SUPREME COURT OF QUEENSLAND

CITATION:	*R v CCA* [2018] QCA 82
PARTIES:	**R** **v** **CCA** (applicant)
FILE NO/S:	CA No 95 of 2017 SC No 792 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application Miscellaneous Application – Criminal
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 4 April 2017 (Martin J)
DELIVERED ON:	4 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2018
JUDGES:	Gotterson and Philippides JJA and Mullins J
ORDERS:	**1. Admit into evidence the affidavits of the applicant sworn on 17 July 2017 and 6 March 2018 and affidavit of Basil Karsas sworn on 12 March 2018.** **2. Grant leave to appeal against sentence.** **3. Allow the appeal.** **4. Vary the sentences under appeal by deleting 4 April 2019 as the appellant's parole eligibility date and substituting for it 4 December 2018.** **5. The sentences are otherwise affirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – TO ADMIT NEW EVIDENCE – where the applicant was convicted of four drug-related offences – where the applicant was sentenced to six years' imprisonment with parole eligibility after two years – where the applicant was raped by another prisoner while he was in custody before his sentencing hearing – where the applicant did not tell his legal representatives that he had been raped – where the sentencing judge did not know of, and therefore did not take into account, the rape and its physical impacts on the applicant – where the applicant sought to adduce evidence of the rape, its immediate physical impacts on him, and his

reasons for non-disclosure – whether evidence of the applicant's rape, its immediate physical consequences, and his reasons for non-disclosure should be admitted – whether the applicant's parole eligibility date should be brought forward

R v Clark [2017] QCA 318, followed
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, considered
R v Spina [2012] QCA 179, considered

COUNSEL: A Hoare for the applicant
D Nardone for the respondent

SOLICITORS: Karsas Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** On 23 March 2017, the applicant, CCA, who was legally represented, pleaded guilty in the Supreme Court at Brisbane to four drug-related offences, the most serious of which was trafficking in dangerous drugs over a period of about nine months ending on 29 May 2015 (Count 1). The drugs included methylamphetamine, cocaine, cannabis, and a derivative, 5-Methoxy-N, N-methylisopropyltryptamine. The last mentioned is supplied in the form of pills and is commonly referred to as "bricks".

[2] The other offences were all committed on 28 May 2015. They were unlawful possession of the dangerous drug methylamphetamine in a quantity exceeding 200 grams (Count 2); unlawful possession of the dangerous drug cannabis in a quantity exceeding 500 grams (Count 3); and possession of communications equipment and vehicles used in connection with the trafficking (Count 4).

[3] The applicant was sentenced on 4 April 2017. For the Count 1 offending he was sentenced to imprisonment for six years. Concurrent sentences of two years were imposed for each of the Counts 2 and 3 offending, and one year for the Count 4 offending. A parole eligibility date was fixed at 4 April 2019. Some 13 days pre-sentence custody were declared to be time already served.

[4] These sentences were imposed upon the application by the learned sentencing judge of s 13A of the *Penalties and Sentences Act* 1992 (Qld). His Honour indicated that but for the applicant's cooperation, he would have imposed sentences of nine years on Count 1, three years on each of Counts 2 and 3, and one year on Count 4; and that he would have set a parole eligibility date at three years from the date of sentence.

[5] I mention that following his arrest in May 2015, the applicant was held on remand for some 196 days until 10 December 2015. Although his Honour could not declare any part of it as time already served, he said that he would take it into account in formulating the sentence.[1]

The applications before this Court

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1 AB30: Tr2 ll24-26.

[6] On 4 May 2017, the applicant filed an application for leave to appeal against sentence.[2] The sole ground of appeal is that the sentence is manifestly excessive. Later, on 21 July 2017, he filed a handwritten application to adduce evidence and a handwritten affidavit that he had sworn on 17 July 2017.

[7] Since then, he has engaged different legal representation. His current solicitor, Mr B. Karsas, has filed a further affidavit made by the applicant called an "addendum affidavit" which was sworn on 6 March 2018. Exhibited to that affidavit are a copy of the earlier affidavit (exhibit "LGC1"), a re-engrossment of that affidavit (exhibit "LGC2"), a copy of a Departmental Case Offender File maintained in respect of the applicant (exhibit "LGC3"), and a copy of an affidavit sworn by the applicant on 23 March 2017 which was read at the s 13A hearing (exhibit "LGC4"). Also filed is an affidavit sworn by Mr Karsas on 12 March 2018 to which is exhibited a further report by Dr Butler dated 16 November 2017.

[8] The further evidence that the applicant seeks to adduce consists of his two affidavits and Mr Karsas' affidavit with their respective exhibits. The application to adduce this evidence is opposed. The affidavits were received by the Court at the hearing of both applications on 5 April 2018 for the purpose of ruling on the application to adduce them. Before turning to that application, I propose to give context to both applications by outlining the remarks made at sentence by the learned sentencing judge.

The sentencing remarks

[9] The learned sentencing judge referred to important aspects of the applicant's offending. It is unnecessary to detail them all for present purposes. His Honour noted that the trafficking involved an extensive network of suppliers and distributors in North Queensland in which the applicant had a "clear and significant involvement".[3] The applicant would supply drugs in varying quantities: from one point to one pound for methylamphetamine; from several grams to 30 pounds for cannabis; from one gram to 3.5 grams for cocaine; and from one to 150 bricks.[4] He had a customer base of about 36 individuals and was in close contact with customers on a daily basis.[5]

[10] Evidence collected by police suggested that the turnover of the applicant's trafficking was between $1.264 million and $1.826 million.[6] The profit yielded might have been as high as $60,000, a large proportion of which was used to support the applicant's own addiction to prescribed drugs.[7]

[11] His Honour had before him a report dated 28 November 2016 prepared by Dr Jeremy Butler, a psychiatrist, who had interviewed the applicant on 25 November 2016,[8] and a report dated 17 March 2017 prepared by Dr Peter Rofe who was the applicant's treating psychiatrist.[9] Drawing from those reports, he said:

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2 AB96-98.
3 AB30: Tr2 ll30-33.
4 AB31: Tr3 ll19-1.
5 Ibid ll21-23.
6 Ibid ll35-37.
7 Ibid ll41-44.
8 Exhibit 5: AB68-78.
9 Exhibit 5: AB79-80.

> "On your behalf, a number of submissions were made about your background and medical condition. Your treating psychiatrist, Dr Rofe, says that your presentation and history are consistent with an ongoing major depressive illness, which has been present for the past five years. His treatment of you has included supportive psychotherapy and the prescription of antidepressants.
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> Another report was obtained from Dr Butler, a psychiatrist, who says that you still have quite severe symptoms of depression and anxiety, including frequent suicidal thoughts. Dr Butler refers to your past history of mental health problems, problems with cannabis use and your addiction to alprazolam, commonly called Xanax. He notes that you made a suicide attempt by way of an overdose of that drug, and that attempts that you have made to withdraw from use of that drug resulted in seizures. His opinion is that you have a moderately severe major depressive illness, complicated by significant anxiety. The symptoms appear to have originated in the context of a relationship breakdown which occurred more than three years ago.
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> In his opinion, your drug dependency affected your judgment and increased the risk of you engaging in illegal activity in order to sustain your own supply of alprazolam. He also says that your risk of reoffending is reduced by the following factors: (1) you do not have an underlying pervasive propensity to behave antisocially or to exploit others, (2) you have insight into the gravity of your offending and the impact it has had upon your prospects, (3) you no longer have a benzodiazepine use disorder, and you are more aware of how to access treatment for mental health symptoms, and (4) you have an occupational skill set which can enable you to maintain an adequate income stream."[10]

[12] The learned sentencing judge took note of favourable references given for the applicant and regarded him as having good prospects of rehabilitation given his negative drug test screens.[11] His Honour also made particular allowance for the applicant's time in custody, his early plea and his cooperation.[12]

The evidence sought to be adduced

[13] In his handwritten affidavit, the applicant spoke of an event that happened when he was on remand in the Capricornia Correctional Centre on 4 November 2015. He did not disclose it to his then legal representatives prior to or during the sentence hearing. Nor had he disclosed it to Dr Butler or Dr Rofe. The learned sentencing judge was therefore unaware of it.

[14] The event, as described by the applicant, happened just after lunch when he went to the toilet to urinate. He washed his hands and as he opened the door to leave, a fellow inmate pushed him inside and locked the door. It was the same person who had hit him the day before for being depressed. He told the applicant to be quiet. Then he pulled a tiny syringe from the top of his pants and started to wave it about.

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10 AB32: Tr4 ll10-34.
11 Ibid ll39-47.
12 AB33: Tr5 ll1-2.

[15] The applicant became scared. The person told him that if he screamed or struggled he would be injected with the syringe. The applicant had no idea what was going on. He begged the person not to harm him and offered him money or shoes.

[16] The person told the applicant to turn around and to pull down his pants. The applicant refused to do so. The person pulled them down and then pushed the applicant into the wall. He held the applicant against the wall by his neck. The applicant felt the person's erect penis rub up and down his buttocks. Next he felt it penetrate his anus. The applicant felt extreme pain.

[17] The penetration continued for several minutes until the person ejaculated into his rectum. The person withdrew and left the toilet straightaway. The applicant began to cry. Next, he heard a "cell access" call to which he reacted by wiping himself and going straight upstairs to his cell. He stripped off and then sat in the shower and cried for several hours.

[18] In his addendum affidavit, the applicant relates that once he had pleaded guilty, he was placed on remand at the Brisbane watch house pending sentence. He immediately started suffering symptoms and flashbacks of the sexual assault. He became fearful. During an induction at the Brisbane Correctional Centre on 30 March 2017 he was asked if he had ever been sexually assaulted. He answered that he had been. That was the first time that he had told anyone about being raped in prison.

[19] After he had been sentenced, the applicant was transferred to the Woodford Correctional Centre on 12 May 2017 and then to the Palen Creek Correctional Centre on 6 June 2017. He discussed the sexual assault with the prison psychologist on 15 August 2017. The general manager at the centre has been sympathetic to his situation and has made allowances for his toilet use.

[20] Dr Butler was supplied with the applicant's handwritten affidavit. In light of the information in it, he reviewed his diagnostic formulation of the applicant's condition and concluded as follows:

> "In my opinion, the context of the alleged assault and [the applicant's] reported reaction are suggestive of his having suffered a post trauma syndrome after the assault and that he more than likely was suffering from an acute stress disorder which transitioned into a post-traumatic stress disorder. I am unable to unequivocally diagnose a post-traumatic stress disorder as I have not interviewed [the applicant] again and do not have access to any prison mental health notes pertaining to the incident.
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> Nevertheless, I believe I am able to opine that, more than likely, some of the anxiety symptoms [the applicant] described to me during my assessment in November 2016, reflected the direct effects of his alleged assault and that this would have complicated and worsened his depressive phenomena.
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> In particular, I believe that such a trauma would markedly increase the risk of [the applicant's] mental health deteriorating and remaining resistant to standard pharmacological treatment whilst in custody. Even appropriate psychological interventions may have limited utility if he were exposed to recurring triggers in prison. His

report of the incident suggests that such triggering would be unavoidable. Also, if he is still symptomatic, I believe the risk of his developing a chronic post trauma disorder is increased by the presence of significant premorbid depression and anxiety.

Therefore I believe that, contingent upon any ongoing contemporaneous reports from prison mental health, [the applicant] is more than likely to require intensive psychological treatment, regular review of his mental state, and assertive monitoring of any suicidal ideation.

If he has continued to be significantly symptomatic, I believe that external treatment of his condition may be required and that this may need to be predicated upon his being placed in a custodial environment where the risk of re-traumatisation is significantly diminished and where he is not exposed to debilitating psychological triggers.

Additionally, a further review by prison mental health of his psychiatric morbidity and attendant risks may support the option of [the applicant] being availed of early parole so as to reduce the risk of his depression and anxiety becoming intractable and severe."

Reasons for non-disclosure prior to sentence

[21] In his addendum affidavit, the applicant gives the following reasons for not having disclosed the rape to his lawyers prior to his sentence hearing:

"(a) I was ashamed of what had happened to me;

(b) I did not want my family knowing because I did not want them to worry about how I would cope returning to custody. My mother already worries a lot about me and I only recently told her that I had been sexually assaulted. I recall this was in the week of 15 January 2018;

(c) I did not want the prison population finding out I was raped in custody. I was afraid of how I would be treated if they found out.

(d) The fear of retribution regarding my cooperation was already playing on my mind. I had been made aware that my s 13A statement had been leaked and posted in the lunch room of Capricornia Correctional Centre and threats were made against my life. I attached a copy of my affidavit sworn 23 March 2017 in this regard as Annexure "**LGC4**" to this affidavit.

(e) I did not think the rape would be relevant on sentence and was just hoping it was never going to haunt me again."

[22] I note that the applicant was not required for cross-examination in the event that the further evidence was admitted. Counsel for the respondent confirmed that the fact of the rape having occurred and the genuineness of the applicant's reasons for not disclosing it prior to sentence were not put in issue.

Narrowing of the issues

[23] In his written outline of argument, the applicant accepts that, on the evidence before the learned sentencing judge, the sentence imposed was a proper one.[13] In oral submissions, Counsel for the applicant conceded that his Honour was aware of, and had taken into account, his client's major depressive disorder. He had also made allowance for the particular risks to which the applicant was exposed in custody and for his vulnerability to aggravation of the risks.

[24] Counsel clarified that the *gravamen* of both applications was that the learned sentencing judge did not know of, and therefore did not take into account, the prison rape and its direct and immediate physical impacts on the applicant. In reply, he clarified that he was not suggesting that there are continuing physical symptoms of that assault.

The application to adduce evidence

[25] It is common ground that the evidence of the rape and its immediate physical impacts is new evidence. The applicant, of course, knew of them at the time of sentence. These facts were consciously withheld by the applicant for the reasons given by him.

[26] In *R v Maniadis*,[14] Davies JA and Helman J observed that the admission, on a sentence review, of evidence of facts known to a person who is to be sentenced and who appreciates the significance of them as sentencing factors but deliberately withholds them from his or her legal representatives, would usually be refused. There is, however, no inflexible rule against their admission in such circumstances. As their Honours went on to say:

> "In the end, the reception of such evidence will depend on whether, if it were excluded, there would be a miscarriage of justice."[15]

[27] To similar effect, Margaret McMurdo P (with whom Fraser JA and Margaret Wilson AJA agreed) more recently said in *R v Spina*:[16]

> "Appellate courts recognise, however, that there remains a residual discretion in exceptional cases to receive new or further evidence which is not fresh in the legal sense where to refuse to do so would result in a miscarriage of justice … In determining an appeal which turns on new or further evidence, there are strictly two questions. The first is whether the court should receive the evidence. The second is whether that evidence, if received, when combined with the evidence at trial, requires that the conviction be set aside to avoid a miscarriage of justice. Frequently those two questions can be conveniently dealt with together." (Citations omitted)

[28] **Applicant's submissions:** The applicant submitted that credible reasons were given by him for not disclosing the prison rape to his legal representatives at sentence. The fact that it had occurred and that it had immediate physical consequences for him were factors that, in the ordinary course, would have been taken into account to his benefit at sentence. That those facts were not taken into account had occasioned

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13 At [3].
14 [1997] 1 Qd R 593 at 597; [1996] QCA 242.
15 Ibid.
16 [2012] QCA 179 at [34].

a miscarriage of justice. Hence, the court's discretion to admit evidence of them ought to be exercised.

[29] **Respondent's submissions:** In its written outline of argument, the respondent opposed admission of this evidence on the basis that it was new evidence and that the learned sentencing judge had taken into account the applicant's depressive illness and his vulnerabilities in prison on account of it. It was beside the point that the learned sentencing judge did not know of a major contributor to the illness.[17] In oral submissions, the respondent did not, however, take issue with the relevance of the rape and its immediate physical consequences to the applicant's sentence.

[30] **Discussion:** I consider that the applicant has given credible reasons for not telling his legal representatives of the rape and for not wanting it aired in public at his sentence hearing. There is no reason to doubt his statement that he was unaware of its relevance to his sentence.

[31] The non-disclosure to legal representatives was consciously undertaken by the applicant. However, it cannot be characterised as deliberate in the sense of being the result of exercise of free choice. Shame, concern for his family and concern for his own safety in detention operated strongly and understandably upon him.

[32] I accept that the facts of the prison rape and its immediate physical consequences for the applicant were relevant to his sentence. Indeed, the respondent does not contend otherwise. Whilst they are not in the nature of extra curial punishment inflicted by a victim or another person seeking revenge, they are properly characterised as relevant to personal circumstances.[18] As such, they have a moderating role to play in sentencing the applicant. Had they been taken into account, a lesser sentence may well have resulted.

[33] For these reasons, I conclude that evidence of the rape of the applicant during his remand in prison, of its immediate physical consequences for him, and of his reasons for the non-disclosure, should be admitted. That evidence is given in the applicant's handwritten affidavit and in certain parts of his addendum affidavit.

[34] It is true that the applicant's addendum affidavit also deals with post-sentence matters and that Dr Butler's second report is focused upon psychiatric issues. Evidence of those matters was deposed to at a time when it was not known whether the respondent would dispute that the prison rape had occurred. One of the purposes of advancing that evidence was to depose to facts which would strengthen the credibility of the applicant's account of it. In the circumstances, I would admit in its entirety each of the three affidavits the subject of the application.

Resentence

[35] In *R v Clark*,[19] this Court affirmed that when further evidence is adduced on a sentence application and is admitted, it is not necessary to find that the original sentence was manifestly excessive in order to intervene. This Court is entitled to re-exercise the sentencing discretion afresh.

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17 At [10], [11].

18 Compare *R v Brunelle* (2010) 202 A Crim R 151; [2010] QCA 140 per Mullins J at [21].

19 [2017] QCA 318 per Philippides JA at [19] (Fraser and McMurdo JJA agreeing) citing *R v Maxfield* [2002] 1 Qd R 417; [2000] QCA 320 at [7].

[36] **Applicant's submissions:** The applicant submits that, on re-sentencing, the period of actual custody that he is to serve before becoming eligible for parole should be reduced by between three months and six months. It is not suggested that different terms of imprisonment should be imposed.

[37] **Respondent's submissions:** In its written outline of argument, the respondent focused upon the comprehensive manner in which the sentence imposed took into account the applicant's depressive illness and associated vulnerabilities. However, there was no serious challenge to the applicant's submission that the non-disclosed facts in question were relevant or that an earlier parole eligibility date is appropriate in order to take them into account.

[38] **Discussion:** The rape of the applicant in prison and its immediate physical consequences for him are, as I have explained, relevant moderating sentencing factors. The question that next arises concerns the appropriate way of recognising their moderating influence. In my view, the circumstance that the rape occurred in prison gives them a greater cogency for determining the period of actual custody to be served for parole eligibility, than to fixing the duration of the prison terms themselves.

[39] Under the present sentence, by the time the applicant becomes eligible for parole, the period of actual custody that he will have served since arrest will be two years and 196 days. I accept the applicant's submission that, upon taking into account the rape and its immediate physical consequences, this Court should vary the sentence by bringing forward the applicant's parole eligibility date. I would bring it forward by four months and set a parole eligibility date of 4 December 2018.

Orders

[40] Consistently with these reasons, I would propose the following orders:

1. Admit into evidence the affidavits of the applicant sworn on 17 July 2017 and 6 March 2018 and affidavit of Basil Karsas sworn on 12 March 2018.

2. Grant leave to appeal against sentence.

3. Allow the appeal.

4. Vary the sentences under appeal by deleting 4 April 2019 as the appellant's parole eligibility date and substituting for it 4 December 2018.

5. The sentences are otherwise affirmed.

[41] **PHILIPPIDES JA:** I agree with the reasons of Gotterson JA and the orders his Honour proposes.

[42] **MULLINS J:** I agree with Gotterson JA.