judge accurately described the offences as being very bad and referred to the terrible effect on the victim and the fear that she felt and was required to live with. In the applicant's favour the learned sentencing judge referred to the fact that the applicant had not been convicted of any other offences of a sexual nature, including in the 10 years that elapsed after the offence and before his apprehension. Her Honour referred also to the applicant's claim that at the time of the offence he had been using amphetamines, and was prepared to accept that played a part in explaining what happened, but not in excusing it.

[40] The learned sentencing judge rejected the submission on behalf of the respondent that the need for the committal proceedings indicated that the applicant had shown no remorse. Instead, her Honour accepted a submission on behalf of the applicant that because the applicant had little recollection of the events he was entitled to test the matters to that extent, until confronted with the fairly strong evidence of DNA. Her Honour acted on the view that it was in the applicant's favour that his plea of guilty shortly after the presentation of the indictment had avoided the need for the complainant to give evidence at the trial.

This application

[41] The applicant contends that the sentencing judge erred in sentencing the applicant under "the 2006 Penalties and Sentences 'Act'" for an offence committed between 1996 and 1997. It is not clear what this means, but I have not found any error of that character. There was no relevant amendment to the *Criminal Code* between the time of the applicant's offending on 12 July 1997 and the sentence on 7 January 2008: the applicant was guilty of "rape" as defined at the time of the offence in 1997 and at that time the offence was punishable by imprisonment for life: see s 347 and s 348 of the *Criminal Code* as in force in July 1997. That remains the case. The subsequent amendments which widened the definition of rape and rearranged these provisions are irrelevant here.

[42] Whilst there were intervening amendments to the sentencing principles expressed in s 9 of the *Penalties and Sentences Act* 1992 the authorities confirm that the sentencing judge was right to apply s 9 in the form it was in at the time of sentence see *R v Truong* [2000] 1 Qd R 663 at [25]; [1999] QCA 21; *Siganto v R* (1998) 194 CLR 656 at 662-663. The provisions concerning serious violent offences in Pt 9A of the Act apply only to offences committed after 1 July 1997 (see *R v Truong*), but the applicant committed these offences after that date.

[43] The sentencing judge failed to make the declaration required by s 161B(1) of the Act that the applicant was convicted of a "serious violent offence". Subsection 161B(2) provides that the failure of a sentencing court to make that declaration does not affect the fact that the offender has been convicted of a serious violent offence. Furthermore, it is clear that her Honour appreciated that this was a "serious violent offence" with the consequence that the applicant would be required to serve 80 per cent of the term of imprisonment. That was mentioned in the course of the prosecutor's submissions. The judge's omission to make the declaration was regrettable, but it does not point to any error in the sentencing discretion.

[44] The applicant submits that he was not given any benefit for his early plea and cooperation. The sentencing judge, however, expressly took into account the plea

and that it saved the complainant from having to come and give evidence and relive the events. Her Honour said that the plea was reflected in the sentence.

[45] In the applicant's written submissions he contends that his counsel failed to follow his instructions and did not inform the sentencing judge of his circumstances, "including my Bi-Polar condition." In oral submissions the applicant added that he also suffered from paranoid schizophrenia for which he is now being treated. There is no evidence that when the applicant committed the offences he did suffer from any such condition or that if he did it had any bearing on the offending.

[46] The applicant contends that the sentencing judge erred in that the sentence of 10 and a half years for the rape offence was manifestly excessive. This is a difficult proposition to make good in circumstances in which the sentence was within the range put forward by the applicant's counsel at the sentence hearing.

[47] In *R v Basic* (2000) 115 A Crim R 456; [2000] QCA 155 an application for leave to appeal against a sentence of eight years imprisonment with a serious violent offence declaration for rape was refused. McMurdo P held that the comparable cases demonstrated that the sentence was within the appropriate range of seven to 10 years. In that case the offender, who pleaded guilty, was 31 years of age and he had previous convictions, although only one for an offence of personal violence. He had grabbed the complainant, forcibly raped her, causing her a lot of pain, and threatened her. Her Honour described the rape as not being one "in the most violent category", reflecting in part the absence of any weapon. It was therefore open to the sentencing judge to regard the offences here as being more serious than the offences for which the President considered that 10 years was the upper limit of the range.

[48] In *R v Bolton* [2005] QCA 335 a sentence of 10 years imprisonment was imposed for an offence of rape. The circumstances were broadly similar in that Bolton had used a knife to threaten the complainant into submission and committed an offence involving unprotected penile penetration, after pushing the complainant to the ground and stuffing a cloth in her mouth. That offender had no previous criminal record, and he was only 18 years of age at the time of the offence. The complainant suffered grievous bodily harm when she had grabbed the knife. Despite the offender's early guilty plea, he was found not to have been genuinely remorseful. On the other hand, that rape, serious as it was, was not accompanied by the further degrading sexual misconduct of which this applicant was guilty. Further, the Court indicated at paragraph [19] that a notional head sentence in the range of 7 to 10 years, which had been said in *Basic* to be appropriate for that case, "may well have been inadequate in the present case, even having regard to the applicant's youth".

[49] The applicant relies upon *R v Van Hassell*, unreported, Britton SC DCJ, District Court, QLD, 31 October 2006, in which a sentence of eight years imprisonment was imposed for similar offending, although that offender had also punched the complainant. In that case, no weapon was used and the sentencing judge took into account psychiatric evidence that the offender's judgment was significantly impaired by a mental illness. The case is therefore distinguishable. In any event it could not be regarded as casting doubt upon the view that the sentence here was within the range of permissible sentences established by decisions of this Court. Nor is any doubt thrown upon that conclusion by the applicant's reference to a shorter sentence imposed in the District Court for offending said to be similar to that

of the applicant (*R v Leon*, unreported, District Court, Queensland, 5 September 2008).

[50] Plainly these were very serious offences. The offences predictably had seriously adverse effects on the complainant, and on her family, as the victim impact statements confirm. A heavy sentence was appropriate in light of the use of the knife, the applicant's mature age at the time of the offence, and his particularly cruel and degrading conduct in the course of committing the offences.

[51] In my opinion, whilst the sentence of 10 and half years was a very substantial sentence, it was not manifestly excessive.

[52] Since preparing the above reasons I have had the advantage of reading the reasons for judgment of Keane JA, with which I agree. I particularly wish to associate myself with his Honour's remarks concerning the difficulty facing an applicant who contends that a sentence is manifestly excessive in circumstances in which the sentence falls within the range advocated on the applicant's behalf at the sentence hearing.

Conclusion and order

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

[54] **ATKINSON J:** I agree that the application for leave to appeal be dismissed for the reasons given by Keane and Fraser JJA.