

CITATION: *The Queen v Carne* [2018] NTSC 54

PARTIES: THE QUEEN

v

CARNE, Kaidyn Andrew

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 21703306

DELIVERED ON: 7 August 2018

HEARING DATES: 26 July 2017, 2 November 2017,
2 August 2018

JUDGMENT OF: Barr J

CATCHWORDS:

CRIMINAL LAW – Mental impairment – accused charged with unlawfully causing serious harm – accused fit to stand trial – accused entered plea of not guilty because of mental impairment – supervision order – nature of supervision order – considerations – risk that accused unlikely to comply with treatment and medication regime if released into the community – custodial supervision order – hypothetical sentencing exercise – offending directly related to schizophrenia – moral culpability lessened by mental impairment – general and specific deterrence less relevant factors – community protection – major review of custodial supervision order to take place after two years and six months

Criminal Code, Part IIA, s 43H, s 43I (2)(a), s 43I (3)(c) & (d), s 43K, s 43Z, s 43ZA (1)(a)(i), s 43ZG (1), (2) & (4B)

REPRESENTATION:

Counsel:

Prosecution: S Ledek
Accused: C Baker

Solicitors:

Prosecution: Office of the Director of Public
Prosecutions
Accused: Northern Territory Legal Aid
Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Carne [2018] NTSC 54
No. 21703306

BETWEEN:

THE QUEEN

AND:

KAIDYN ANDREW CARNE

CORAM: Barr J

REASONS FOR DECISION

(Delivered 7 August 2018)

Introduction

- [1] On 2 August 2018, I made a custodial supervision order committing Kaidyn Carne to custody at the Darwin Correctional Centre. I now publish my reasons for decision and set out the orders made.
- [2] On 2 November 2017, Mr Carne (referred to either as “the accused” or “the supervised person”) was arraigned and entered a plea of not guilty because of mental impairment to the single count in the indictment charging him with having unlawfully caused serious harm to Brian Nolan on 21 August

2016. At the time the plea was entered, the accused was presumed fit to stand trial.¹

[3] The facts and circumstances of the accused's conduct were as follows:

At the material time, the accused was a patient in the Medical Centre of the Holtze Correctional Facility.

Mr Nolan, who was employed as a prison officer at the Correctional Facility, was rostered on duty as the Medical Officer.²

In the morning of Sunday 21 August 2016, Mr Nolan noticed that the noise level from the television in the accused's cell was very loud. He spoke to the accused through the door of his cell and told him to turn the volume down because it was interrupting the medical treatment of other patients in the facility. The accused complied, to the extent that he turned the volume down about halfway. He then asked Mr Nolan, "Where is my breakfast? I'm hungry".

Because the volume of the television was still too loud, Mr Nolan opened the door of the accused's cell about halfway, and again told the accused to turn the volume down.

The accused then got up from his bed and walked over to Mr Nolan, saying, "I want my fucking breakfast". Mr Nolan told him that the kitchen had been notified three times and that his breakfast should be on its way.

Without warning, the accused punched Mr Nolan twice to the head with clenched fists.

Mr Nolan attempted to restrain the accused, who once again punched him to the left side of his head. The punch was forceful and connected with the left side of Mr Nolan's head.

[4] In addition to the agreed facts extracted above, the prosecution showed CCTV footage of the incident and tendered a still from that footage.³ In reliance on that evidence, I made a finding that Mr Nolan fell to the ground as a result of a combination of (1) being struck by the forceful punch to the

¹ See s 43K (1) *Criminal Code*.

² I understood this to mean the Corrections Officer working in the Medical Centre.

³ Exhibits P6 and P7.

head while grappling with the accused and (2) the accused having positioned himself so as to allow him greater leverage against Mr Nolan than Mr Nolan had against him.

- [5] When Mr Nolan fell backwards to the ground, the accused fell on top of him. Mr Nolan landed heavily, suffering fractured ribs and a punctured lung. He suffered fractures to the right fifth, sixth and seventh ribs as well as a right pneumothorax and a right haemothorax. If the injuries had been left untreated, it was likely that his lung would have collapsed due to expansion of the pneumothorax, causing hypoxia from the compression of the lung, and ultimately resulting in death.
- [6] In his victim impact statement, Mr Nolan referred to the very high levels of pain he experienced, both as a result of the injury and surgical procedures undergone. Mr Nolan was incapacitated for work for a significant period of time.
- [7] After the accused's plea entered on 2 November 2017, the Court recorded a finding of not guilty because of mental impairment, and then declared the accused liable to supervision under Division 5 of the *Criminal Code*.
- [8] An order was made under s 43I(c) and (d) for a psychiatric examination, with a report to be provided to the Court with recommendations as to custodial or non-custodial supervision and conditions. Further consideration was adjourned to 18 January 2018 and the accused was granted bail.

Initial recommendation as to non-custodial supervision

- [9] Dr Ranjit Kini is and was at all material times the Senior Staff Specialist (consultant forensic psychiatrist) within the Top End Mental Health Service.
- [10] Dr Kini interviewed the accused on 13 September 2017. The history he obtained was set out in a report dated 11 October 2017. At the time of interview, the accused was living in the community and was adhering to the conditions of his bail, including being abstinent from alcohol and illegal drugs. He was engaging well with the community mental health team responsible for his care, and was co-operating with urine drug screening on a regular basis. He appeared to have real insight. He said that his earlier period of incarceration at the Darwin Correctional Centre had changed him and given him “a new lease of life”. He referred to regular meals, enjoying good sleep, abstaining from alcohol and illegal drugs and taking his antipsychotic medication. He said that he no longer felt angry or frustrated as he had in the past.
- [11] As mentioned above, the accused entered the plea of not guilty because of mental impairment on 2 November 2017. Dr Kini then re-interviewed the accused on 8 December 2017 and provided a report to the court dated 10 January 2018. In that report, Dr Kini confirmed that his working diagnosis was schizophrenia, but noted that the accused’s mental health was particularly vulnerable to the effects of illegal substances and excessive alcohol use. His underlying antisocial and borderline personality traits and

the residual impact of a previous closed head injury⁴ contributed to his clinical presentation. Nonetheless, he had made good progress since release from custody on bail. His clinical improvement was as a result of his engagement with his treating team, compliance with psychiatric medication, support from family and a significant reduction in illegal drug use. The imposition of bail conditions was considered significant in reducing risk.⁵ Dr Kini recommended a non-custodial supervision order with residential conditions, mandatory compliance with his treatment plan and urinalysis and breath and alcohol testing to ensure compliance with alcohol and drug restrictions.

Change in recommendation from non-custodial to custodial supervision

[12] At some time before 8 January 2018, the accused left Darwin to travel to Queensland. He failed to attend an appointment on 8 January 2018 for his depot injection and clinical review. While in Queensland the accused used illicit drugs including cannabis, LSD and methamphetamine. He later claimed that he self-administered his depot injection whilst in Queensland, but there was no independent support for that claim. In relation to his oral antipsychotic medication, he provided contradictory accounts in relation to his asserted compliance.

4 The accused sustained a serious head injury at the age of 14 and medical opinion was that he had an Acquired Brain Injury (an 'ABI') as a result

5 Report 10 January 2018, pars 7.2 and 7.3.

[13] In breach of bail, the accused did not attend court on 18 January 2018. He returned to Darwin on 12 April 2018, and on 17 April 2018 he was admitted to the Joan Ridley Unit after presenting with his mother at the Royal Darwin Hospital Emergency Department with acute psychotic symptoms.⁶ It was noted that, on 20 April 2018, the accused assaulted an Aboriginal patient in the ward without any apparent provocation. In addition to the alleged assault of the Aboriginal patient, the accused was alleged to have unlawfully assaulted two Darwin Correctional Centre officers on 1 May 2018.

[14] Dr Kini re-assessed the accused on 6 June 2018 and provided a further report to the Court dated 14 June 2018 (“the third report”).

[15] Dr Kini expressed the opinion in the third report that, without high levels of support and supervision, and a structured care plan with a legal requirement for adherence, Mr Carne would pose a significant risk of harm to others and to himself. That risk could not currently be appropriately managed in the community (see paragraphs 7.7 and 7.8 of the third report). If, on the other hand, the accused were to abstain from illicit drugs and comply with psychiatric treatment, his prognosis *in relation to his mental illness* was favourable. However, the long-term prognosis generally was poor because of the accused’s co-morbid health conditions relating to his acquired brain injury (ABI), his substance use and unresolved trauma. He has significant deficits in emotion regulation, problem-solving, interpersonal

⁶ Report 14 June 2018 par 5.2.

communication, impulse control, frustration tolerance and anger management (see paragraph 7.9 of the third report).

[16] Dr Kini also expressed the opinion that the accused's motivation to engage genuinely in psychological therapy was questionable, and that he continued to minimise and rationalise his violent conduct.⁷ Dr Kini concluded that, in the absence of a custodial supervision order, the accused was likely to disengage with treating professionals, default on his care plan and revert to using alcohol and illegal drugs. This would have a significant detrimental impact on the accused's own mental health, and risk harm to others and to himself.

[17] The opinions expressed by Dr Kini, summarised in the preceding paragraphs [15] and [16], persuaded me that a supervision order committing the accused to a custodial correctional facility was the only appropriate supervision order. There was no practicable alternative in the circumstances.⁸

The hypothetical sentencing exercise

[18] In making a supervision order, the Court had to comply with s 43ZG *Criminal Code*, which provides relevantly as follows:

43ZG Major review of supervision orders

- (1) When the court makes a supervision order, the court must fix a term in accordance with subsection (2), (3) or (4) that is appropriate for the offence concerned and specify the term in the order.

⁷ Third report par 7.16.

⁸ See s 43ZA (2) *Criminal Code*.

- (2) Subject to subsections (3) and (4), the term fixed under subsection (1) is to be equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged.

[19] The hypothetical sentencing exercise under s 43ZG required me to assume that the supervised person had been found guilty of the offence charged, and thus, by necessary implication, that mental impairment was not such as to have affected the making of that assumed finding by providing a defence under s 43C(1) *Criminal Code*. However, normal sentencing principles required that Mr Carne's schizophrenia and his co-morbid health conditions should be taken into account.⁹

[20] The maximum penalty provided by law for the offence is 14 years' imprisonment.

[21] In reviewing Mr Carne's conduct, I observe that he initiated the physical confrontation with the victim and aggressively punched him to the head. The victim then grappled with Mr Carne in an attempt to restrain him. The victim's injuries were caused when, in the ensuing struggle, he fell heavily onto the ground, fracturing a rib which then punctured the lung. Although the victim's injuries were potentially life-threatening, there was no evidence of intent on the part of Mr Carne to bring about the unfortunate result. Further, I consider that the possibility of Mr Nolan suffering the particular injury he suffered was not a strong possibility, and was not readily

⁹ See *R v Morton* [2010] NTSC 26 at [46].

foreseeable.¹⁰ Overall, I assess that the objective seriousness of Mr Carne's conduct to have been in the low to mid-range for offences of this kind.

[22] The accused's conduct and the consequences of his conduct are to be considered in the context that he suffered from a mental illness, the residual psychotic symptoms of which, according to Dr Kini,¹¹ caused him to experience paranoia, persecutory ideation, mild thought disorder and limited insight. The stress of incarceration, inadequate sleep and hunger were likely to have adversely impacted on his mental health and exacerbated the underlying mental illness, affecting his judgment, emotion regulation, frustration tolerance and impulsivity control. The residual sequelae of his previous head injury are also likely to have contributed to his inability to moderate his impulsivity and manage his frustration. Dr Kini writes, "Mr Carne's paranoid and persecutory ideation is likely to have reduced his ability to reason, at the material time, with a moderate degree of sense and composure, about the appropriateness of his actions."

[23] Although the accused probably would have known the nature and quality of his conduct, his ability to control his actions was reduced. His illness in my view lessened the moral culpability of his conduct.¹² As a result, had he

10 Based on the High Court's recent decision in *Irwin v The Queen* [2018] HCA 8 at [51], dealing with a Queensland provision analogous to s 31(2) *Criminal Code* (NT), the position in the Northern Territory is that the prosecution must prove, beyond reasonable doubt, that an accused foresaw an injury of the kind which constituted the serious harm in fact suffered by the victim.

11 Report dated 11 October 2017, pars 13.7, 13.8.

12 See *R v Verdins* (2007) 16 VR 269, which contained a restatement, in somewhat revised form, of the guiding principles which the Court of Appeal of Victoria laid down in *R v Tsiaras* [1996] 1 VR 398.

been sentenced after a finding of guilt, his sentencing would not have been an appropriate vehicle for either general or specific deterrence. However, although the accused will be under supervision for the foreseeable future, I considered that community protection was a relevant consideration in the hypothetical sentencing exercise required by the *Criminal Code*.

[24] Under s 43ZG(2) *Criminal Code*, I was of the opinion that a term of imprisonment of two years and six months would have been the appropriate sentence to have imposed on Mr Carne if he had been found guilty of the offence charged.

[25] Pursuant to s 43ZG(1), I fixed a term of two years and six months for the purposes of the supervision order. I ordered that the term so fixed was to be backdated by three months and 23 days, and deemed to have commenced on 11 April 2018, pursuant to s 43ZG(4B) *Criminal Code*.

[26] The formal orders made by me were as follows:

1. Kaidyn Carne is subject to a Custodial Supervision Order (“CSO”) and is committed to custody at the Darwin Correctional Centre pursuant to s 43ZA (1)(a)(i) of the *Criminal Code*.
2. The Commissioner of Correctional Services, officers and employees within the meaning of the *Correctional Services Act* (“Commissioner”), in consultation with the Chief Executive Officer of the Department of Health, her employees, servants and agents (“CEO”) shall be responsible for the safe care and custody of Mr Carne.
3. Mr Carne is to co-operate fully with the treatment plan offered to him by Top End Mental Health Services (“TEMHS”) and in particular he is to:

- a) Comply with all reasonable directions of TEMHS including the taking of prescribed medications, testing, assessment and other medical interventions necessary as adjuncts to the taking of those medications;
 - b) Participate in any counselling or education relevant to his mental illness as deemed necessary and appropriate by the treating team at TEMHS;
 - c) Attend any rehabilitation or treatment program relevant to violent offending and/or the misuse of alcohol and illicit or dangerous drugs as recommended by the treating team; and
 - d) Not threaten or assault any person.
4. A term of 2 years 6 months is fixed pursuant to s 43ZG(1) of the *Criminal Code*.
 5. The term of 2 years 6 months will be deemed to have commenced on 11 April 2018, pursuant to s 43ZG (4B) of the *Criminal Code*.
 6. The appropriate person shall file and serve a report for the purpose of s 43ZG(5) by close of business on Wednesday, 24 June 2020.
 7. The matter is listed for major review on Wednesday, 8 July 2020 at 9.00 am.
 8. The appropriate person is to file and serve a periodic review report pursuant to s 43ZK by close of business on Wednesday, 27 March 2019.
 9. The matter is listed for periodic review at 9.00am on Wednesday, 10 April 2019.
 10. The parties have liberty to apply.
