SUPREME COURT OF QUEENSLAND

CITATION:	*R v McConnell* [2018] QCA 107
PARTIES:	**R** **v** **McCONNELL, Kieran John** (applicant)
FILE NO/S:	CA No 254 of 2017 DC No 1773 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 3 October 2017 (Porter QC DCJ)
DELIVERED ON:	5 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2018
JUDGES:	Sofronoff P and Fraser and Philippides JJA
ORDER:	**Leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on his own pleas of guilty to one count of assault occasioning bodily harm, one count of deprivation of liberty and two counts of rape – where the offences occurred shortly after the 17 year old complainant broke off her relationship with the 18 year old applicant – where the applicant had no criminal history – where the psychological report noted the applicant had a low risk of sexually reoffending but without further intervention would be at an increased risk of reoffending if he were to find himself in the same circumstances – where the applicant was sentenced to imprisonment for five years for each count of rape and six months imprisonment on each other count to be served concurrently with parole eligibility after two years – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 9(10A) *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited *R v Beaver* [1992] QCA 238, cited *R v McCauley* [2000] QCA 265, cited *R v Miller* [2012] QCA 168, cited *R v Pickup* [2008] QCA 350, cited

R v Postchild [2013] QCA 227, cited
R v Stephens (1994) 76 A Crim R 5; [1994] QCA 507, cited

COUNSEL: G McGuire for the applicant
C N Marco for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Fraser JA and the order his Honour proposes.

[2] **FRASER JA:** The applicant was convicted on his own pleas of guilty to one count of assault occasioning bodily harm, one count of deprivation of liberty, and two counts of rape. Each offence was charged as a domestic violence offence. The applicant was sentenced to imprisonment for five years on each count of rape and six months imprisonment on each of the other counts. The sentences are to be served concurrently. It was also declared that eight days of pre-sentence custody was imprisonment already served under the sentence. A parole eligibility date was fixed at a time when the applicant will have served two years of the sentence.

[3] The applicant has applied for leave to appeal against the sentence on the ground that it is manifestly excessive. The applicant submits that the sentence was rendered manifestly excessive by both the length of the effective five year term of imprisonment and the two year period before parole eligibility. He contends that an appropriate sentence is imprisonment for three and a half years with parole eligibility after one-third of that period.

Circumstances of the offences and the applicant's personal circumstances

[4] At the time of the offences the applicant was 18 years old and the complainant was 17 years old. They had their own separate bedrooms in a share house in which they resided with others in Brisbane. Each of them was a university student. After the applicant and the complainant had been in a relationship for three months the complainant told the applicant that she wanted to end the relationship. The applicant became very emotional and told the complainant he would consider killing himself. They both cried. The applicant repeatedly said that he had nothing to live for and the complainant asked another housemate to speak to the applicant. Later the same night the applicant spoke to the complainant, prevented her from going to bed, insulted her, and threatened that she would never feel safe in the house again and would have to move out. The applicant refused to leave the complainant's bedroom and the complainant ultimately stayed in the bathroom until the applicant fell asleep. The following day the applicant broke some of the complainant's personal items and later apologised. That evening the complainant comforted the applicant and the applicant slept in her bed. The following morning they had consensual intercourse. The complainant told him that it was their last time together.

[5] On the following day, as the complainant was preparing to leave the house for university, the applicant sought to discuss the breakdown of the relationship, became frustrated, and went into the complainant's bedroom. He used offensive

language, cornered the crying complainant against the bookshelf, frightened her and moved towards her in short, sharp movements. He asked whether she thought she could really get out of this unscathed. The complainant asked the applicant to stop. She cried and begged him to stop when he grabbed her necklace and ripped it off her neck, breaking the necklace and causing instant pain and two abrasions to the back of the complainant's neck. The applicant said with a smirk that it was going to leave a scar.

[6] The applicant attempted to break the complainant's mobile phone. She pushed past him and ran to another room, banging on the door to get help. The applicant told her the occupant of the room could not hear her and that no one was going to help her. She banged on the door of another housemate close to the bathroom, but there was no response. The applicant used his body to make the complainant move into the bathroom. He shut the door and ushered the complainant back against the bathroom window. Whilst she was crying and telling him to stop he moved towards the complainant with short sharp movements. The complainant screamed a few times. Each time the applicant put his hand over her mouth. During the ordeal the applicant told the complainant a couple of times that he could kill her if he wanted to and it would be so easy. The complainant unsuccessfully tried to push past the applicant a number of times. When she heard someone in the other bathroom she screamed for help but the applicant told her that no one could hear her and no one would be coming to help. She asked if the applicant could let her out. The applicant told her that he could not. The complainant was fearful that the applicant was going to kill or at least hurt her.

[7] The applicant made further statements blaming the complainant for his behaviour and told her that she could leave only if she gave him what he wanted. He insisted despite the complainant telling him no, crying, and asking for him to let her out. Because the complainant thought that she would get out of the bathroom alive only if she did what the applicant wanted, she indicated she would comply because she feared for her safety. The complainant begged the applicant to stop taking her clothes off but he continued. When the complainant was naked the applicant asked her who she had shaved her legs for and accused her of being a "slut" and ready to "leave and fuck somebody else". The complainant was crying and saying "no". The applicant pushed the complainant to her knees. She performed oral sex on him for about three minutes. On each of the three times the complainant tried to pull away, he forced her head back onto him. The applicant did not ejaculate and the complainant was finally able to pull away and stand up. After using demeaning sexual language, the applicant performed oral sex on the resisting complainant.

[8] The applicant grabbed the complainant by her shoulders, and turned her around towards the window. The complainant was still crying and telling the applicant to stop. He complied with her request to use a condom. Whilst the applicant held onto the window sill on either side of the complainant's arms, the applicant forcefully penetrated her vagina with his penis for a couple of minutes causing her pain and discomfort. He moved his hands over her body and touched her anus with his finger whilst saying, "you never liked this, did you?". He turned her head by pulling her hair, told the complainant to look at him, and asked whether she had liked "what you've done to me". The applicant also moved the complainant's head towards a glass panel and told her to look. The applicant made the complainant get onto the floor, and then onto her hands and knees whilst she was still crying and asking him to stop. He forced his penis back into the complainant's vagina for some minutes

before eventually ejaculating. During the rape the applicant moaned with pleasure. The crying complainant then ran out of the bathroom into her room and locked her door. She sent a message to her mother for help. The applicant came to her door and asked whether he had just ruined his life. She yelled to him that he had. He said he would not give her mobile phone back.

[9] Upon examination on the day of the offences the complainant was noted to have two narrow curved linear abrasions on her neck and two circular blue bruises on her left buttock consistent with injuries caused by fingers. A victim impact statement by the complainant and a letter from a clinical psychologist described the severe short term impact and the improved, but still very significant, lasting impact the applicant's offending had upon her. She experienced daily panic attacks (having only had one panic attack earlier in her life) and significant anxiety. The psychologist considered that she fitted the criteria for post-traumatic stress disorder. The complainant suffered in many ways, including emotionally, by increased difficulties in coping with university, and in her relationships with family and friends. Her parents suffered emotional distress.

[10] Police attended at the scene and spoke with the applicant. He told them "you're here for me". He was arrested. He did not participate in a formal interview with police after receiving legal advice. The applicant had no criminal history. The sentencing judge remarked that he received an excellent education. It is apparent that he did well at school. After he moved into the share house, his university marks began to deteriorate because, as the sentencing judge observed, he preferred to stay at home and did not want to leave others around the complainant. Ultimately he failed all of his subjects and left the university at the end of the month in which he committed the offences. Prior to sentence, he was working in a restaurant and living with his mother. He intended to return to university. A psychologist noted that the applicant had good relationships with his family members, except his father (who had reportedly abused and later separated from the applicant's mother when the applicant was very young), he had many male peer relationships through school and university and engaged in team sports regularly, he did not report significant history of substance abuse, he had many interests and engaged in activities on a regular basis, he did not meet any of the criteria for a personality disorder, and he had respect for the justice system and wanted help for his problems. The psychologist referred to the applicant having suffered extremely severe depression and moderate stress from which he had recovered within about six months.

[11] Another psychologist interviewed the applicant and administered psychological testing. That psychologist concluded that the applicant was at a low risk of sexually reoffending, but without further intervention he would be at an increased risk of reoffending if he were to find himself in the same circumstances. He demonstrates partial insight into his offending behaviour. The narrative in the psychologist's report refers to it having been found during the police investigation that the applicant had been texting the complainant with multiple messages "apologising and asking her not to press charges against him." The report also refers to the applicant becoming tearful and expressing deep remorse during an interview, which occurred eight and half months after the offences and four and a half months before the sentence hearing. The psychologist referred to the applicant having protective factors, including his plan to return to university, his relationships with his family and peers, his willingness to attend psychotherapy, his partial insight into his offending, that he does not use illicit substances, and that he feels guilty and

remorseful about his offending. Seven favourable references about the applicant, all dated shortly before the sentence hearing, were tendered. Three of the references – by the applicant's mother, his current partner and a close family friend – described the applicant's remorse for his offences. Another reference also referred to the applicant taking responsibility for his behaviour at all levels. A letter of apology by the applicant to the complainant, which was dated two days before the sentence hearing, was also tendered at the sentence hearing.

Consideration

[12] I do not accept the applicant's arguments that the sentencing judge gave too much weight to the young age of the complainant and insufficient weight to the young age of the applicant and the remorse demonstrated by the applicant, and that the sentencing judge miscategorised the applicant's prospects of rehabilitation. The sentencing judge appropriately mentioned the youthfulness of the complainant on a number of occasions, in each case in a relevant context. The applicant referred to the sentencing judge's remark that the applicant committed the offences "at a very young age" which was "a matter of very significant weight in determining how to sentence you", and that the circumstance that the complainant was "very young … only a 17 year old girl" was "a very significant countervailing consideration". Taking into account and comparing the significance of these relevant sentencing considerations did not involve an error in the exercise of the sentencing discretion.

[13] The applicant referred to the sentencing judge's statement that, "I can accept that you feel remorse for these actions, but it is … difficult to say that significant and genuine remorse, concerned with the effects on [the complainant], was shown at or about the time of the offending." That statement was made in the context of preceding remarks that the multiple text messages of apology to the complainant, mentioned in the psychologist's report, were sent in the context of requests that she not press charges against the applicant and that the applicant's letter of apology to the complainant was sent only two days before the sentence hearing. There was evidence that the applicant was genuinely and significantly remorseful for his offending, including for the effects of it upon the complainant, but the sentencing judge did not err in finding that such remorse was not shown at or about the time of the offending. As the applicant submitted, the sentencing judge did not expressly refer to the statements in the references (or, I would add, in the second psychological report) that the applicant had developed genuine remorse and sorrow for his actions. But there is no reason to think that the sentencing judge did not read the references and the report. They are consistent with the sentencing judge's acceptance that the applicant was remorseful but that his remorse was not shown at or about the time of the offending. The applicant also argued that the sentencing judge's remark about the applicant's letter of apology revealed that the sentencing judge was concerned about the delay but that the delay should not have detracted from the weight accorded to the expression of remorse in the letter. The letter of apology is consistent with the sentencing judge's findings.

[14] The sentencing judge observed that the general conclusion in the second psychological report of a low risk of sexual re-offending was modified by reference to an increased risk in the event of a recurrence of the same circumstances, and that was exactly the context likely to confront the applicant when he re-entered the community. The sentencing judge also referred to the same report in the context of an observation that personal deterrence was a relevant factor in the sentence. The

applicant argued that the contextual risk identified by the psychologist was one requiring treatment and monitoring and that the applicant would have the benefit of the necessary programs on parole, consistently with the psychologist's recommendation that treatment should be undertaken in a non-custodial setting. In the applicant's submission, in light of the applicant's young age, his remorse, his lack of criminal history, and the report, the sentencing judge erred by categorising his risk of re-offending as other than low. There was no such error. The sentencing judge quoted a passage in which the psychologist observed that the applicant would be at an increased risk of offending in the specified circumstances "without intervention". That did identify a risk which differed from the psychologist's general conclusion that the risk of sexually re-offending was low. Personal deterrence as a factor in sentencing does not seem to be very significant in light of the psychologist's report, particularly because the report suggests that it is very likely that the applicant will obtain the desirable psychological intervention. But that does not mean that it is irrelevant. Nor was that factor mentioned by the sentencing judge in the context of setting the parole eligibility date; rather, the sentencing judge took into account the plea of guilty and the applicant's young age and remarked that an earlier parole eligibility date was not appropriate, given the seriousness of the offences.

[15] The real issue is whether the sentence is manifestly excessive. That is not established unless the sentence is "unreasonable or plainly unjust" such as to justify the conclusion "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance".[1] In this case the parties' arguments were largely based upon sentences imposed in what were said to be comparable cases. French CJ, Keane and Nettle JJ stated in *R v Pham*,[2] that "[a]ppellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle". And, as the respondent also submitted, sentences in comparable cases do not "set a 'range' of permissible sentences" or "mark the outer bounds of a sentencing judge's permissible discretion", they assist a judge to understand how factors in common should be treated but they do not determine the sentence.[3]

[16] The respondent referred to a remark made by Muir JA (with whom White JA agreed) in *R v Hampson*,[4] and submitted that the absence of comparable cases might make it more difficult for the appellate court to conclude that a sentence is manifestly excessive. For the reasons given in *R v Goodwin; ex parte Attorney-General (Qld)*,[5] I adhere to my conclusion in that case that although the absence of sentences in comparable decisions "is likely to make the already demanding task of arriving at the just sentence according to law yet more difficult, it does not leave open a wider range of permissible sentences than otherwise would be the case."

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1 *House v The King* (1936) 55 CLR 499 at 504-505.

2 (2015) 256 CLR 550 at 559. See also *Hili v The Queen* (2010) 242 CLR 520 at [58], [59].

3 *R v Goodwin; Ex parte Attorney-General* [2014] QCA 345 at [5]. See also *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

4 [2011] QCA 132 at [33].

5 [2014] QCA 345 at [5].

[17] The sentencing judge was referred by counsel for the Crown to *R v McCauley*,[6] *R v Postchild*,[7] and *R v Pickup*.[8] The applicant's counsel referred the sentencing judge to *R v Stephens*[9] and *R v Beaver*.[10] In this application, the respondent also referred to *R v Stallan*,[11] *R v Robinson*,[12] and *R v Hennessy*.[13] All of those cases were decided before the commencement of operation on 5 May 2016 of subsection 10A of section 9 of the *Penalties and Sentences Act* 1992 (Qld). It provides that, "[i]n 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." (The provision gives examples of exceptional circumstances. There are no exceptional circumstances in the present case.) As Mullins J observed in *R v Hutchinson*,[14] this provision is likely over time to have an effect on the sentencing of offenders convicted of offences that are domestic violence offences, but the effect in a particular case will depend on balancing all of the relevant factors relating to the offending and the offender. Furthermore, *Stephens*, *Beaver*, *Stallan* and *Robinson* were all decided before the commencement on 1 July 1997 of the amendment[15] to the *Penalties and Sentences Act* 1992 introducing the qualification to the general rule that a sentence of imprisonment should be imposed as a last resort, that it does not apply to an offence involving violence or physical harm.

[18] For those and the following reasons, no material assistance in the present sentence may be obtained from the sentences in any of the cited cases other than *Stephens* and *Beaver*, which supply only limited assistance. *Stallan* (three and a half year imprisonment with a recommendation of parole after 12 months, reduced on appeal to three years imprisonment with a recommendation for parole after nine months) and *Hennessy* (three years imprisonment suspended after nine months, with the suspension period reduced on appeal to 11 weeks) supply no material assistance in the present case, mainly because the circumstances of those offences were significantly less serious than in the present case. In *Robinson*, a sentence of six years imprisonment upon a plea of guilty to one count of rape was considered to be on the lower end of the range of sentences for offences of that character, but the circumstances of that offence were markedly more serious than the present offence: in the presence of the complainant's five year old daughter, the 29 year old offender abused the complainant, struck and punched her about the face and head, dragged her from her bed so that she landed heavily on the floor, dragged her from the bedroom to the top of some stairs, continued punching her face and head while pinning her to the ground with a knee, caused her intense pain by striking her in the stomach, forced her then from the top of the stairs to a bedroom, forced her to engage in demeaning conduct and statements and various other indignities, and raped her. The complainant sustained much more significant injuries than were sustained by the complainant in this case. That the offence occurred in a domestic

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6 [2000] QCA 265.
7 [2013] QCA 227.
8 [2008] QCA 350.
9 [1994] QCA 507.
10 [1992] QCA 238.
11 [1995] QCA 109.
12 [1997] QCA 66.
13 [2002] QCA 523.
14 [2018] QCA 29.
15 *Penalties and Sentences (Serious Violent Offences) Amendment Act* 1997 (Qld).

violence context was not taken into account as an aggravating factor in that case, as it properly should be in this case. But *Robinson* is not a comparable case, particularly because of the much greater violence in the offence and the circumstance that the offender was much older than the applicant and had a criminal record involving offences of violence.

[19] *McCauley* (eight years imprisonment) was a worse case. The offender was a 27 year old man, the complainant was a 17 year old woman, the offender menaced her with a knife and in other ways made her feel captive and powerless whilst he raped her three times during a 14 hour period, and the offender did not plead guilty. In *Pickup* (five years imprisonment with an order that the offender serve 12 months of a suspended term of nearly two and a half years, with parole eligibility at the mid-point of the resulting six year period), the offender committed three counts of rape of broadly similar seriousness to the circumstances in this case, but that offender was 26 years old, he had a criminal record which included breach of a domestic violence order, assault, and malicious act with intent, he committed the offences during the operational period of the suspended sentence imposed for the malicious act with intent, and the sentence was moderated by the sentencing judge's decision to require the offender to serve only one year of the two and a half year balance of the suspended sentence. In *Postchild* (six years imprisonment with parole eligibility about six weeks before the mid-point), although the offender committed one rape offence compared to the multiple offences in the present case, his offending was made much more serious by his conduct in tying the complainant to a bed and (when the complainant screamed and tried to move the offender applied duct tape to her mouth), that offender was 24 years old with a long criminal history including an offence of unlawful carnal knowledge of a 13 year old girl when he was 18, he committed the rape offence when he was on parole, and he did not plead guilty. That the more severe sentence in that quite difference case was not manifestly excessive sheds no real light on the proper sentence in this case.

[20] In *Stephens*, a sentence of three years imprisonment with recommended eligibility for release on parole after six months for two counts of rape and one of indecent assault was held to be manifestly inadequate. The offender was resentenced on an appeal by the Attorney-General to five years imprisonment with recommended eligibility for parole after two years – the same sentence as was imposed in this case. The sentence in *Stephens* was imposed after a trial, the circumstances of the offences were, overall, more serious than this case, and the personal circumstances of that offender were much less favourable than those of the applicant. The offender in *Stephens* was also living in a de facto relationship with the complainant, but that offender was older than the applicant (he was 21 when he committed the offences), he had a minor criminal record, he was found to have shown no remorse, he told a false story to police, and he did not plead guilty. Furthermore, that offender assaulted the complainant at least once every day from shortly after the commencement of their relationship and, on the day before the offence, the offender told the complainant to leave, threatened to shoot her if she did leave, and held a gun which he pointed at her. His offences, and his statements during them, were otherwise generally similar to those of the applicant, but the greater violence in the offences in *Stephens* is evidenced by a deep and two centimetre long wound to that complainant's vagina. The sentence is *Stephens* therefore makes the applicant's sentence seem very severe, but when *Stephens* was decided the Court generally moderated sentences it imposed upon a successful appeal by the Attorney-General: *R*

v Lacey; ex parte Attorney-General (Qld).[16] Significantly, the Court in *Stephens* considered that the appropriate sentence might have been one between five and seven years.[17] With that and the subsequent legislative amendments in mind, the applicant's sentence, though severe, is reconcilable with the same sentence in the worse case of *Stephens*.

[21] The Court in *Stephens* distinguished *Beaver* on the grounds that, according to a psychiatrist in the latter case, the offender's separation from his wife of 12 years triggered powerful emotions because he was emotionally dependant on her, his violent offence of raping his wife was uncharacteristic, and immediately on the conclusion of the rape he cried, expressed remorse, offered immediately to go to the police, and did so. Otherwise, the circumstances in *Beaver* seem broadly similar to those in this case, yet the Court considered that the sentence of three years with a recommendation for parole after nine months was a proper sentence and not particularly light. *Beaver* is distinguishable by the immediacy of the strong remorse expressed by that offender. On the other hand, he was an adult who had been married for 12 years, whereas the applicant was only 18 years old. In *Beaver* the complainant was older than here but the significance of the youthfulness of the applicant must be kept steadily in mind. As Byrne J observed in *R v Lovell*,[18] "the rehabilitation of youthful, even violent, offenders, especially those without prior, relevant convictions, also serves to protect the community".

[22] However, *Beaver* was decided before the enactment of the *Penalties and Sentences Act* 1992. The amendments to that act on 1 July 1997 and last year by the introduction of subsection 10A of section 9 reduce further the value of *Beaver* as guidance for this sentence. In particular, in conformity with s 9(10A) of the *Penalties and Sentences Act*, the circumstance that the offences committed by the applicant were domestic violence offences must be treated as an aggravating factor. That must be taken into account together with all of the other matters to which I have referred, including the protracted, demeaning, violent and very threatening character of the applicant's offences. As the sentencing judge observed, this is a difficult case in which to impose a sentence that properly balances all of the considerations a sentencing court is required to take into account. The applicant's plea of guilty and remorse, and especially his youthfulness and absence of previous convictions, are weighty mitigating factors. But denunciation and general deterrence are also important in sentences in this kind of offending. A different judge might have imposed a more lenient sentence, but my conclusion is that the sentence imposed upon the applicant, whilst severe, is not manifestly excessive.

[23] I note that this conclusion is consistent with an authority not cited by either party, *R v Miller*,[19] in which an 18 year old remorseful offender with no criminal history was sentenced, upon a plea of guilty of raping a sleeping 18 year old in her own house, to five and a half years imprisonment with parole eligibility after one third of that term (22 months).

Proposed order

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16 [2009] QCA 274 at [150], [153] (de Jersey CJ, Keane, Muir and Chesterman JJA) and at [270] (McMurdo P). This point was not in issue in the appeal to the High Court: (2011) 242 CLR 573.

17 *R v Stephens* [1994] QCA 507 at page 6.

18 [1999] 2 Qd R 79 at 83.

19 [2012] QCA 168. *Miller* was recently discussed in a different context in *R v Bouttell* [2018] QCA 52 at [17]-[21].

[24] I would refuse leave to appeal.

[25] **PHILIPPIDES JA:** I agree with the order proposed by Fraser JA for the reasons given by his Honour.