SUPREME COURT OF QUEENSLAND

CITATION:	*R v Utley* [2017] QCA 94
PARTIES:	**R** **v** **UTLEY, Ivan Bernard** (applicant)
FILE NO/S:	CA No 280 of 2016 DC No 281 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville – Date of Sentence: 16 September 2016
DELIVERED ON:	19 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2017
JUDGES:	Fraser and Philippides JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – OTHER MATTERS – where the applicant was convicted of one count of rape, one count of burglary with circumstances of aggravation, two counts of assault occasioning bodily harm whilst armed, and one count of common assault – where the applicant received a head sentence of 10 years on the count of rape – where the length of the head sentence imposed necessitated the declaration of a serious violent offence – where the applicant must then serve at least 80 per cent of the head sentence imposed – where the applicant contends the learned trial judge failed to take account of the applicant's pleas of guilty, causing a miscarriage of the sentencing process – where the applicant additionally contends that the sentence imposed was excessive in all of the circumstances – whether leave to appeal the sentence should be granted *Penalties and Sentences Act* 1992 (Qld), s 13 *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2, cited *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited *R v Cobb* [2016] QCA 333, considered

R v Mallie [2000] QCA 188, considered
R v Newman (2007) 172 A Crim R 171; [2007] QCA 198, considered
R v Safi [2015] QCA 13, applied
R v Richards [2008] QCA 211, considered
R v Rix [2014] QCA 278, considered

COUNSEL: M J Copley QC for the applicant
V A Loury QC for the respondent

SOLICITORS: Arthur Browne and Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the order proposed by his Honour.

[2] **PHILIPPIDES JA:** I have had the advantage of reading the reasons for judgment of Boddice J. I agree with those reasons and the order proposed.

[3] **BODDICE J:** On 16 September 2016, the applicant pleaded guilty to one count of rape, one count of burglary with circumstances of aggravation, two counts of assault occasioning bodily harm whilst armed and one count of common assault. He was sentenced to an effective head sentence of 10 years imprisonment. As a consequence, there was automatically a declaration the applicant had been convicted of a serious violent offence, necessitating he serve 80 per cent of that head sentence.

[4] The applicant seeks leave to appeal that sentence. Two grounds are relied upon by the applicant. First, the sentencing judge failed to appropriately recognise the pleas of guilty causing a miscarriage of the sentencing process. Second, the sentence imposed was manifestly excessive in all the circumstances.

Background

[5] The applicant was born on 1 December 1971. He is indigenous and has no prior criminal history. The applicant was aged 42 years at the time of commission of the offences of 6 February 2014. He was aged 44 years at sentence.

[6] The offences, whilst committed on the same day, arose out of two separate incidents involving two separate female complainants. Each complainant was in a different house. In respect of the first complainant, the applicant pleaded guilty to one count of unlawful assault. The remaining counts were committed against the second complainant.

Offences

[7] On the afternoon of 5 February 2014, the applicant had been drinking alcohol at his local hotel with a male friend. He had also consumed some Valium. They were joined around midnight by the friend's partner, who was the first complainant. The applicant then travelled to the friend's house where he consumed alcohol for a further period of time. That consumption included the drinking of spirits.

[8] Some time in the early hours of the following morning the applicant's friend and the first complainant left his friend's house. The first complainant later returned to the

house. The applicant remained at the house throughout this time. He fell asleep. At some point he awoke. The applicant said he had a hypodermic needle and syringe in his arm. He felt irrational and left the house. He returned to the house and assaulted the first complainant. The applicant held her on the floor and choked her. The first complainant was able to successfully resist his attack and flee the scene.

[9] The applicant then left that house and walked further down the road to another house. The second complainant was in that house. The applicant entered the second complainant's house through an unlocked door. He was armed with a broken vodka bottle. Prior to entering that house, the applicant had shaken the doors of two other houses.

[10] The applicant used the vodka bottle to strike the complainant, causing a 1.5 cm laceration to the bottom of her nose. The applicant then forced the second complainant into the bedroom. He tried unsuccessfully to penetrate her vaginally. The complainant, fearing she was going to die, assisted the applicant to achieve entry of his penis into her anus. The applicant did not use a condom. Throughout that act, the applicant held the vodka bottle to the complainant. As a consequence, she sustained a number of lacerations, including a 4 cm laceration to her shoulder blade requiring six sutures.

[11] The second complainant was able to escape and ran naked into the street. The applicant remained in the house. Police subsequently arrived at the scene. His behaviour with police was described as irrational and completely out of character. Police described him as going in and out of consciousness. Other witnesses described him as screaming out in a strange way.

Sentencing remarks

[12] The sentencing judge observed that the offences to which the applicant had pleaded guilty were very serious. The most serious, rape, involved entering a dwelling whilst armed with a bottle which he used to menace the female complainant before an act of anal rape. The sentencing judge observed that the circumstances would have been a very frightening experience for the female complainant.

[13] The sentencing judge noted that the applicant was significantly intoxicated on the night in question which may have explained his behaviour, although it did not justify it. The sentencing judge also noted that the applicant had no prior convictions and that his conduct was out of character. The sentencing judge accepted it was bizarre behaviour but said it was nevertheless serious behaviour. The sentencing judge observed that whilst the applicant had pleaded guilty the case against him was an overwhelming case.

[14] After taking into account the full circumstances of the offending, as set out in the Schedule of Facts, and weighing up all of those matters and having regard to the authorities, the sentencing judge sentenced the applicant to 12 months imprisonment on the count of common assault, three years imprisonment in respect of each of the offences of burglary and aggravated assault occasioning bodily harm and 10 years imprisonment in respect of the count of rape. All sentences were to be served concurrently. It was declared that 953 days served in pre-sentence custody be time served for those sentences.

Applicant's submissions

[15] The applicant submits that whilst the sentencing judge expressly noted the applicant had pleaded guilty, the sentencing judge did not comply with the obligation imposed

in ss 13(3) of the *Penalties and Sentences Act* 1992 ("the Act") by stating that the guilty pleas had been taken into account in determining the sentences. Further, the references to the applicant's pleas of guilty occurred in the context of observations that the offences were serious and the pleas had been entered in an overwhelming case. Those remarks supported a conclusion the sentencing judge had given insufficient recognition to the significance of the pleas of guilty.

[16] The applicant submits the pleas of guilty were significant for two reasons. First, they saved both female complainants from the ordeal of having to testify, which was particularly significant in relation to the second complainant who would have had to have given evidence in respect of the offence of rape. Second, the pleas of guilty demonstrated remorse for his actions, which were completely out of character for the applicant. The sentencing judge made no reference to the beneficial effect of the pleas or to the remorse shown by those pleas. Had those matters been considered, the pleas of guilty would have been properly recognised by warranting a less severe sentence for the offence of rape.

[17] The applicant further submits that the sentence of 10 years imprisonment for rape was manifestly excessive. Whilst the authorities supported the imposition of longer sentences of imprisonment for offences of rape of a woman in her own home where serious violence was inflicted, such a sentence was manifestly too long in the case of the applicant, who had no prior convictions, who acted in a state of gross intoxication and whose offending did not involve the infliction of serious injury. A proper reflection of those circumstances and the pleas of guilty would have been a sentence of nine years imprisonment with no declaration of a serious violent offence. In that event, the applicant accepted there would no reason for an earlier parole eligibility date than as set by the legislation.

Respondent's submissions

[18] The respondent accepts the sentencing judge did not specifically state, in according with s 13(3) of the Act, that the pleas of guilty had been specifically taken into account on sentence. However, the sentencing remarks clearly established the pleas of guilty were taken into account. Further, they were given appropriate recognition. Whilst the pleas of guilty saved both female complainants the trauma of having to give evidence, they were entered late and after the matter had been listed for trial. The lateness suggested they were not pleas indicative of genuine remorse, rather than a reflection of the overwhelming nature of the Crown case.

[19] The respondent submits that when consideration is given to the relevant authorities, the sentence imposed by the sentencing judge indicated the pleas of guilty had been properly taken into account. Section 13(1)(b) of the Act expressly preserves a sentencing judge's discretion to not reduce a sentence on account of a guilty plea. A relevant consideration in the exercise of that discretion is the time at which the offender entered the plea and indicated an intention to do so.

[20] The respondent further submits that the sentence imposed in respect to the offence of rape was not manifestly excessive. A consideration of the authorities revealed sentences of imprisonment significantly higher were open in cases of rape involving physical violence inflicted upon the complainant. The applicant had inflicted significant violence. He had been armed with a weapon which he used to cut the face of the complainant and subsequently to menace her during the act of rape. The applicant threatened to

"slit her throat". The complainant sustained a 4 cm incision on her left shoulder blade and a smaller incision nearby. Both incisions required sutures. The complainant also sustained other injuries and multiple abrasions.

[21] The offences themselves also occurred over a protracted period of time, in circumstances where the applicant had broken into a dwelling with the intent to rape the female complainant. The female complainant suffered the further indignity of running naked in the street before seeking help from neighbouring residences. The rape had also occurred against the background of an earlier assault on a separate female complainant in another residence. The fact the applicant chose to arm himself with a weapon in the case of the second complainant demonstrated an escalation in the degree of violence.

Discussion

Guilty plea

[22] Section 13(3) of the Act expressly requires a sentencing judge to state that a plea of guilty has been taken into account in determining a sentence. That requirement is an important obligation. However, a failure to comply with that obligation does not of itself justify interference with a sentence, if it is evident from the sentence that the guilty plea was in fact taken into account.[1]

[23] In the present case, the sentencing judge twice stated that the applicant had pleaded guilty. Whilst there was not an express acknowledgement that as a consequence of those pleas of guilty the female complainants had been saved from the trauma of having to give evidence, there was no particular obligation on the sentencing judge to do so in the present case. That factor may be tempered, where, as here, the sentencing judge properly observed that the pleas of guilty were late and in the context of an overwhelming Crown case. The matter had been listed for trial. The female complainants had therefore faced the trauma of believing they were required to give evidence at a trial. The indication of a plea, late in that process, did not absolve the complainants of that trauma.

[24] There was also no obligation on the sentencing judge to expressly refer to remorse. Whilst the applicant had no prior convictions and the conduct was out of character, the pleas of guilty had been entered late in the context of an overwhelming Crown case. It was open to the sentencing judge to therefore no place particular reliance upon the element of remorse.

[25] In any event, the sentence imposed in respect of the offence of rape properly reflected the guilty plea. The applicant had entered a dwelling with the intention of raping the female complainant. He did so whilst armed with a broken bottle. He used that bottle to first cut the female complainant and then menace her into compliance with his sexual demands. The female complainant suffered actual injuries which required sutures. The rape involved anal penetration without the use of a condom. The female complainant feared catching a disease.

[26] A consideration of other relevant authorities supports the conclusion that the sentence of 10 years imprisonment imposed in the present case fell within a proper exercise of the discretion after giving due regard to the pleas of guilty. Indeed, the aggravating features would have supported the imposition of a higher period of imprisonment on

---

1 *R v Safi* [2015] QCA 13 at [16].

the offence of rape than that imposed by the sentencing Judge in the exercise of his discretion.

[27] In *R v Mallie*[2] a very young offender who committed rape and lesser associated offences including burglary whilst inflicting actual violence upon his female complainant was sentenced, on pleas of guilty, to 10 year imprisonment. Whilst that applicant had some minor criminal history he was sentenced on the basis the offending was out of character and his prospects of rehabilitation were relatively good. The violence inflicted in that case involved repeated punching and occasioned bruising, gross swelling and cuts to the eye and lip. Although the applicant did not inflict that level of physical violence, he was armed with a weapon. In that respect, his level of criminality was broadly similar.

[28] In *R v Newman*[3] a 17 year old offender who pleaded guilty to offences of rape, grievous bodily harm, robbery with violence, burglary and depravation of liberty was sentenced to an effective head sentence of 13 year imprisonment for rape. An application for leave to appeal against that sentence was dismissed. That offence involved a 60 year old female complainant who was known to the offender. The offences occurred after the consumption of drugs and were committed in the victim's home. The rape was occasioned by actual physical violence including punching the complainant. The complainant received a broken lower jaw and rib as well as bruising to various parts of her body. The complainant suffered significant ongoing psychological problems as a consequence of those injuries.

[29] Whilst Newman was sentenced on the basis he had shown no remorse, and had engaged in gratuitous violence, he had worn a condom and had pleaded guilty at the earliest opportunity. He was also very youthful and had no previous criminal convictions. Those differences support a conclusion that the sentence imposed on the applicant for the offence of rape, which was significantly shorter, was a sentence which properly reflected the applicant's plea of guilty.

[30] Whilst there are other authorities[4] in which sentences of less than 10 years have been imposed, albeit with a declaration that the offence of rape was a serious violent offence, those authorities are merely examples of the exercise of a sentencing discretion. *Rix* is particularly instructive. It involved a 26 year old drunk offender with some minor criminal history breaking into the unit of a 19 year old female complainant who was threatened and assaulted before being made to fellate the offender who then raped her, penetrating her vagina and anus. An initial 11 year head sentence was reduced to nine years with a serious violent offence declaration on appeal, on the basis the sentencing judge had erred in not taking into account that the offender at the time of the offence was suffering from an undiagnosed post-traumatic stress disorder and his drunkenness that night was related to alcohol abuse causally linked to his disorder.

[31] The existence of those authorities does not support a conclusion that the sentence imposed on the applicant for rape failed to take into account the pleas of guilty. As was observed by McMurdo JA (with whom the Chief Justice and Ann Lyons J agreed) in *R v Cobb*[5], comparable sentences do not define the numerical limits of a sentence which can be imposed in any particular case. They also do not establish a range of sentences for the particular case in question.

---

2 [2000] QCA 188.
3 [2007] QCA 198.
4 *R v Richards* [2008] QCA 211; *R v Rix* [2014] QCA 278; *R v FAI* [2016] QCA 150.
5 [2016] QCA 333.

[32] The observations of the plurality in *Barbaro v The Queen*[6] remain apposite, notwithstanding recent amendments to s 15 of the *Penalties and Sentences Act* 1992:

> "[27] The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some 'substantial wrong has in fact occurred' in fixing that sentence. For the reasons which follow, the essentially *negative* proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any *positive* statement of the upper and lower limits within which a sentence could properly have been imposed.
>
> [28] Despite the frequency with which reference is made in reasons for judgment disposing of sentencing appeals to an 'available range' of sentences, stating the bounds of an 'available range' of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that different sentence neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall."

[33] Having regard to those principles the circumstances of the applicant's case do not permit a conclusion that the sentencing judge failed to take into account the applicant's pleas of guilty in the sentence imposed upon the applicant for the offence of rape.

Manifestly excessive

[34] The remaining ground of appeal is that the sentence imposed was manifestly excessive. That too relied upon an analysis of comparable authorities. However, the sentencing judge, in his albeit brief Reasons, clearly explained both the aggravating and mitigating circumstances. Importantly, the sentencing judge properly observed that the offence of rape was particularly serious notwithstanding the mitigating factors in the applicant's favour. Whilst it may have been open, in the exercise of the discretion, for the sentencing judge to have imposed a lesser sentence for the offence of rape, the sentence imposed was not "unreasonable or plainly unjust" such as to constitute an error in the exercise of the sentencing discretion justifying interference by this Court.[7]

[35] A proper exercise of the sentencing discretion involves a range of factors. A consideration of the relevant factors in the present case supports a conclusion that the sentence imposed for the offence of rape was not manifestly excessive.

Order

[36] I would order that the application for leave to appeal be refused.

---

6 (2014) 253 CLR 58, at 70-71 [27]-[28].

7 *House v The King* (1936) 55 CLR 499 at 505.