SUPREME COURT OF QUEENSLAND

CITATION:	*R v Walsh* [2008] QCA 391
PARTIES:	**R** **v** **WALSH, Joel Patrick** (applicant)
FILE NO/S:	CA No 159 of 2008 DC No 358 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	5 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	25 November 2008
JUDGES:	de Jersey CJ, Keane JA and White AJA 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 – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted upon the verdict of a jury of one count of unlawful assault, one count of unlawful deprivation, and one count of rape – where the applicant was convicted on his own plea of one count of doing grievous bodily harm – where the applicant was sentenced to 10 years imprisonment for the rape offence, with lesser concurrent sentences imposed for the other offending – where the applicant's Counsel at trial accepted that 10 years imprisonment was within the range of sentences which might legitimately be imposed – whether in the circumstances the sentence imposed was manifestly excessive *Corrective Services Act* 2006 (Qld), s 182, s 185 *Penalties and Sentences Act* 1992 (Qld), s 160A(5) *R v AAF* [2008] QCA 235, cited *R v Carter* [2008] QCA 226, cited *R v Cosh* [2007] QCA 156, considered *R v Edwards* [2004] QCA 20, considered

R v Newman (2007) 172 A Crim R 171; [2007] QCA 198, considered
R v Rankmore; ex parte A-G (Qld) [2002] QCA 492, considered

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] **de JERSEY CJ:** I have had the opportunity of reading the reasons for judgment of Keane JA. I agree with the order proposed by His Honour, and with his reasons.

[2] **KEANE JA:** On 16 May 2008 the applicant was convicted upon the verdict of a jury of one count of unlawful assault, one count of unlawful deprivation of liberty, and one count of rape. At the commencement of the trial on 14 May 2008, the applicant had pleaded guilty to one count of unlawfully doing grievous bodily harm.

[3] On 20 May 2008 the applicant was sentenced to concurrent terms of imprisonment of two years for the assault, four years for the deprivation of liberty and grievous bodily harm and 10 years for the offence of rape. Five days pre-sentence custody was declared to be time served under the sentence. The applicant's parole eligibility date with respect to the sentence for the assault conviction was fixed at 30 April 2009.

[4] The applicant seeks leave to appeal against his sentence on the ground that it was "manifestly excessive in all the circumstances".

[5] It may be noted that, so far as the sentence in respect of the account of common assault is concerned, the parole eligibility date fixed by the learned sentencing judge is of no effect as a result of the operation of s 160A(5) of the *Penalties and Sentences Act* 1992 (Qld) and s 182 and s 185 of the *Corrective Services Act* 2006 (Qld). The application for leave to appeal did not advert to this irregularity: it is sufficient to note that the parole eligibility date fixed for the assault is of no effect.

[6] The principal focus of the application must necessarily be upon the sentence imposed in respect of the offence of rape. I will discuss this application after first setting out the circumstances of the offending, the applicant's personal circumstances and the matters taken into account by the learned sentencing judge.

The circumstances of the offence

[7] The offences in question were committed on 19 July 2003. The complainant was a young woman who was 18 years old at the time. The applicant forced the complainant to leave a party they had been attending. He forced her, against her will, to go about 100 metres to his home. She voiced her protests and tried to resist him physically; she was screaming and crying. He silenced her by punching her in the mouth, breaking her jaw. He easily overcame her physical resistance; he was a powerfully built man and she was a slight young woman. He dragged her along the road to his house.

[8] At his house, she almost escaped, but he grabbed her by the hair and dragged her back. He forced her into a room where he locked her in. He detained her for a

period of about six hours. She was unable then to call out because of the pain caused by the injury to her jaw.

[9] The applicant then raped the complainant. She was crying and tried to push him away but to no avail. After he had finished having sex with her, he allowed her to leave his house.

[10] The complainant was subsequently hospitalised. She underwent surgery to fix her jaw on two occasions. She still suffers pain and inconvenience from this injury. The incident has left the complainant with emotional and social difficulties in the small community in which she lives and where the applicant has a large family.

The applicant's personal circumstances

[11] The offences occurred shortly before the applicant's 20th birthday. He was 24 years old when he was sentenced.

[12] The applicant had a minor criminal record before the offending in question. On 28 June 2007 he assaulted another woman while trying to persuade her to go home with him. For this offence he was punished by a fine of $300.

The sentence

[13] The learned sentencing judge noted that the considerable delay between the commission of the offences and the trial was in no way the applicant's fault. His Honour also took into account in the applicant's favour the circumstance that he was a young man with no previous offences involving personal violence.

[14] The learned sentencing judge regarded it as a matter of concern, however, that the applicant, now a more mature person than when he committed the offences in question, assaulted another woman while he had these offences "hanging over [his] head".

[15] His Honour noted the injuries to the complainant, and referred to the circumstance that she was pressed at trial with the suggestions that she had consented to intercourse and had willingly remained with the applicant while intercourse occurred.

[16] The learned sentencing judge emphasised the importance of protecting women from this sort of violence and the need for general deterrence to that end.

[17] Counsel who appeared for the applicant accepted that 10 years imprisonment was an appropriate sentence for the offence of rape in the circumstances of this case. The applicant's Counsel said: "I would not seriously contend that your Honour would do anything else …"

The application in this Court

[18] Remarkably, having regard to the position taken by the applicant's Counsel at the hearing before the learned sentencing judge, it is now said that the sentence of 10 years for the rape was manifestly excessive. That contention is impossible to sustain for reasons which may be stated briefly.

[19] The decisions of this Court in *R v Rankmore; ex parte A-G (Qld)*,[1] *R v Edwards*,[2] *R v Newman*[3] and *R v Cosh*[4] show that a range of 10 to 14 years imprisonment is appropriate for a persistent and prolonged offence of rape where serious, but not extreme, violence has been used by the offender upon the victim.[5] A sentence in this range, ie in excess of 10 years imprisonment, carries with it the consequence that 80 per cent of that term must be served in actual custody.[6]

[20] It is evident that the personal circumstances which should have been taken into account by the learned sentencing judge in mitigation of sentence were taken into account. The learned sentencing judge expressly took into account the applicant's youth at the time of the offending.

[21] It is also important to observe that the applicant was not entitled to the benefit of a plea of guilty in respect of the offence of rape. The applicant showed no remorse for his offence. In this regard, it is a matter of concern that his lack of insight into his offending was such that he was disposed to maintain that the complainant whose jaw he broke had consented to sexual intercourse with him.

[22] Insofar as it is said that the head sentence of 10 years was manifestly excessive, it is to be noted that this sentence accords with the submissions made by Counsel on the applicant's behalf to the learned sentencing judge.

[23] The imposition of a just sentence is, of course, the responsibility of the sentencing judge; but where the sentence which is imposed accords with the position taken by the offender before the sentencing judge, the contention that leave to appeal should be granted because the sentence is **manifestly** excessive is difficult to sustain. If the sentence were indeed **manifestly** excessive then the applicant would not have agreed, by his Counsel, that it might properly be imposed. The applicant's submission is one to which effect could be given only in special circumstances sufficient to warrant the conclusion that the applicant should not be regarded as bound by the conduct of his case in the court below.[7] No such circumstances are apparent here.

Conclusion and order

[24] The applicant has failed to show that the sentence was manifestly excessive.

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

[26] **WHITE AJA:** I agree with the reasons and order proposed by Keane JA.

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1 [2002] QCA 492.
2 [2004] QCA 20.
3 [2007] QCA 198.
4 [2007] QCA 156.
5 See also *R v Bolton* [2005] QCA 335.
6 See s 161A *Penalties and Sentences Act* 1992 (Qld) and s 182 *Corrective Services Act* 2006 (Qld).
7 *R v Carter* [2008] QCA 226 at [19]; *R v AAF* [2008] QCA 235 at [11].