SUPREME COURT OF QUEENSLAND

CITATION:	*R v VN* [2023] QCA 220
PARTIES:	**R** **v** **VN** (applicant)
FILE NO/S:	CA No 216 of 2021 DC No 818 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 30 August 2021 (Clare SC DCJ)
DELIVERED ON:	14 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2023
JUDGES:	Bowskill CJ and Morrison and Dalton JJA
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 by a jury of three counts of rape, one count of assault with intent to commit rape and two counts of common assault – where the applicant was sentenced to 12 years' imprisonment for each of the three counts of rape, lesser concurrent sentences for the assault with intent to rape and one count of assault, and no additional punishment for the other count of assault – where the applicant and the complainant lived in the same house and the applicant was essentially the complainant's step-father – where the rapes occurred in the complainant's family home – where the first rape involved force and physical violence – where the subsequent rapes were committed under the force of threats including blackmail about releasing a video of the first rape on social media – whether the sentence of 12 years was manifestly excessive in all the circumstances *Penalties and Sentences Act 1992* (Qld), s 9(2A), s 9(10A) *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, cited *R v Benjamin* (2012) 224 A Crim R 40; [2012] QCA 188, considered *R v Dendle* [2019] QCA 194, considered

R v Flew [2008] QCA 290, cited
R v Heckendorf [2017] QCA 59, considered
R v Newman (2007) A Crim R 171; [2007] QCA 198, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v SDM [2021] QCA 135, distinguished

COUNSEL: S R Lewis for the applicant
J D Finch for the respondent

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

[1] **THE COURT:** The applicant was convicted, following a trial by jury, of three counts of rape, one count of assault with intent to commit rape and two counts of common assault. He was sentenced to 12 years' imprisonment, concurrently, for each of the three counts of rape, with additional concurrent terms of four years' imprisonment for the assault with intent to rape and six months' imprisonment for one count of assault, with no additional punishment for the other count of assault.

[2] His appeal against the convictions was dismissed on 12 September 2023: *R v VN* [2023] QCA 184. He applies for leave to appeal against his sentence, on the ground that the sentences imposed, in particular for each of the three counts of rape, were manifestly excessive.

[3] The factual circumstances of the offending are addressed in detail in the reasons for dismissing the appeal against conviction. The applicant, who was then aged 40 to 41, was in an intimate relationship with the complainant's mother. As such, the complainant, who was then aged 17 to 18 (and just 19 at the time of count 6), was essentially his step-daughter.

[4] The complainant first met the applicant when he came to her home in October 2017. The circumstances were traumatic, because her mother had attempted suicide and was in hospital. The complainant lived with her mother and brother. They were a traditional Tamil family, who had fled Sri Lanka a few years earlier. The applicant, who had also come to Australia from Sri Lanka, met the complainant's mother shortly after she and her children first arrived in Australia, and offered to assist them. Although he then moved to Sydney, they stayed in contact, with the applicant returning to Brisbane in late 2017. From that time on, the applicant visited regularly, and started to stay the night sometimes.

[5] The complainant and her family lived in a two-bedroom unit. She and her mother shared one bedroom, and her brother had the other bedroom. So when the applicant stayed over, he stayed in the same room with the mother and the complainant; the complainant would turn to face the wall when trying to sleep.

[6] As the learned sentencing judge observed, "[i]n a short time, [the applicant] worked his way to being the de facto head of the family". At first, the complainant called him "uncle", as a cultural sign of respect. But after a time, she was encouraged by her mother to call him "dad". The applicant started to come to the home more often, and started to inappropriately touch the complainant, touching her breast and bottom, brushing it off as an accident when she confronted him about it.

[7] The first time he forced her to have sex (count 1) was shortly before her 18th birthday. He came into her room, woke her up and told her that he wanted to have sex with her. She said she tried to walk away, and also that she screamed and was yelling and crying, but he "just forced me", and also slapped her a number of times. She had never had sex before. The applicant left the room, came back a few minutes later and threatened her, saying she was not to tell anyone, especially her mum.

[8] A couple of weeks later, the applicant came into the complainant's room and told her he had captured a video of him having sex with her. He told her he would post it "everywhere" on social media, unless she continued to have sex with him. His threat was believable to her, because he worked as a videographer. It was especially frightening to her, because of her cultural background and the impact it could have on her future. When she said she would tell her mother, the applicant responded that "she [the mother] might kill herself if she knows that", a particularly cruel response given the circumstances in which the complainant first met the applicant. The complainant felt trapped and frightened, and agreed to have sex with the applicant "out of fear". She had just turned 18.

[9] The second rape (count 2) took place a couple of weeks later, once again in the bedroom the complainant shared with her mother. The third rape (count 4) happened on another occasion when she was returning from the shower to her bedroom, with a towel wrapped around her. In addition to the three specific occasions, the complainant said there were other times when the applicant forced her to have sex with him. She could not say accurately how many times, other than it was "definitely less than 10". It eventually stopped when she stood up to him, telling him to do whatever he wanted with the video because she was done with it.

[10] The assault (count 3) occurred after that, when the complainant was talking on the phone to a male friend, and the applicant came into her room, slapped her and hit her with his fist to her face. He was angry because she was speaking to this friend.

[11] The assault with intent to rape (count 5) occurred a couple of months later, after the family had moved to another home. The applicant was drunk. Nobody else was home. The applicant came into the kitchen, where the complainant was, and threatened her, telling her he wanted to have sex with her. She was frightened and tried to get away, but was unable to. She said the applicant was hitting her hard, she was on the floor and he kicked her on her thighs. She was crying and he slapped her, near her ear, causing her to feel an echo in her ear and become dizzy. All the while he was using swear words and speaking "nastily, using very dirty words" to her. Eventually, he fell unconscious, and she was able to run outside. A few months later again, the final assault (count 6) occurred, just after the complainant turned 19.

[12] In a victim impact statement tendered at the sentencing hearing, the complainant said that since these crimes, she had struggled to enjoy life, find her self-worth and future, saying "my hopes have been shattered into pieces". She described feeling abandoned, fearful, "unclean and unworthy", leading to suicidal thoughts.

[13] The prosecutor submitted a sentence of "not less than 10 years" was appropriate for each count of rape, which would carry with it an automatic "serious violent offence" declaration, requiring the applicant to serve 80% of the sentence before being

eligible for parole. Reliance was placed on *R v Heckendorf* [2017] QCA 59, *R v Dendle* [2019] QCA 194 and *R v Benjamin* (2012) 224 A Crim R 40; [2012] QCA 188.

[14] The solicitor then appearing for the applicant submitted that to imprison him would be a miscarriage of justice because, in essence, he had been wrongly convicted in circumstances where video evidence sought to be tendered at the sentencing hearing would show the relationship between the applicant and the complainant was a loving, consensual one. The learned sentencing judge properly refused to receive such evidence, making it clear the applicant had the opportunity to put his case to the jury and it was not for the sentencing court to undermine the verdict of the jury.

[15] The sentencing judge concluded that a just sentence for each of the rape offences was 12 years' imprisonment. Her Honour's reasons included the following:

> "The jury found the prisoner guilty of raping a vulnerable, young woman. These were domestic violence offences. The girl's mother had allowed the prisoner into their home. She trusted him. This was a traditional Tamil family. They had fled Sir Lanka, and the prisoner knew the particular hardships they had faced. In a short time, he worked his way to being the de facto head of the family. The offending started soon after.
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> When he first overpowered her, the prisoner was 40 years old, the victim not yet 18, and still a virgin. She had screamed and struggled, but physically, she was no match for him. It was a terrible trauma, made even worse, as the prisoner well knew, by the cultural implications for her as damaged goods. The prisoner used the potential destruction of the girl's reputation and future as a weapon against her. It was one of the threats that he applied to commit further rapes and to maintain secrecy. He made the girl worry that her mother's shame would be so deep that her mother would kill herself. He also made death threats.
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> The prisoner has been convicted of three rapes, all of them involving significant physical force. Each of them, over his victim's screams and pleas. She felt trapped. She had to endure having her rapist live in the same house, she had to worry about when he might rape again and she felt unable to seek help from anyone. That was the dreadful burden that she had to bear. After months of living like that, she realised the threat of releasing the video was sheer bluff. She told the prisoner to go ahead. He was not so bold then, but his attitude towards her did not soften. There are three convictions for slapping her when she did not obey him. They include a drunken assault as she refused his approach to have sex with her again.
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> On sentence, the prisoner gave sworn evidence. He said he married in Sri Lanka 17 years ago. Unfortunately, the couple had little time together. He estimated a total of only six months. His wife and children are still in Sri Lanka. The prisoner has been in Australia since 2012, and under a protection visa since 2017 or '18. The prisoner said the absence of his family made him feel like killing himself. He also said his family depend on him financially. While

> on bail for the past two and a-half years he was unable to make any payments. If he is imprisoned, his family will suicide. The defence also tendered a document from his wife. She iterated that he was her only source of income.
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> The prisoner swore that he was forced to be a child soldier, and spent 19 years with the LTTE, until the Tamil Tigers disbanded. He was a videographer and fighter. The atrocities of that war and the brutality of both sides has been well documented. The prisoner describes a horror beyond words. He said he ran away, then pretended to be a civilian and fled Sri Lanka twice, leaving his wife and children behind. The second time, he came to Australia as a refugee.
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> Certainly, the prisoner's claim for protection must have been accepted by authorities for his refugee status to have been upheld, but as to the details of his involvement, no firm conclusion can be drawn. The prisoner has a credibility problem. He tried to mislead the jury with a doctored video during the trial. The sentence was adjourned to afford him opportunity to find support for his claim of life risking bravery. That claim was not pursued on sentence and the declaration from his wife offers no information about the prisoner's life in Sri Lanka at all."

[16] The sentencing judge noted that the applicant had no criminal record in Australia. It was accepted, even without specific evidence, that the convictions may well affect his visa and ability to stay in Australia.

[17] Her Honour also noted that there was no cooperation, no evidence of insight or any effort by the applicant to change his attitude towards women or sexual violence and that:

> "There is no evidence of remorse. After the victim had told her mother of the rapes, he became more openly menacing. Even after his conviction, he continued to deny the offences. On instructions, his new solicitors referred to the acts of rape as love and romance.
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> In truth, on the actual evidence accepted by the jury, the prisoner crushed an unworldly teenage girl before she even had a chance to find her place in the world. His only response has been to diminish her further. First, by the physical assaults, then by threats to poison her own mother against her and by trying to destroy her reputation. The poison has left her feeling dirty and alone. Every day has been a struggle. She has felt like taking her own life, but she is determined that this will not defeat her. She is a remarkable young woman. She found the courage to testify and she hopes to draw on her own trauma as a victim to help others."

[18] In relation to the submission on behalf of the applicant that he posed no risk and ought not be sentenced to imprisonment, the sentencing judge said:

> "The submission flies in the face of s 9 of the Penalties and Sentences Act and the established pattern of sentencing for even an isolated incident of rape. Rape is a very serious offence. The

> maximum penalty is life imprisonment. This prisoner repeated it three times, in a violent way, over an extended period of time. It was not some mere lapse of character. Counts 2 and 4 were especially calculated, prefaced by blackmail and threats. There was some actual violence. It was a grave betrayal of trust and abuse of power. Personal deterrence is clearly relevant because of those things: the gravity and repetition of the offending, the steps the prisoner took to avoid prosecution, and the absence of remorse or insight. The proven capacity for that level of behaviour marks him as a real risk, even now, two and a half years later, to any vulnerable females with whom he may have an association."

[19] In relation to the comparable authorities relied upon by the prosecutor, her Honour noted all concerned offending prior to 2016, therefore before the amendment to s 9 of the *Penalties and Sentences Act 1992* to include sub-section (2A), which provides that the principle in s 9(2)(a) (that a sentence of imprisonment should only be imposed as a last resort) does not apply to the sentencing of an offender for any offence that involved the use of violence against another person or that resulted in physical harm.[1] The learned sentencing judge observed that amendment had "increased the prominence of the objective circumstances of the offending and the ramifications for the community in the sentencing synthesis".

[20] It is relevant to observe that another amendment made in 2016 was the inclusion in s 9 of sub-section (10A) which provides that:

> "In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case."[2]

[21] On this application for leave to appeal against the sentences imposed, the applicant does not submit any specific error was made. He submits the sentence was manifestly excessive, having regard to the circumstances of the case, and that having regard to the authorities cited at first instance, and another case, *R v SDM* [2021] QCA 135, the appropriate sentence would be in the range of 8-9 years' imprisonment.

[22] As is well-established, to succeed on an application on this ground it is not enough to establish that the sentence imposed was different, or even markedly different, from sentences imposed in other matters. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle, or that the sentence is "unreasonable or plainly unjust".[3]

[23] In *R v Benjamin*, the 25 year old offender was convicted of one count of rape. The victim was a 19 year old student, a stranger to him, who was out jogging at 7.00 pm one evening. She was hit from behind, and had only patches of memory from that

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1 That subsection was inserted by s 61(3) of the *Youth Justice and Other Legislation Amendment Act (No 1) 2016* (Act No 38 of 2016).

2 That subsection was inserted by s 5 of the *Criminal Law (Domestic Violence) Amendment Act 2016* (Act No 16 of 2016).

3 *Hili v The Queen* (2010) 242 CLR 520 at 538-539 [58]-[59], referring to *Wong v The Queen* (2001) 207 CLR 584; see also *R v Pham* (2015) 256 CLR 550 at [28].

point. She recalled screaming and asking "why me?" and the offender responding "because you were the only one out here". She felt something going into her vagina and asked the applicant if he had HIV, to which the offender responded that he did not. As a result of the attack on her, she suffered a number of bruises and cuts, some of which required suturing, as well as swelling and abrasions and chronic headache. The offence understandably had a significant adverse impact on her. The offender was 25 at the time of the offence, 28 when sentenced, and had a good work history. He had a criminal history for various offences, including breach of a domestic violence order and common assault, which was not regarded as of significance. He pleaded guilty at the first opportunity. On appeal, the sentence of 11 years imposed at first instance was reduced to 9 years with a serious violent offence declaration (Henry and North JJ concurring as to the orders; McMurdo P dissenting, only in that her Honour would not have imposed the declaration). After a detailed review of earlier authorities, Henry J, with whom McMurdo P and North J agreed on this point, concluded that the sentence of 11 years may have been appropriate after a trial, but reflected inadequate discounting of the head sentence to allow for the timely plea of guilty and/or the discounting was from too high a starting point.

[24] This case does not support a conclusion that the sentence of 12 years imposed in the present case is manifestly excessive – given that the sentences were imposed for convictions after trial of three counts of rape committed by a 40-41 year old man against his 17-19 year old step-daughter, in circumstances involving some personal violence, threats, blackmail, abuse of power and trust, and where no remorse or insight was shown.

[25] In *R v Heckendorf*, the offender was convicted, on his pleas of guilty, of one count of rape and one count of assault with intent to commit rape and sentenced to 10 years and five years' imprisonment, respectively. The application for leave to appeal against the 10 year sentence was refused. The victim in that case was a 28 year old woman, who went to a hotel one afternoon where she met the applicant and a friend of his, neither of whom she had known before. They spent the afternoon drinking and socialising together, before going to the applicant's father's house to continue drinking. The friend left at about 8.30 pm. When the victim said she would leave also, the offender asked her to come inside for a cigarette. As soon as she entered, he attacked her, grabbing her by the throat and slamming her head on the floor. He was heavily intoxicated. He continued to violently assault her, dragging her to a bedroom, throwing her onto a bed, choking her, ripping her clothes off and throwing her to the floor. His conduct to this point constituted the offence of assault with intent to rape. She continued to fight against him whilst she was on the floor, but he then raped her by forcing his penis into her vagina. The woman suffered serious physical injuries, including a fractured rib, injuries to her neck, arms and legs; and also contracted Hepatitis C as a consequence. The offender was 22 at the time of the offending, with an insignificant criminal history. A report from a psychiatrist was relied upon at the sentencing hearing, outlining the offender's poor education and history of substance abuse, with a provisional diagnosis that he suffered from some form of psychotic illness, possibly schizophrenia or a drug induced psychosis, although it was noted there was no evidence linking that illness to the offence. He entered an early plea of guilty and it was accepted that he was remorseful. The sentencing judge at first instance indicated that but for the plea, she would have imposed a sentence of 12 years' imprisonment; that was reduced to 10 years on account of the plea, and the fact that

the offender would serve 80% of the sentence in custody. In refusing the application for leave to appeal McMurdo JA (with whom Fraser JA and Mullins J, as her Honour then was, agreed) observed that the case involved a high degree of violence and the fact the victim contracted Hepatitis C was an important aggravating circumstance. Whilst the sentence was described as "heavy", the court was not persuaded it was so heavy that there must have been some misapplication of principle.

[26] *Heckendorf* also supports the appropriateness of the sentences imposed on the applicant. *Heckendorf* involved only one count of rape (not three), a plea of guilty, a much younger offender and there was evidence of remorse. None of those features are present here. There was, objectively, a greater level of violence involved in the one instance in *Heckendorf*, and the consequences for the victim included contracting Hepatitis C. However, as further addressed below, the consequences for the complainant in the present case cannot be said to be less serious or severe on that basis.

[27] In *R v Dendle*, the offender was convicted, following a trial, of four counts of indecent treatment of a child under 16 and two counts of rape. He was sentenced to 12 years' imprisonment for the first rape and nine years' imprisonment for the other, with lesser terms imposed on the other offences. The victim in this case was a 13 year old boy. He lived with his father who was a friend of the offender's. The father offered the offender accommodation in their home, and he occupied a bedroom near the boy's bedroom. The offences were committed about a month after the offender moved in. He had been drinking during the day and was heavily intoxicated. After the victim's father went to sleep, the offender invited the victim into his bedroom and, once he was there, closed the door and pushed him onto the bed, putting his hand over his mouth and then a pillow over his face. He proceeded to sexually abuse the victim over the period of three or four hours, including raping him anally and orally. The offender threatened the victim, and tried to blackmail him. The following morning, when the victim went out with his father, he told him what had happened and his father took him straight to the police station. Tragically, 10 weeks later the victim committed suicide. The offender's appeal against his conviction was dismissed, and his application for leave to appeal against the sentence was refused.

[28] The younger age of the victim in *Dendle* is a distinguishing feature. However, the offending in the present case was not limited to a single occasion; it went on for many months, with the complainant having to "endure her rapist live in the same house". And there are a number of similarities – including the position of trust the offender was in, having been invited into the victim's family home, and the absence of remorse and insight. On balance, *Dendle* does not support a conclusion that the sentence imposed in this case, for each of three counts of rape, was manifestly excessive.

[29] The additional case relied upon on this application is *R v SDM*. In this case, the offender and victim were both adults who had been involved in an intimate relationship with each other for about a year, and had lived together for about 10 months, before the offending. The victim ended the relationship, but agreed to allow the offender to stay in the spare bedroom while he looked for alternative accommodation. On the same occasion, he raped her vaginally, anally and then by forcing his fist into her vagina causing excruciating pain. The offender was 44, with

a criminal history, but no prior sexual offending. There was psychiatric evidence before the sentencing judge, including evidence that a combination of benzodiazepine misuse, alcohol use and a narcissistic personality disorder led to the offending. He pleaded guilty and was found to be remorseful. At first instance, a sentence of seven years' imprisonment, with a serious violent offence declaration, was imposed on the third count of rape, with lesser concurrent terms imposed on the others. An application for leave to appeal was allowed, on the basis that the declaration rendered the sentence manifestly excessive in the circumstances. Upon the re-exercise of the sentencing discretion, a sentence of seven and a half years' imprisonment was imposed, with parole eligibility at the statutory half way mark.

[30] This case is not comparable. It involves serious offending, involving three counts of rape, but all of which occurred on the one occasion between adults. The victim in the present case was a vulnerable 17 year old when she was raped for the first time, by a 40 year old man who was essentially her step-father. Then there are all the other features of this case: that the offences of rape were committed over a number of months in the complainant's family home, where she ought to have been able to feel safe; the offences were domestic violence offences; she was trapped, having to endure having her rapist live in the same house for months; the offending involved a significant abuse of trust and power; there were three separately charged incidents; the first rape involved force and physical violence; the subsequent rapes were committed under the force of threats to the complainant, the applicant blackmailing her with the threat of posting a video on social media, and also playing on her vulnerability due to her mother's earlier suicide attempt; the cultural implications of the blackmail for the complainant as "damaged goods"; the offending had a significant impact on the complainant; and the marked absence of any remorse or insight on the part of the applicant. As to the last point, counsel for the applicant conceded that there were really no mitigating features at all.

[31] The applicant seeks to distinguish these cases on the basis of the greater level of physical violence involved and, in some of them, because the offending was against strangers, such that protection of the public takes on an added significance in those cases.

[32] Previous decisions of this Court have referred to an appropriate "range" of 10 to 14 years' imprisonment for violent rape where the offender is entitled to the benefit of a plea of guilty.[4] The effect of these decisions is to regard physical injury and harm as an aggravating feature, rendering the offence more serious in those cases, than in cases where physical harm is not caused. The tendency to use physical injury and harm as a tool for comparison of sentences seems to have developed in cases where the rape or rapes occurred on one violent occasion. By contrast, here the rapes and other violence occurred over a prolonged period of time and involving the non-physical harm referred to in paragraph [30] above. It is hard to see how it could be said the psychological harm caused to a complainant such as in the present case can be said to be any less significant. She was a young, vulnerable 17 year old when she was first raped, in her home, by a man in the position of de facto head of her family. Her education was affected because she dropped out of school. Her brother moved out of the family home. Her relationship with her mother must have been damaged and confused. She lived for months with the trauma and burden of

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[4] See, for example, *R v Newman* (2007) A Crim R 171; [2007] QCA 198 at [20] and *R v Flew* [2008] QCA 290 at [23], referred to in *Benjamin* at [58]-[59] and [63].

having her rapist live in the same house, not knowing when he might rape again, and with the threat of destruction of her reputation, a matter of particular significance given her cultural background. She was robbed of the opportunity to develop as a sexual being in her own time and on her own terms. To diminish the harm caused by serious sexual offending of the kind the applicant committed by contrasting it with physical harm is to misunderstand the real impact of offending of this kind. The sentencing judge appropriately characterised the harm and it was justly penalised, for convictions following a trial, by the imposition of sentences of 12 years for each of the three counts of rape.

[33] The sentences imposed below were not manifestly excessive. The application is refused.