SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pickup* [2008] QCA 350
PARTIES:	**R** **v** **PICKUP, Steven Geoffrey** (applicant)
FILE NO/S:	CA No 138 of 2008 CA No 208 of 2008 DC No 86 of 2008 DC No 336 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application Application for Extension (Conviction)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	5 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2008
JUDGES:	McMurdo P, Fraser JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for an extension of time within which to appeal against conviction refused** **2. 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 CONVICTION RECORDED ON PLEA OF GUILTY – GENERAL PRINCIPLES – where applicant pleaded guilty to three counts of rape – where the admitted facts disclosed all of the elements of each of the charges of rape – where the applicant argued that many of the admitted facts were incorrect and that those errors vitiated his guilty plea – whether an extension of time within which to appeal against conviction should be granted 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 the applicant was sentenced to five years imprisonment for each of the three counts of rape and was also ordered to serve

twelve months of a remaining term of nearly two and a half years of a sentence of three years suspended after 166 days that had been imposed after a conviction for a malicious act with intent – where applicant also had previous convictions for common assault and for a breach of a domestic violence order – where the applicant had the benefit of an early guilty plea – where the applicant had suffered an unfortunate upbringing –where the sentence imposed was within the range submitted by the applicant's counsel at sentence – whether the sentence was manifestly excessive

Meissner v The Queen (1995) 184 CLR 132; [1995] HCA 41, cited
R v Carkeet [2008] QCA 143, cited
R v Flew [2008] QCA 290, cited
R v Hunt [1994] QCA 440, cited
R v McCauley [2000] QCA 265, cited
R v Stevens; ex parte the A-G (Qld) (1994) 76 A Crim R 5; [1994] QCA 507, cited
R v Tait [1999] 2 Qd R 667; [1998] QCA 304, cited

COUNSEL: The applicant appeared on his own behalf
G J Cummings for the respondent

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

[1] **McMURDO P:** The application for an extension of time to appeal against conviction and the application for leave to appeal against sentence should both be refused for the reasons given by Fraser JA.

[2] **FRASER JA:** On 4 March 2008 the applicant was convicted in the District Court in Cairns upon his own pleas of guilty of three counts of rape. He was sentenced on 21 April 2008. On 29 May 2008 the applicant filed a notice of application for an extension of time to apply for leave to appeal against sentence. On 1 July 2008 the court granted that application and the application for leave to appeal against sentence was listed for hearing on 28 August 2008.

[3] On 6 August 2008 the applicant filed an application for an extension of time within which to appeal against conviction. As a result his application for leave to appeal against sentence was adjourned to 24 October 2008 so that it might be heard together with his application for an extension of time within which to appeal against conviction.

Application for an extension of time within which to appeal against conviction

[4] The grounds of the application for an extension of time to appeal against conviction are contained in a short letter in which the applicant contends that he was unable to speak to his solicitor until 20 May 2008 when his solicitor suggested that he lodge an appeal against his sentence. At the hearing of the application the applicant, who represented himself, asserted his ignorance as the reason for his delay in appealing

against conviction. The assertion is not credible and it is unsupported by evidence. It is evident that the applicant has no satisfactory explanation for his delay.

[5] Nevertheless it is appropriate to consider whether the proposed appeal might have merit in order to determine whether it is in the interest of justice to grant the extension of time.[1]

[6] The applicant entered apparently voluntary pleas of guilty to the offences in open court. He has adduced no evidence that those pleas were not entered in the exercise of his free choice and in his own interests; that he did not understand the charge or did not intend to admit guilt; that his pleas of guilty were obtained by any improper inducement, fraud or intimidation; or that there is any other circumstance potentially giving rise to a miscarriage of justice. That being so there is no basis for thinking that the applicant has any prospects of success in his proposed appeal.[2]

[7] The applicant submitted that he was induced to plead guilty by his lawyer's advice that if he did not plead guilty he would be sentenced to a very lengthy term of imprisonment. There is no reason to think that his legal advice was incorrect, much less that it rendered his plea other than a voluntary plea made in his own interests.

[8] In the applicant's written submission he contended that "it was never my initial decision" to plead guilty and that he does not feel "entirely guilty". That provides no support for a view that the applicant's pleas were involuntary, mistaken, or influenced by any improper pressure or misunderstanding.

[9] The applicant also argued that he was not guilty on the facts he admitted. I will now summarise those facts.

[10] At the time when the applicant committed the rape offences he had been living in a de facto relationship with the 20 year old complainant in her apartment. A couple of days before the applicant committed the offences the complainant told him that she no longer wished to be with him and she commenced sleeping in a spare bedroom in the unit. The complainant returned home from work on 16 October 2005 in the afternoon and noticed that the applicant had been drinking. He offered her money, which she refused, for oral sex and anal intercourse (her opposition to which she had always made clear to the applicant). After the complainant had showered and returned to her bedroom to get dressed, the applicant, who was naked, pushed the complainant face down onto her bed and lay on top of her.

[11] The applicant then left the room and the complainant dressed herself and went into the lounge room where the applicant started to harangue her about the difficulties in their relationship. When the applicant later demanded sex the complainant repeatedly told him that she did not wish to participate. Despite those protests the applicant lay on top of the complainant and had vaginal intercourse with her: count 1.

[12] Shortly afterwards the applicant pushed the complainant face down onto a bed, placed a pillow over the back of her head and inserted his penis into her anus. After

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1 *R v Tait* [1999] 2 Qd R 667; [1998] QCA 304; *R v Witsen* [2008] QCA 31 at [3]; *R v Carkeet* [2008] QCA 143 at [21].

2 *Meissner v The Queen* (1995) 184 CLR 132 at 141; [1995] HCA 41; *R v Carkeet* [2008] QCA 143 at [24]-[26].

a short time during which the complainant was struggling and crying out in pain the applicant told her to "shut up" and that if she stopped screaming and crying he would not replace the pillow. To bring her ordeal to an end the complainant told the applicant to "hurry up". The applicant continued his anal rape. In order to escape the pain the complainant suggested that she fellate the applicant instead of his persisting in anal intercourse and that occurred. The applicant demanded that the complainant persist under threat that if she did not he would recommence anal intercourse. The conduct constituting count 2 concluded with the applicant ejaculating into the complainant's mouth.

[13] Count 3 involved a prolonged incident in which the applicant had vaginal intercourse with the complainant whilst she was extremely distressed. Whilst the applicant was committing that offence he repeatedly sought the complainant's assurances that she would not tell anyone else of his conduct; and he held the complainant in a grip which restrained her movements.

[14] The complainant left the unit on the following morning, pretending that she was unconcerned so as not to provoke the applicant into further misconduct. She made an early complaint of the applicant’s offending. She was medically examined on 20 October 2005. The doctor reported bruising in the area of her anus.

[15] Furthermore, the applicant does not challenge the admission made on his behalf at the sentence hearing that on the very night after he committed the offences he sent a text message to the complainant: "It wasn't OK. It's that simple. I'm really sorry that it happened. There's no excuse and my reasoning for it doesn't warrant the crime." The applicant’s counsel submitted to the sentencing judge that the applicant accepted what he had done was wrong.

[16] Nor does the applicant dispute that during a pretext phone call made during the course of the police investigation the applicant admitted that he knew that what he had done was wrong, that the applicant could have suffocated the complainant with the pillow he was holding over her head while he was raping the complainant and that he apologised. Nor does the applicant dispute the statement by the prosecutor at the sentence hearing that during a record of interview the applicant made full admissions of the facts outlined by the complainant.

[17] Plainly the admitted facts disclosed all of the elements of each of the charges of rape to which the applicant pleaded guilty. There is no substance in the applicant’s argument to the contrary.

[18] The applicant pointed to the lack of medical evidence of any bruising on the complainant's arm, mouth, wrist or throat and the absence of vaginal or anal tears. The medical evidence was in no way inconsistent with the prosecutor’s statement of the complainant’s evidence, in which she complained of very painful anal intercourse but did not complain of other bruising and that the applicant used a pillow at one point to subdue her (causing her breathing difficulties and apprehension). That the complainant did not suffer greater physical injury than she did was fortunate.

[19] The applicant’s written outline referred to a poem concerning sexual matters penned by the complainant early in their relationship (which, contrary to the applicant’s argument, bore no relevance to the offences after the complainant had ended the

relationship); that, as he alleges, on the day of the offences the applicant cooked the dinner and hung out the washing, which the complainant retrieved (which, contrary to the applicant's argument, was in no way inconsistent with their having argued about money and domestic duties as stated by the prosecutor); and that the applicant's references from his current partner and other women with whom he had relations were not handed to the sentencing judge (no such references were provided to this Court or shown to be of any relevance either to the proposed appeal against conviction or to the application for leave to appeal against sentence). There is no substance in any of those arguments.

[20] The applicant argued that his legal advisors had advised him that it would not be wise to adduce evidence of consensual sexual acts engaged in between the applicant and the complainant during the course of their relationship prior to the offences. Nothing has been suggested which would indicate that the legal advice, if it was given, was inappropriate. In any event this argument, like all of the applicant's other arguments, falls well short of showing a fairly arguable basis for setting aside the applicant's pleas of guilty.

[21] The applicant has neither provided a satisfactory explanation for his delay in appealing against his conviction nor demonstrated that if he were permitted to appeal he would have any prospect of persuading the Court to set aside his pleas of guilty.

[22] I would refuse the application for an extension of time within which to appeal against conviction.

Application for leave to appeal against sentence

[23] The applicant was sentenced to five years imprisonment for each of the three counts of rape. He was also ordered to serve twelve months of the remaining term of nearly two and a half years of a sentence of three years suspended after 166 days that had been imposed on 26 November 2003 for a malicious act with intent. (On 3 May 2005, it had been ordered, consequent upon a breach of the suspended sentence that its term be extended for six months to expire on 26 April 2007. The suspended sentence was extended for a further two months by an order of the Cairns Magistrates Court on 27 December 2006.) Each of the five year terms was ordered to be served concurrently with each other but cumulatively upon the twelve month term of imprisonment. The sentencing judge fixed a parole eligibility date at 21 April 2011, the mid-point of the total sentence of six years.

[24] The stated grounds of the application for leave to appeal against sentence are that the sentence was excessive and that "not all the evidence was handed to the Judge on my behalf. I also feel I was poorly represented during my case. The judge did not [sic] into consideration of the Doctor's report."

[25] The record reveals no defect in the way in which the applicant's counsel advanced a plea in mitigation of sentence. The last sentence of the ground of the application is also wrong: the judge did take into account the absence of more serious injury to the complainant. Those complaints may be put to one side. It is necessary only to discuss the contention that the sentence was excessive.

[26] The applicant was born on 23 September 1979. He was 26 years old when he committed the subject offences and 28 years old when sentenced for them. His criminal history commenced with convictions on 28 June 1999 for breach of the *Bail Act*, possession of dangerous drugs and possession of utensils for use in connection with dangerous drugs. His next conviction was in February 2000 for breach of a domestic violence order. Next he was convicted on 12 February 2001 of common assault. On 26 November 2003 he was convicted of three offences committed on 13 June 2003, malicious act with intent, wilful damage and common assault. The applicant committed those offences after his father accidentally ran over his puppy on the driveway to his house. After an argument the applicant drove through the front gate of the property. He then accelerated his car towards the complainant who leapt behind a pole supporting the carport. The applicant drove the car at the complainant, hitting the pole behind which the complainant was sheltering. The applicant then raised a pick handle to strike the complainant but desisted when the complainant's wife begged the applicant to stop.

[27] For those offences the applicant was given the sentence I described earlier: three years imprisonment suspended after 166 days.

[28] A psychologist's report tendered at the sentence hearing contained the opinion that the applicant, who had an unfortunate upbringing, suffered from no psychological disorder; that there was a low to moderate risk of his committing further violent offences, that he was "naive and immature" and that he lacked "significant understanding of the impact of his upbringing on his offending behaviour."

[29] There was a committal hearing at which three police officers, the doctor, the complainant’s mother and the complainant gave evidence. The complainant was not cross-examined. However the applicant contended and Crown conceded that the pleas of guilty were not late pleas because the original charges of torture and deprivation of liberty were not pursued. The sentencing judge accepted the contention that the pleas should not be treated as having been entered late. The applicant was entitled to some credit for having pleaded guilty.

[30] The offences were properly characterised by the sentencing judge as serious, despite the absence of more serious injury. The applicant subjected the complainant to a degrading and intimidating experience. His offending was protracted and at times extremely painful and distressing to the complainant. The applicant callously inflicted that pain and distress. The complainant's victim impact statement revealed that she continued to experience emotional and psychological difficulties as a result of the applicant's offending. That was a predictable consequence of the applicant's offences, which were calculated to degrade and to demonstrate the applicant's physical and emotional domination of the complainant.

[31] It is a further aggravating feature of the applicant's offending conduct that he committed these offences during the operational period of a suspended sentence which was itself imposed in part for an offence involving violence.

[32] The applicant’s counsel at the sentence hearing submitted that the appropriate sentence for the rape offences was four or five years. He submitted that a sentence of four and a half years should be imposed. Taking into account the breach of the partly suspended sentence the applicant’s counsel submitted that a total sentence in the order of six years was appropriate. He also submitted that the sentencing judge

might consider fixing a parole eligibility date after two and a half years, rather than the three years otherwise fixed by statute.

[33] The sentence of five years imprisonment for the rape offences was within the range submitted by the applicant's counsel. The order that that sentence be served cumulatively upon only one year of the partially suspended sentence produced an overall sentence of six years, which was the overall sentence submitted to be appropriate by the applicant's counsel. In those respects the judge sentenced within the range submitted to be appropriate by the applicant's own counsel, so that the applicant bears a heavy burden of demonstrating error.[3] In my view there was no error.

[34] The sentencing judge did not adjust what was otherwise the applicant's statutory entitlement to be considered for parole at the mid-point of the overall sentence. However in determining upon the overall sentence (which included only the moderate period of one years imprisonment in respect of the outstanding balance of the partly suspended sentence) his Honour expressly did give the applicant credit for the matters in his favour to which I have referred, including his plea of guilty.

[35] The sentences were within the range suggested by decisions of this Court.[4] In my opinion there is no substance in the applicant's contention that the sentences were excessive, much less that they were so unreasonably severe as to justify interference by this Court.

[36] I would dismiss the application for leave to appeal against sentence.

[37] **McMEEKIN J:** I have read the reasons of Fraser JA in draft. I agree with the orders proposed by Fraser JA and with his Honour's reasons for those orders.

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[3] *R v Flew* [2008] QCA 290 at [28], [46] and [52].

[4] See *R v McCauley* [2000] QCA 265, *R v Stevens; ex parte A-G (Qld)* (1994) 76 A Crim R 5; [1994] QCA 507, and *R v Hunt* [1994] QCA 440.