SUPREME COURT OF QUEENSLAND

CITATION:	*R v Daphney* [2010] QCA 236
PARTIES:	**R** **v** **DAPHNEY, Harry Junior Graham** (appellant/applicant)
FILE NOS:	CA No 97 of 2010 SC No 469 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	3 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2010
JUDGES:	Holmes, Muir and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction for count 5 be allowed and that conviction be set aside, otherwise the appeal against conviction be dismissed;** **2. The endorsement on the nine count indictment be amended in conformity with these reasons;** **3. The application for leave to appeal against sentence and the appeal against sentence be allowed;** **4. The sentences, other than the sentences imposed for counts 8, 9 and the further offences not included on the nine count indictment, be set aside, and the following terms of imprisonment be substituted:** **Count 1 — Eleven years** **Count 2 — Four years** **Each of counts 3, 4 and 7 — Four years** **Count 6 — Two years** **5. The terms of imprisonment be served concurrently;** **6. It be declared, in respect of count 1, that the appellant has been convicted of a serious violent offence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – appellant was charged with three counts of rape on a nine count indictment – appellant

was arraigned in bulk and one count of rape was omitted – appellant was convicted of and sentenced for three counts of rape – whether there was a miscarriage of justice – whether sentences should be set aside and the sentencing discretion exercised afresh

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESIVE OR INADEQUATE – appellant convicted of taking a child for immoral purposes (count 1), deprivation of liberty (count 2), rape (counts 3-5), indecent treatment of a child under 16 (under 12) (counts 6-7), assault occasioning bodily harm (armed) (count 8), assault occasioning bodily harm (count 9) and the further offences of assault occasioning bodily harm (armed) and breach of a protection order – appellant sentenced to 15 years imprisonment for each of counts 1, 3, 4, 5, 6 and 7, three years for count 2, four years for count 8, two years for count 9, three years for the further offence of assault occasioning bodily harm (armed) and six months for breaching a protection order – complainant in counts 1-7 an 11 year old child who the appellant detained overnight and digitally raped multiple times – appellant had relevant criminal history – appellant incorrectly sentenced for three rape offences when he was only convicted of two – whether sentence manifestly excessive

R v Bielefeld [2002] QCA 369, considered
R v D [2003] QCA 88, considered
R v Daphney [1999] QCA 69, considered
R v Faifuaina [2004] QCA 262, considered
R v P [2000] QCA 271, considered
R v SAS [2005] QCA 442, considered
R v TM [2005] QCA 130, considered

COUNSEL: J M Sharp for the appellant/applicant
D C Boyle for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Muir JA and with the orders he proposes.

[2] **MUIR JA: Introduction**
The appellant was arraigned in the District Court in Townsville on 10 April 2006 on a nine count indictment charging him with the following offences:

"Count 1: Taking child for immoral purposes
Count 2: deprivation of liberty
Counts 3-5: Rape
Counts 6-7: Indecent treatment of children under 16 (under 12)

Count 8: Assault occasioning bodily harm (armed)
Count 9: Assault occasioning bodily harm"

[3] At the commencement of proceedings, reference was made by the judge and the prosecutor to a nine count indictment. The judge asked defence counsel if the appellant "intend[ed] to plead guilty to each one". Defence counsel replied in the affirmative. With the consent of defence counsel, there was a bulk arraignment in which the associate mistakenly referred to only two of the three counts of rape. There was a query about whether the charge of assault occasioning bodily harm was accompanied by an aggravating circumstance. That was clarified and the associate arraigned the appellant again, making the same error as before. The appellant pleaded guilty and the allocutus was administered.

[4] The matter was then adjourned to enable a pre-sentence report to be obtained. The sentencing hearing took place before another judge on 24 August 2006. It proceeded on the understanding of all parties that the appellant had been convicted on a plea of guilty of nine offences including three of rape. The appellant was arraigned on the further offence of assault occasioning bodily harm whilst armed and the summary offence of contravening an order under the *Domestic and Family Violence Protection Act* 1989 (Qld). He pleaded guilty to those offences.

[5] Defence counsel did not dispute the facts placed before the sentencing judge by the prosecutor. They may be summarised as follows. At the time of the offence the appellant was residing in a house in Wulguru with his de facto spouse, the complainant in respect of count 8. The appellant threw a half full beer can at the complainant, striking her on the right side of the head. He then threw a full beer can at her. It hit her on the side of the head also. The complainant ran out of the house and stood behind the appellant's brother, whom the appellant struck with a chair. He then kicked the complainant in the head, pulled her hair, and punched her in the forehead and the mouth. The complainant in count 9 was a female next door neighbour, who was punched in the head by the appellant as she stood in front of the appellant's de facto spouse in order to protect her.

[6] All of the other offences concerned an 11 year old girl who was living with a number of other people in the house in which the appellant resided. The complainant was taken against her will in the evening into bushland and then to a nearby church, where the appellant molested her. The offending conduct was described in the following uncontested statement by the prosecutor on the sentencing hearing:

> "… With respect to the three offences of rape, the prisoner admitted to police that he inserted his finger into the complainant's vagina a number of times, that he had inserted his finger into the child's anus a number of times and that he had the complainant perform oral sex upon him.
>
> With respect to the two counts of indecent dealing, the prisoner told police he had taken the complainant's clothes off and fondled and kissed her breasts. Further, he stated that he made her fondle his penis, which is the second example of indecent dealing. So, your Honour, count 3, rape is the insertion of his fingers into her vagina. Count 4 is insertion of his finger into her anus. Count 5, inserted his finger into her vagina a number of times. Count 6 is the indecent treatment where

> he played with the complainant child's breasts and made her take her clothes off. And count 7, he made the child play with his penis and made her suck his penis in an attempt to achieve an erection, …"

[7] In his sentencing remarks, the primary judge said, in relation to the rape offences:

> "You placed your finger in her vagina, placed a finger in her anus, and again in her vagina."

[8] The appellant also admitted to police that the complainant was "scared of him". She was released by the appellant at dawn, having been held against her will overnight for eight and a half hours.

[9] The appellant was sentenced to a term of imprisonment of 15 years for each of counts 1, 3, 4, 5, 6 and 7, and to terms of imprisonment of three years, four years and two years respectively for counts 2, 8 and 9. A three year term of imprisonment was imposed for the offence of assault occasioning bodily harm while armed. The appellant was sentenced to imprisonment for six months for the summary offence. All terms of imprisonment were ordered to be served concurrently.

[10] This Court granted the appellant an extension of time within which to appeal against his conviction in respect of the three counts of rape and to apply for leave to appeal against all his sentences to 16 April 2010. He has appealed against his rape convictions and has sought leave to appeal against his sentences.

Appeal against conviction

[11] The amended grounds of appeal are as follows.

[12] There was a miscarriage of justice arising from a fundamental error which could not be rectified other than by the quashing of the rape convictions. That error was the sentencing of the appellant for three rape offences when he had been convicted of only two.

[13] It was submitted that the convictions had to be set aside as it was impossible to know which two of the three counts of rape were the ones on which the appellant had been sentenced. It was further submitted that there was a fundamental and incurable procedural flaw in that it could never be possible to determine which of the three counts of rape were the subject of the two guilty pleas.

[14] The convictions should stand. The mistake, contrary to the submissions of counsel for the appellant, does not give rise to a fundamental problem. The appellant has been convicted of two counts of rape and can be dealt with for them, and only them.

[15] Counts 3, 4 and 5 were identical in terms, namely:

> "That on or about the fourth day of January 2004 in Townsville in the State of Queensland Harry Graham Daphney raped [the complainant]".

[16] There is no evidence that particularisation of the allegations was given or sought prior to the guilty plea. That is not surprising having regard to the appellant's confessions.

[17] In the absence of particularisation of the rape offences no particular significance attaches to the numbering of the counts of rape. That is especially so as the three

offences were perpetrated on the same victim in the course of the same incident at the same place and were of the same character, namely, digital penetration.

[18] In the circumstances under consideration, even if the particulars given by the prosecutor on the sentencing hearing had been provided prior to the plea of guilty, failure to link the guilty pleas to a particular count would not have invalidated the pleas. The appellant could suffer no prejudice if the guilty pleas were treated as being in respect of counts 3 and 4. One act of penetration was alleged in respect of each of these counts. That is also the logical course to follow where the appellant has set out to plead guilty to three sequentially numbered counts but, by accident, has succeeded in pleading guilty only to two.

[19] The evidence plainly justifies the sentencing of the appellant for one act of digital vaginal penetration and one act of digital anal penetration. In the circumstances under consideration neither form of penetration merits any greater or lesser punishment than the other.

[20] In consequence of the associate's error on the rape counts, the appellant was convicted of two counts rather than three. He could therefore have been sentenced only in respect of two counts but was sentenced for three. Plainly, his conviction for count 5 must be set aside.

[21] Although I consider it unlikely that the sentences imposed would have differed had there been three offences properly before the Court rather than two, it is impossible to conclude that the erroneous conclusion that there were three rape offences rather than two was not a material factor in the exercise of the primary judge's discretion when sentencing for counts 1 to 7 inclusive. Accordingly, these sentences must be set aside and the sentencing discretion exercised afresh.

[22] It is desirable to record that there is no suggestion on the evidence before this Court that the pleas were not entered by the appellant in the exercise of free choice or that the appellant was under any mental or other impediment at the time the pleas were entered. The pleas were supported by admissions and there is nothing before the Court to suggest that the admissions were tainted in any way. The appellant has failed to demonstrate any miscarriage of justice except to the extent that a conviction for three counts of rape rather two has been recorded.

[23] I would order that the appeal against conviction be dismissed and direct that the endorsement on the indictment be amended in conformity with these reasons.

Appeal against sentence

[24] The appellant contends that the sentencing judge erred by:

(a) Fettering the sentencing discretion with reference to a previous 15 year term of imprisonment imposed on the appellant for rape;

(b) Concluding that the starting point in respect of the head sentence imposed was 18 years; and

(c) Sentencing on the basis that the appellant had been convicted of three offences of rape.

It is contended also that the sentence was manifestly excessive.

[25] Because of the conclusions expressed earlier, it is necessary for this Court to determine the appropriate sentences. Counsel for the appellant criticised the

comparable cases relied on by the prosecution at first instance and on appeal: *R v Daphney*[1] and *R v D*.[2]

[26] The 18 year old applicant in *Daphney* was refused leave to appeal against a sentence of 15 years imprisonment imposed after a plea of guilty, for the anal rape of a four year old girl. The applicant, who lubricated himself with margarine taken from the refrigerator of the house in which the complainant resided, and into which he entered at night, removed the complainant from the house in the course of the attack and later returned her. The complainant suffered bruising of the outer perianal skin and a small tear at the entry of the anus but, seemingly, no lasting physical injury.

[27] The offence in *Daphney* was more serious than this one by virtue of the victim's age, the abduction from her home at night, although for a relatively short period, the injuries inflicted and, in particular, the fact that the rape was penile. The offender's conduct was not regarded by the sentencing judge as opportunistic. Although the applicant had a substantial criminal history, he had no convictions for violence or for sexual offences.

[28] In *R v D*, the 40 year old applicant's 12 year sentence, after a plea of guilty, for the rape of a five year old girl, was set aside and replaced with a sentence of 10 years imprisonment. A concurrent three year sentence for deprivation of liberty was not challenged. The complainant was abducted from her family's back yard by the applicant, a next door neighbour, who took her to his bedroom where he undressed and commenced to molest her. He was interrupted by the complainant's mother. The complainant's hymen was found to be bruised and haemorrhaged and her injuries were consistent with digital penetration. Penile penetration was not established. The offender had a lengthy criminal history but no convictions for sexual offences. He entered a guilty plea on the morning of the trial.

[29] Counsel for the appellant placed reliance on *R v Bielefeld*;[3] *R v P*;[4] *R v TM*;[5] *R v SAS*[6] and *R v Faifuaina*.[7] The applicant in *Bielefeld* was sentenced after a plea of guilty to one count of abduction (taking away the complainant girl who was then nine years old with intent to know her carnally); one count of sodomy of the girl and one count of unlawfully and indecently assaulting her by penetrating her vagina with a finger. He was sentenced to imprisonment for eight years for the sodomy and to two years imprisonment for each of the other two offences. A serious violent offence declaration was made.

[30] The 19 year old applicant contended that the declaration made the sentence manifestly excessive. The offending conduct occurred when the applicant chanced upon the complainant who had injured her foot. He offered to take her home on his motorcycle. She accepted and after driving her some distance, the applicant took her into bushland where he penetrated her anally with his penis, while also digitally penetrating her. The attack took only a short space of time and was not accompanied by violence, except that the applicant placed his hand over his victim's mouth to prevent her from screaming.

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1 [1999] QCA 69.
2 [2003] QCA 88.
3 [2002] QCA 369.
4 [2000] QCA 271.
5 [2005] QCA 130.
6 [2005] QCA 442.
7 [2004] QCA 262.

[31] The decision is of limited use for present purposes as the argument on appeal was directed to whether there should have been a serious violent offence declaration.

[32] The 60 year old applicant in *R v P* was refused leave to appeal against a sentence of nine years imprisonment accompanied by a serious violent offence declaration for an offence of sodomy committed on a 10 year old boy. He was also convicted of four counts of unlawful and indecent dealing with the complainant. The applicant was a trusted friend of the complainant's mother and the complainant was regularly left in his care. The act of sodomy was perpetrated by the applicant lubricating the complainant's anus and his own penis with Vaseline and then sodomising the complainant. He then showered with the complainant, digitally penetrated the complainant's anus and performed fellatio on him.

[33] The applicant had a criminal history which included three convictions for sodomy. He was of borderline intelligence and in receipt of a disability pension.

[34] The 42 year old applicant in *R v TM* was sentenced to three years imprisonment for a rape committed on Thursday Island and to eight years imprisonment for an offence of torture committed in Cairns. He was also convicted of two counts of rape and one count of stealing at Cairns. No sentences were imposed in respect of these two counts of rape but a six month term of imprisonment was imposed in respect of the stealing count.

[35] At the time of the commission of the second offences, the applicant was on bail in respect of the Thursday Island offence. The applicant and the complainant in the Thursday Island offence knew each other and had socialised occasionally. The offending conduct occurred when the complainant and a female friend went to sleep in the applicant's residence where they were spending the night. The complainant awoke to find the applicant with his hand inside her clothing, moving his finger or fingers in and out of her vagina. The applicant admitted the offence in an interview with police.

[36] The torture offence arose out of an attack by the applicant on a young foreign woman on a working holiday. She resided in a building of which the applicant was the caretaker. After drinking with her and others, the applicant attempted to give the complainant what he said was to be back massage. The complainant attempted to leave, whereupon the applicant blocked her way and punched her in the face. At his direction she took off her underwear and lay on the bed. He tied her up, rubbed her breasts and digitally penetrated her vagina on two occasions. He also gagged her, placed a pillowcase over her head and shaved her pubic area before photographing her. He then performed cunnilingus on the complainant and while doing so he digitally penetrated her vagina. He kept her prisoner for about 26 hours.

[37] The complainant sustained swelling and bruising to both eyes, a swollen nose, bruising and swelling to her left ear area and bruising to a shoulder and leg. The digital penetrations were subsumed in the broader offence of torture. The Court declined to interfere with the sentences, which were cumulative, except by reducing the torture sentence from eight years to seven years to give effect to the declared intention of the sentencing judge.

[38] The applicant in *R v SAS* pleaded guilty to three counts of indecent treatment of a child under the age of 16 years, one count of deprivation of liberty and two counts of rape. He was sentenced to nine years imprisonment on each count of rape with a

recommendation that he be considered for parole after four years. Concurrent terms of five years imprisonment were imposed on each of the counts of indecent treatment and a three year term of imprisonment was imposed on the count of deprivation of liberty.

[39] The applicant had a prior conviction for unlawful assault and one for assault occasioning bodily harm. He had also been convicted of offences of breaching domestic violence restraining orders. The 14 year old complainant had been consuming alcohol with the applicant and others in a motorcycle club house. She fell asleep on a bed in the premises and awoke to find that her pants had been removed and the applicant performing cunnilingus on her. The complainant telephoned the police and attempted to leave the premises. The applicant prevented her, saying, "If I'm going to gaol for this, I might as well finish". He threatened her with a pool cue and on his demand, she sat on a bar stool, took off her underpants and inserted her own finger or fingers into her vagina while the applicant masturbated. He then lifted her onto a pool table, licked her breasts and again performed cunnilingus.

[40] Over the complainant's protests, the appellant penetrated her vaginally twice while wearing a condom. She complained of being hurt by his conduct but he attempted to have intercourse with her again. Police arrived before he could achieve his purpose. The complainant suffered a split to her hymen and a tender, small split to the posterior fourchette. In his sentencing remarks, Jerrard JA, with whose reasons McMurdo P agreed, identified the appropriate range of sentence as seven to nine years. He concluded that the limited force used warranted a sentence at the midpoint of the range rather than at the high end and a sentence of eight years imprisonment was substituted.

[41] The final case relied on by the appellant was *R v Faifuaina*. The applicant, who was 24 years of age at the date of the offences and had no prior convictions, was sentenced to 12 months imprisonment for deprivation of liberty and four years imprisonment for one count of attempted rape in respect of one complainant and to 18 months imprisonment for deprivation of liberty and seven years imprisonment for the rape of a second complainant. The first complainant was a 16 year old schoolgirl who the applicant invited into his unit out of the rain. As she went to leave, he forced her onto a mattress, lay on top of her and attempted to kiss her and to lift her shirt. She resisted successfully, then got up and left. Within a couple of hours, the second complainant, who was 14, accepted an invitation by the applicant to dry herself off with a towel. He attempted to kiss her, prevented her from walking away, dragged her into his unit and locked the door. She attempted to escape but was prevented and pushed onto a mattress on which the applicant forcibly overcame her resistance and inserted his penis into her vagina.

[42] His semen was found on the inside of her skirt. The sentencing judge described the offences as opportunistic and a late plea was taken into account. The application was dismissed. In this case, as in a number of the others discussed above, the Court of Appeal's task was to determine whether the sentence was within the appropriate range. Caution must therefore be exercised when referring to such decisions in order to determine whether a sentence exceeds that which could be imposed by the proper exercise of the sentencing discretion.

[43] In my view, the above decisions, and in particular, *R v Bielefeld*, *R v D*, *R v P* and *R v SAS* support a head sentence of 10 to 12 years imprisonment. The appellant had

been sentenced to 15 years imprisonment for a particularly violent rape in June 1988. He was released from custody on 17 January 2003 and committed his next offence, assault occasioning bodily harm, two months later. The subject offences were committed within a year of the appellant's release from custody.

[44] Those are material considerations and strongly suggest a need for personal deterrence and community protection. The complainant, although not as young as the victims in *R v D* and *R v Bielefeld*, was only 11 years of age, the period of detention was protracted and the conduct to which she was subjected was generally degrading. The complainant was saved from penile rape and possible resulting injury only by the appellant's physical inability. It is not reported that she suffered any physical injury as a result of her ordeal and the evidence of her psychological affectation is quite limited.

[45] For the above reasons I would order that:

(a) The appeal against conviction for count 5 be allowed and that conviction be set aside, otherwise the appeal against conviction be dismissed;

(b) The endorsement on the nine count indictment be amended in conformity with these reasons;

(c) The application for leave to appeal against sentence and the appeal against sentence be allowed;

(d) The sentences, other than the sentences imposed for counts 8, 9 and the further offences not included on the nine count indictment, be set aside, and that the following terms of imprisonment be substituted:

Count 1	Eleven years
Count 2	Four years
Each of counts 3, 4 and 7	Four years
Count 6	Two years

(e) The terms of imprisonment be served concurrently;

(f) It be declared, in respect of count 1, that the appellant has been convicted of a serious violent offence.

[46] The sentence for count 1 is a head sentence which reflects the overall criminality of the appellant's conduct.

[47] **WHITE JA:** I have read the reasons for judgment of Muir JA and agree with the orders proposed by his Honour for the reasons that he gives.