SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ray* [2011] QCA 365
PARTIES:	**R** **v** **RAY, David Samuel** (applicant)
FILE NO/S:	CA No 259 of 2011 SC No 6 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	13 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2011
JUDGES:	Margaret McMurdo P, White JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. Instead of the sentences imposed below for counts 3, 4 and 5 impose a sentence of 14 years imprisonment on each of counts 3 and 4 and three years imprisonment on count 5.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of murder; two counts of rape; two counts of burglary; one count of breaking, entering and stealing; and one summary offence of trespass – where subject offences committed against 82 year old woman living alone – where applicant aged 18 and intoxicated – where applicant sentenced to life imprisonment for murder and each count of rape; 15 years imprisonment for one burglary; lesser terms of imprisonment for other offences, to be served concurrently – where applicant seeks leave to appeal against two life sentences for rape offences and 15 year term of imprisonment for one burglary – where respondent concedes 15 year term of imprisonment for one burglary should be reduced to three years – where respondent seeks to hold two life sentences for

rape – where primary judge's sentencing of these offences influenced by contribution of those offences to victim's death – whether sentences manifestly excessive

Buckley v The Queen (2006) 80 ALJR 605; [2006] HCA 7, considered
R v Bolton [2005] QCA 335, cited
R v Edwards [2004] QCA 20, considered
R v H [2001] QCA 167, cited
R v Jerome [1997] QCA 299, considered
R v Mallie [2000] QCA 188, cited
R v Newman (2007) 172 A Crim R 171; [2007] QCA 198, considered
R v O'Brien [2008] QCA 163, considered
R v Price [2004] QCA 10, considered
R v Robinson [2007] QCA 99, considered
Veen v The Queen [No. 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: A J Glynn SC for the applicant
D A Holliday for the respondent

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

[1] **MARGARET McMURDO P**: I agree with White JA's reasons for granting the application for leave to appeal and allowing the appeal against sentence. I agree with the orders proposed by her Honour.

[2] **WHITE JA**: On 12 September 2011 in the Supreme Court at Rockhampton the applicant pleaded guilty to one count of murder; two counts of rape; two counts of burglary; one count of breaking, entering and stealing; and to one summary offence of trespass. He was sentenced to life imprisonment for the murder and for each of the rapes; 15 years imprisonment for one burglary; three years imprisonment for the other; two years for the break and enter; and imprisonment of one month for the summary offence, all to be served concurrently. Time of 592 days in pre-sentence custody was declared as time served under the sentences.

[3] The applicant seeks leave to appeal against the two life sentences for the rapes and the 15 year term of imprisonment for one burglary.

[4] The respondent concedes that leave should be given in respect of the burglary, the appeal allowed and a sentence of three years be imposed consistently with the three years imposed on count six for the other burglary. However, the respondent seeks to hold the two life sentences for the rapes.

Circumstances of the offending

[5] The applicant was born in July 1991. The events which give rise to the charges occurred on 26 January 2010 when he was aged 18. He was 20 when sentenced. He had previous criminal convictions, largely for stealing and break and entering premises and vehicles offences and had been given probation in 2006.

[6] On 26 January the applicant broke into the Leichhardt Hotel in central Rockhampton at about 2.30 am. He was seen on video camera stealing bottles of alcohol from behind the bar. He left and attended a party. Later in the morning he was seen by various witnesses staggering in a state of intoxication.

[7] The subject of the rape and murder charges lived alone and independently in her home in George Street, Rockhampton. She was aged 82 and had lived there for 52 years. She required a walker to get around and had had installed an electric chair lift to take her up to the first floor of her house. She suffered from some ailments and took blood thinning and other medication. As a consequence of her medication her eyesight was very poor but her hearing good. She was very security conscious around her home. The deceased had five children and many grandchildren and great-grandchildren.

[8] At about 8.00 am on the morning of 26 January Mr Mark Booth, who lived next door to the deceased, looked across to her back garden and saw her in her yard raking leaves. About 40 minutes later he looked again and saw an Aboriginal male lying in her backyard on what he thought at first was a mattress but realised that it was the deceased. Next to the man was a fire extinguisher which had been in the deceased's kitchen. Mr Booth shouted at the man who got up and ran to the rear of the premises. The gate was locked so he apparently negotiated the rear fence and left the yard. Mr Booth called emergency services and then went down to the deceased whom he saw had significant facial injuries. Her nightdress was up about her waist revealing her underwear. She was covered in white powder. Police arrived and the ambulance took the deceased, who was alive but unconscious, to hospital.

[9] On search by police it was apparent that the deceased's house had been disturbed. Subsequently the applicant's fingerprints were found at the entrance doorframe downstairs and on top of her wardrobe in her bedroom at the front of the house.

[10] After leaving the deceased's house via the back fence the applicant gained entry to another nearby house by climbing through the casement windows at the front. Nobody was home. The applicant took a bag with foodstuffs, a quantity of alcohol and a ring valued at $3,000, subsequently recovered from the applicant's home address. The applicant had left the fire extinguisher which he had carried from the deceased's house at the second house. The applicant's DNA was found on the fire extinguisher. The applicant had been seen by a witness walking up the street spraying the fire extinguisher and running into the cloud of powder.

[11] The summary offence concerned trespass to another nearby house.

[12] The deceased did not regain consciousness. She had profuse bleeding from the vagina from a laceration of approximately two centimetres with extreme bruising and a tear inside her anus which also bled profusely. The deceased was observed to have massive, fluctuant and boggy swelling to her skull, bilateral bruising consistent with bilateral base of skull fractures and what were described as "panda eyes" because of the damage to the facial bones. She was transferred to the Royal Brisbane and Women's Hospital. Her facial injuries were described as:

> "Bilateral fractures to the nose and base of skull fracture. Extensive left-sided facial bone injuries, with a fracture of the left zygomatic arch. Multiple fracture lines with separate bone fragments along the walls of her left maxillary sinus, and fractures of the nasal bones.

> Two ribs fractured on the left side, a fracture through the sternum. She had a small pneumothorax, air in the lung cavity, and collapse in both lower lobes of the lungs."[1]

The specialist doctor's assessment of her head injuries were of

> "a depressed left skull fracture, bilateral raccoon eyes, suggesting base skull fractures, bleeding from the ears, extensive swelling of the tongue, extensive swelling to both eyes to the extent that they were shut. Active ongoing bleeding from the nostrils, …"[2]

[13] The deceased showed no signs of improvement after several days of active treatment and she died on 3 February 2010 after treatment was desisted. At post-mortem the pathologist identified the cause of death as loss of blood from head and anal-genital injuries contributed to by the anti-thrombotic blood thinning medication. The injuries to the head were as a result of blunt force trauma which could have been blows from the fire extinguisher or a fist, elbow, knee or foot. The lacerations to the vagina and the anus were consistent with blunt force injuries from the insertion of a body part or object.

[14] The applicant's DNA was found on parts of the deceased's body and her DNA was found on the top the applicant was wearing when subsequently interviewed.

[15] Police began looking for the applicant on 26 January. He attended at the police station with a relative the next day. In an interview with police he recalled assaulting an old lady but had difficulty remembering details. He recalled committing a burglary at the house, using his elbow to assault her repeatedly, kneeling down and elbowing her trying to make her unconscious so that he would not be implicated in the burglary. He told police he was looking for money to buy more alcohol and cannabis. He said he could not remember sexually assaulting the deceased as he was extremely intoxicated. He could not recall the burglary following the assault.

[16] The applicant was re-interviewed on 8 February and said, "I went a bit too far, and I did some other things I shouldn't have done".[3] He stated that he "had sex with her". But he said he did not actually remember doing so. He also recalled kicking the victim in the face. He was wearing sandals. He said he was sorry for doing those things and wished to be forgiven.[4]

[17] The applicant's pleas of guilty followed within three weeks of his solicitors receiving a report from Dr Mark Schramm, psychiatrist. He had been asked to report on the presence and nature of any mental illness or natural mental infirmity, whether the applicant was of sound mind at the time of the offences and his current fitness for trial.[5] Dr Schramm concluded that apart from voluntary intoxication there were no defences of unsound mind or diminished responsibility, that he was fit for trial and that he was unable to ascertain any reason for the applicant's violent conduct. The personal history of the applicant was set out in detail in Dr Schramm's report. He noted that from his early teens the applicant had been an extensive user of alcohol, inhalants and cannabis. He had been assessed by mental

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1 AR 12.
2 AR 12.
3 AR 13.
4 AR 14.
5 AR 57.

health professionals when about 14 when he attempted to hang himself. He had one young child with his de facto partner. Whilst he was on remand he had done drug and alcohol and some vocational courses.

[18] Through his counsel the applicant apologised to the deceased's family. The primary judge had many statements from the deceased's children and other family. All attested to the devastation which they felt at the manner in which she had been assaulted and died.

Prosecution submissions below

[19] The prosecutor contended that because the rape offences were "so inextricably linked to the murder"[6] life imprisonment should be imposed for each rape. The prosecutor gave his Honour no authority for that submission. He also submitted for a life sentence for count five, the burglary of the fire extinguisher at the deceased's house, because it, too, was "inextricably linked to the death".[7]

Defence contentions below

[20] Defence counsel accepted that the two rapes were very serious examples of the crime but noted that there had been some co-operation in the administration of justice by the plea of guilty and the applicant's voluntary attendance at the police station. Defence counsel offered no assistance to the primary judge by way of reference to comparable authorities.

The primary judge's reasons

[21] The primary judge noted that the facts were "appalling" and that the prosecution case was "overwhelming" and the plea, although late, had the utilitarian value that the community was saved the trouble and expense of a trial. His Honour noted that the deceased would have suffered fear, pain and gross indignity and that the loss of their loved and valued family member was deeply felt by her children and their families.

[22] His Honour noted the part that alcohol and drugs had played in the offending. He recorded that the applicant appeared distressed, tearful and demonstrated genuine remorse and shame to Dr Schramm. His Honour said, in relation to the two counts of rape, that

> "… these actions were so inextricably bound up with [the deceased's] death that you deserve the maximum sentence that the parliament has laid down, that of life imprisonment."[8]

His Honour did not accept the prosecution's submission of a life sentence for the burglary but did impose a sentence of 15 years imprisonment.

Manifestly excessive?

The applicant's submissions

[23] Mr A Glynn SC, for the applicant, submitted that while serious, the rapes would have been unlikely to have caused death in the absence of the anti-thrombotic

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6 AR 14.
7 AR 15.
8 AR 25.

medication and, in imposing life sentences, the primary judge blurred the boundary between the murder, for which the applicant had been sentenced to life imprisonment, and the rapes. By imposing a life sentence no recognition was given to the applicant's pleas of guilty nor his youth and remorse. He submitted the range was 15 to 16 years and sought a term of imprisonment of 15 years. Mr Glynn referred to the observations of Keane JA, with whom Williams JA and Muir J (as his Honour then was) agreed, in *R v Robinson*:[9]

> "In relation to the argument that the sentence was manifestly excessive, it is not to the point to say that the maximum penalty should have been reserved because it is possible to imagine a worse case of this kind of offending than is presented by this case. On the other hand, the imposition of a sentence of life imprisonment for an offence other than murder is exceptional. It is incumbent on a sentencing judge to consider whether the purposes which are reflected in the sentence could be met by a lesser sentence so as to avoid the 'banalisation' of a sentence of life imprisonment."[10] (footnotes omitted)

[24] The facts in *Robinson*, one of three cases mentioned on appeal, are of little assistance in considering the appropriate sentence here. The 55 year old offender was found guilty after a trial of one count of maintaining a sexual relationship with a child under the age of 16 and two counts of rape and sentenced to 18 years imprisonment on each count.[11] The child was aged between five and seven during the offending. A listening device placed by police in the offender's car for another purpose recorded one of the rapes which was clearly painful for the child. Keane JA referred to other serious cases of maintaining and rape including one[12] where the offender raped three children, and on one occasion of intercourse with his daughter, broke her wrist and fractured her rib. He was sentenced to 17 years imprisonment.

The respondent's submissions

[25] Ms D Holliday, for the respondent, sought to uphold the life sentences notwithstanding the mitigating features of the pleas of guilty and the applicant's youth. She submitted that apart from the "horrific"[13] circumstances of the rapes:

> "Importantly and uniquely to the facts of this matter, the complainant's death was contributed to by the injuries inflicted in the rape offences."[14]

[26] Ms Holliday referred to the statement by Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen [No 2]*[15]:

> "… the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that

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9 [2007] QCA 99 at [38].

10 At [38]. The expression "banalisation" was used by the High Court in respect of the imposition of an indefinite sentence in *Buckley v The Queen* (2006) 80 ALJR 605 at [42]; [2006] HCA 7.

11 The court would have imposed a sentence of 20 years but to avoid the anomaly of a later parole eligibility date of 16 years than for a life sentence in the then provisions in the *Corrective Services Act* 2000 (Qld), imposed 18 years.

12 *R v H* [2001] QCA 167.

13 Written submissions for the respondent para 10.

14 Written submissions for the respondent para 10.

15 (1988) 164 CLR 465 at 478.

> penalty is prescribed … That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."

Discussion

[27] There are decisions, not referred by counsel to the sentencing judge, involving violent rapes of adult women which assist in considering whether the imposition of life imprisonment for these rapes was excessive.

[28] *Buckley*[16] was remitted to this court by the High Court to re-exercise the sentencing discretion due to errors made at first instance in circumstances where an indefinite sentence had originally been imposed with a nominal sentence of 22 years on five rape charges. The facts were set out by Holmes JA in the first leave to appeal application and quoted by Muir JA:[17]

> "[13] … The first two rapes were committed on a 20 year old woman who was walking alone to her home in Dalby at about 4 am. The applicant grabbed her from behind and forced her to the ground. He then used the strap of her shoulder bag around her neck to choke her and force her to an area where he anally and vaginally raped her, causing what was described in a medical report as "major anal trauma" and other less serious genital injuries. At the end of the assault he threatened to kill the complainant if she moved as he left.
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> [14] The second series of assaults was committed on a 67 year old woman. At about 5 am one morning, the applicant broke a window to get into the bedroom where the victim was sleeping. He tried to sodomise her inside the bedroom and then dragged her out of the house into the backyard, where he attempted to put his penis into her mouth. He then sodomised her while placing his fingers in her vagina. Those events gave rise to rape and indecent assault charges.
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> [15] The third set of offences was committed on a 15-year-old girl whom the applicant attacked as she walked alone in a Toowoomba city street at about 1 am. He chased her, and then knocked her to the ground from behind, causing her in the fall to suffer a fractured femur. Notwithstanding her plea that she thought her leg was broken, he raped her vaginally and anally. At one stage when he thought she had looked at him he slapped her on the face and head."

His Honour added:[18]

> "Each of the offences, and in particular the first and third, were protracted and accompanied by the infliction of severe pain on the terrified victim."

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16 *R v Buckley* [2008] QCA 45.

17 At [5].

18 At [6].

That offender was aged 32 with a limited criminal history. For each count of rape he was re-sentenced to 22 years imprisonment.

[29] *Edwards*[19] involved "quite shocking" circumstances. Davies JA, with whom the Chief Justice and Mackenzie J agreed described the offending conduct:

> "The appellant broke and entered the dwelling of the complainant, who was then pregnant, at about 3.15 am. She was alone in the house and asleep at the time. She awoke to find the applicant at her bedroom door. He then commenced to indecently assault her by grabbing her around the throat. He performed oral sex on her, demanded that she perform oral sex on him and repeated this on a number of occasions.
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> He then had forced vaginal intercourse with her and then repeated his demands for oral sex. This process was repeated during which the applicant was threatening to hurt the complainant unless she complied. He then attempted to have anal intercourse which she managed to prevent by contracting her buttocks. He again then had vaginal intercourse with her, then appeared to ejaculate inside her. By this time she was bleeding. She told the applicant she thought she was miscarrying and asked him to call an ambulance. He replied, 'You're not pregnant anymore, you're going to have a bath.'
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> He then forced her to have a bath in circumstances where the water was rushing directly into her vagina. He then put his hand in her vagina apparently in an attempt to wash it out. Before leaving he told the complainant to remember what he had said earlier, which had been that if she told anyone he would come back and kill her and her family."

His application for leave to appeal against his 15 year sentence for the three counts of rape was refused.

[30] A decision with some parallels to the present is *Newman*[20]. That applicant pleaded guilty to rape, grievous bodily harm, robbery with violence, burglary and deprivation of liberty. He was sentenced to 13 years imprisonment on the charge of rape and lesser concurrent sentences for the other offences. He was just seventeen when the offences were committed and 18 when sentenced. The victim was a 60 year old married woman who lived next door to the applicant's grandmother. He had been introduced to her on one occasion. The applicant had consumed ecstasy the night before and went to his grandmother's house during the day. He went outside for a cigarette and saw the victim go inside her house. He decided to rob her as he had no money. The victim was in her bathroom washing her hands when she heard the door shut. She tried to open it but realised there was someone pulling on the door from the other side. She eventually managed to open the door a little way and saw the applicant on the other side. He grabbed her, held one hand over her mouth and told her not to scream. He dragged her into the hallway with the victim pleading with him not to do anything. As described by Williams JA:

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19 *R v Edwards* [2004] QCA 20.

20 *R v Newman* [2007] QCA 198.

> "[3] …[s]he was thrown to the floor in the middle of the doorway to the second bedroom. She immediately felt immense pain in her lower back. Following that the applicant punched the complainant to the left side of her face near the left eye. He kept telling the victim to shut up and not to scream. The victim was then punched at least four times to the side of her face causing extreme pain. The victim told the applicant that her back was hurt and she begged to be allowed to get up from the floor. The applicant said he did not care about her back and continued to punch her. The victim begged the applicant not to punch her in the left eye as she had had operations previously on that eye and was scared she would lose sight. The applicant told her he did not care. He then ordered her to take her clothes off but she refused. The applicant then dragged off the victim's dress and removed her bra. He dragged her into the main bedroom whilst the victim was crying because of the severe pain in her back. She was pushed onto the bed and the applicant then placed a pillow over her face. The victim asked the applicant to take the pillow off her face as it was hurting but he refused.
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> [4] The victim was able to see in a mirror that the applicant's pants were down and he put a condom on his penis. The applicant then proceeded to remove the victim's underpants and penetrated her vagina with his penis. The victim was not sure whether or not he ejaculated."

[31] On examination at the hospital extensive bruising was seen around her left temple, right cheek, below her right eye and elsewhere. An x-ray revealed that she had a broken lower jaw and broken rib on the right side. The fractured jaw was wired and remained so for about six weeks which caused excessive difficulty eating and drinking. The victim became profoundly depressed and was admitted to a private psychiatric hospital for almost two weeks. She continued to be hospitalised for treatment for post-traumatic stress disorder and depression. The applicant showed no remorse. He had no previous criminal convictions.

[32] The court considered a number of comparable decisions – *Mallie*[21], *Bolton*[22], *Price*[23], and *Jerome*.[24] Those cases demonstrated that the appropriate range where rape and grievous bodily harm were involved was 10 to 14 years. It is useful to consider *Jerome* and *Price* because they involved the rape of older women. In *Jerome* the offender was convicted after a trial of burglary, rape and indecent assault. A sentence of 14 years imprisonment was imposed for the rape. That offender had an extensive criminal history and had been drinking heavily. After an argument with his wife the offender decided to go to the complainant's house, described as "an elderly woman", with the intention of raping her. He turned off the power, entered the house through a bathroom window, went into her bedroom and raped her. He threatened that if she told anyone he would make it

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21 *R v Mallie* [2000] QCA 188.
22 *R v Bolton* [2005] QCA 335.
23 *R v Price* [2004] QCA 10.
24 *R v Jerome* [1997] QCA 299.

worse for her but the following morning, seized with remorse, he returned and asked for forgiveness. Williams JA in *Newman* commented that if there had been any violent physical attack on the complainant causing grievous bodily harm a sentence well in excess of 14 years would have been called for.

[33] In *Price*[25] the offender pleaded guilty to burglary with violence, rape, serious assault and stealing. He was sentenced to 12 years imprisonment for the rape and lesser concurrent sentences on the other counts. The complainant was a 66 year old woman living alone. The offender entered her home around midnight after she had retired to bed. She told him she was a little old lady and asked him not to hurt her. He said he would not do so but proceeded to punch her with a closed fist to the left side of her face four or five times. He attempted intercourse but was apparently unable to effect complete penetration. After he left the complainant found $140 missing from her purse. She suffered severe bruising to the left side of her face and the upper arm and bruising in the genital area. That offender was 29 and a serious abuser of alcohol. He had a criminal history which included convictions for assault occasioning bodily harm. The sentence was not said to be manifestly excessive.

[34] In *O'Brien*[26] the offender pleaded guilty to burglary, rape and stealing. He was sentenced to 14 years imprisonment for the rape. He was 33 at the time of the offences and 41 when sentenced. He had a lengthy criminal history for dishonesty and assaults. He had been to prison on 18 separate occasions. The offender broke into the house of an elderly woman who lived alone and woke her at knifepoint. He took her by the throat and restricted her breathing. When she tried to fight him off he punched her in the eye with a closed fist and choked her again. He repeatedly raped her anally (about five times) and forced her to perform oral sex on him. As he was leaving he took the money in her purse and threatened to return if she rang police. The attack was described as vicious and callous. The sentence was not regarded as manifestly excessive.

[35] These decisions suggest that a sentence range of between 13 to 18 years, depending on the circumstances and any mitigating factors, after a plea of guilty to rape. The learned primary judge was induced, by the prosecution submissions, and not dissuaded from that view by any useful analysis by defence counsel, into allowing his approach to the sentence for the separate offences of rape to be influenced erroneously by the fact that bleeding from the rapes (in addition to bleeding from the head injuries) had led to the victim's death. The applicant was punished for that death by a life sentence. A sentence cannot represent an appropriate punishment for the particular offence by including aspects for which an offender has already or will be punished separately.

[36] It is necessary to exercise the sentencing discretion anew. These rapes were particularly brutal and inflicted frightful injury on an elderly, frail woman in her own home. The comparable sentences of *Newman* and *Price* in particular suggest that the appropriate sentence for each of the rapes would be 14 years.

[37] The orders which I propose are:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.

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25 [2004] QCA 10.

26 [2008] QCA 163.

3. Instead of the sentences imposed below for counts 3, 4 and 5 impose a sentence of 14 years imprisonment on each of counts 3 and 4 and three years imprisonment on count 5.

[38] **MULLINS J**: I agree with White JA.