FG v Peach [2003] NTSC 114

PARTIES:	FG
	v
	DAVID NICHOLAS PEACH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 45/03 (20214031)
DELIVERED:	26 November 2003
HEARING DATE:	17 November 2003
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Appellant:	J Lawrence
Respondent:	G McMaster

Solicitors:

Appellant:	T Crane
Respondent:	DPP

Judgment category classification:	C
Judgment ID Number:	bai0305
Number of pages:	19

bai0305

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

FG v Peach [2003] NTSC 114
No. JA 45/03 (20214031)

BETWEEN:

FG
Appellant

AND:

DAVID NICHOLAS PEACH
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 26 November 2003)

[1] This is an appeal against a sentence imposed by the Court of Summary Jurisdiction sitting at Darwin on 24 February 2003. On that date the appellant pleaded guilty to five counts of aggravated indecent dealing with a child under the age of 16 years (contrary to section 132(2)(a) and (4) of the *Criminal Code*). Four of the offences were committed between 5 July 2000 and 1 February 2001. The fifth offence was committed between 1 October 2001 and 8 October 2001. Each of the five offences was aggravated by reason that the victim was a lineal descendant, the daughter, of the appellant. The maximum penalty for each of the five offences (on indictment) is imprisonment for 10 years.

[2] In addition to the offences contrary to s 132 of the *Criminal Code*, the appellant pleaded guilty to six counts of administering a dangerous drug to herself (contrary to s 13 of the *Misuse of Drugs Act*). The dangerous drugs were cannabis, MDMA ('ecstasy') and amphetamines. The maximum penalty for each of these six offences is imprisonment for 2 years or a fine of $2,000 or both.

[3] With respect to the six offences contrary to the *Misuse of Drugs Act*, the learned magistrate imposed an aggregate fine of $500. The appellant makes no complaint about that sentence. With respect to the five offences of aggravated indecent dealing, the learned magistrate sentenced the appellant to an aggregate term of imprisonment of 2 years and 6 months and ordered that the balance of the sentence be suspended after the appellant had served 9 months imprisonment. The appellant appeals against that sentence on the grounds that the learned magistrate –

i) erred in imposing a sentence that was manifestly excessive in all the circumstances of the offending and the offender;

ii) erred in failing to give a sufficient discount for the appellant's plea, remorse and assistance to the authorities; and

iii) erred in failing to properly consider the effect the incarceration would have on the victim and other children of the family.

[4] The circumstances of the five offences of aggravated indecent dealing were the subject of agreement and reduced to writing (Exhibit No 1). In summary, the appellant was 34 years old at the outset of the offending. In around January 1999, the appellant together with her three children (the victim then aged 12, another daughter, then aged 10 and her son, then aged 7) began cohabiting with a man who I shall refer to in these reasons as "P". The appellant and P conducted a de facto relationship until late August 2002.

[5] The five offences followed a similar pattern, albeit with an escalating level of indecency or perversion. On the first two occasions, the offender entered the victim's bedroom sometime between 10.00 pm and 6.00 am. The victim's younger sister was asleep in the same room. The appellant woke the victim and directed her to accompany the appellant into the bedroom that the appellant shared with P. In that bedroom, the appellant directed the victim to lay down on the floor. The appellant then climbed into bed with P and engaged in penile/vaginal intercourse in clear view of the victim who was awake at the time.

[6] With respect to the third and fourth offences, the appellant similarly woke the victim and directed her to accompany the appellant to the bedroom the appellant shared with P. On these occasions, P told the victim to get on or into the bed with him and the appellant. The appellant then performed fellatio on P with the victim watching.

[7] The first four offences occurred at the home shared by the appellant, P and the appellant's three children. The victim was 13 years old, nearly 14 at the outset of the offending.

[8] The fifth offence was committed between 1 and 8 October 2001. The appellant and the victim attended at a Darwin serviced apartment where P was staying. Throughout the day and night the appellant and P consumed ecstasy tablets, cannabis and alcoholic drinks laced with amphetamines. The victim was also supplied by P with ecstasy tablets, cannabis and drinks laced with amphetamines throughout the day and night.

[9] At some point during the day, the appellant, P and the victim undressed and climbed into bed. The appellant performed fellatio on P whilst the victim lay beside them and observed their actions.

[10] Following this, the appellant and P engaged in digital intercourse. P inserted his fingers into the appellant's vagina. He removed his fingers and forming a fist, inserted his fist into the appellant's vagina. Throughout this time, the victim was lying on the bed beside the appellant and P. The victim was awake and observed the actions of the appellant and P.

[11] On 26 August 2002, the appellant made a report to the Police that the victim had disclosed that she had been sexually abused by P for an extensive period. I note that P has been charged with maintaining a sexual relationship with a child and numerous other offences.

On 28 August 2002, the appellant participated in an electronic record of interview (Exhibit No 4).

[12] In his reasons for sentence, the learned magistrate took a serious view of the appellant's indecent dealing offences. His Worship expressed the view that the mother/ daughter relationship is "one of the most profound bonds and relationships of trust that we have as human beings". The learned magistrate described the appellant's offences as a total and utter breach of that bond and trust. He considered that what the appellant had done was "repugnant", "an example of serious criminal conduct" and deserving of incarceration. The learned magistrate considered the appellant's offences was much more serious than the 'more usual' offences against s 132 of the *Criminal Code*, for example where an uncle indecently deals with a young niece or nephew. His Worship emphasised that the appellant's offences were a public wrong in which the community has an interest - not a private affair which could be settled between the appellant and her victim daughter.

[13] The learned magistrate turned to mitigating factors. His Worship found that the appellant was a 37 year old mother of three of previous positive good character. He treated her as a first offender (ignoring an irrelevant traffic matter). He took into account that the appellant was attending counselling with her daughter, the victim. He took into account the 'devastation' that a sentence of imprisonment would have upon her children and expressly referred to the principles outlined in *R v Nagus* (1995) 5 NTLR 45.

[14] The learned magistrate also took into account that the appellant was "under the influence" of P, her lover "who sought to pervert her and her daughter". In the course of submissions, the learned magistrate had described P as "a control freak" who controlled the appellant and "used her as a sex slave and induced her … to do the same in relation to her daughter". The learned magistrate took into account that at the time of the offences, the appellant was under the influence of drugs.

[15] His Worship noted that s 78BB of the *Sentencing Act* requires that in the case of an offender who commits an offence against s 132 of the *Criminal Code*, the court must impose a term of actual imprisonment, ie a term of imprisonment which is not wholly suspended.

[16] The learned magistrate indicated that general deterrence was a factor in sentencing for offences of the present nature. His Worship continued:

> "The maximum sentence is 10 years and I had considered whether or not in all the circumstances to send the matter to the Supreme Court. I don't think I need to, I would have thought it's the kind of conduct at the end of the day, looking at it objectively, that you would start with a prison sentence in mind of 5 or 6 years – the maximum is 10.
>
> Having regard to her co-operation, remorse, contrition, the fact that she went to the police with her daughter and effectively started the bandwagon rolling to see that this kind of offending came to court, I would have though a third off that. Then as I understand it, and we'll sentence her on the following principle that she ought to get an appropriate and recognisable discount on that for what is commonly called the informant's discount, she swearing up to proof and giving evidence against the man involved.

> Doing all I can for the defendant, feeling compassionate for her to a certain extent but particularly compassionate to her children, and having regard to all the principles and guidelines in the Sentencing Act, the eloquent submissions of Mr Rowbottom and all of the documentary material in front of me, in my view a sentence of two and a half years by way of an aggregate sentence for the indecent dealing charge is appropriate.
>
> Once again having regard to the same factors I order that that sentence be suspended after the service of nine months imprisonment."

[17] Mr Lawrence, on behalf of the appellant, emphasised what in his submission was the context of the offending. It was put that P had wielded great control over the appellant. P was able to manipulate and intimidate the appellant. P supplied the appellant with dangerous drugs (cannabis, amphetamines and ecstasy) which the appellant consumed in large quantities. The evidence of the victim was that the appellant was heavily affected by drugs at the time of each of the offences. There also was evidence from the appellant and the victim that P had anally raped the appellant and was violent towards her.

[18] In summarising the reasons for sentence of the learned magistrate, I have referred to his taking into account by way of mitigation that the appellant was under the "undue influence" of P who in the course of submissions the learned magistrate described as a "control freak". However, there was other evidence before the learned magistrate, in particular a transcript of the appellant's record of interview, which indicated the appellant was far from having surrendered entirely to the wishes and demands of P. For example, the appellant told the Police in her record of interview (page 6) that in

relation to the majority of times that P asked the appellant to invite the victim into their bedroom, she would either refuse or walk out into the hallway and then return without the victim. The appellant also described her drug use as periodic (page 6) and confined mostly or exclusively to weekends (page 39) because of her employment at a credit union.

The appellant was asked how the drugs affected her. She told the Police (page 38):

> "They, they made me feel good. They made me feel, some of them made me feel relaxed and heightened a lot of emotions and made it fun I suppose. I was a lot more talkative. I'd be dancing, bits and pieces. They were used purely for relaxation, not relaxation, but recreation I suppose … that was the purpose of them and to, to heighten my involvement with P, just to have fun with him while we were at home. Improved our sex life dramatically as well".

[19] The appellant goes on to describe the drugs on occasions as causing her a loss of control and an inability to function. It is apparent that the appellant was both a willing consumer of drugs supplied by P and aware of their disinhibiting effect.

[20] In relation to P's violent nature, the appellant told the Police in her record of interview that the "first time I'd ever seen him violent" (page 9) was during the stay at the Darwin serviced apartment (where the fifth offence was committed). The appellant refers to P breaking down a bathroom door because the appellant's daughter, the victim, was slow in coming out of the bathroom. The appellant explained her participation in what occurred at the serviced apartment in the following way:

> "My reasoning was an awful lot of, an awful lot of drugs. An awful lot of… I was scared of him because of his actions earlier on when he, he lost control because he was, he was extremely moody at that time. His mood swings were up and down all the time. And he was, he was a dangerous man when he was on the drugs, he was a dangerous man when he was off the drugs, when he was coming off the drugs. I think I was scared of him and it was just to please him and to do the right thing by him, to keep him calm and to keep quiet because I had never seen a violent streak in him before that and I think I was, I was, I was a little scared. I was scared for (my daughter, the victim) and I just couldn't think clearly enough to make, to just get up and walk out the door. I was just too scared to just get up and walk out the door."

[21] There is no suggestion by the appellant in her record of interview that fear of P had any role to play in her commission of the first four offences of indecent dealing.

[22] In the light of the appellant's record of interview (which was tendered on behalf of the appellant) the learned magistrate's assessment that the appellant was under the undue influence of P, that during the relationship the appellant "suffered a physical and mental torture almost" and that the appellant "was humiliated and controlled by the man involved" may be seen as favourable to the appellant.

[23] The first ground of appeal relied upon by the appellant is that the sentence was manifestly excessive in all the circumstances of the offending and the offender.

[24] In the course of submissions, Mr Lawrence conceded, quite properly, that the offences were serious and merited a sentence of imprisonment. No complaint was made as to the length of the sentence (two years and

six months). The gravamen of Mr Lawrence's complaint was that (subject to section 78BB of the *Sentencing Act*) the sentence should have been suspended (almost) entirely.

[25] Where a court finds an offender guilty of a sexual offence (which includes an offence contrary to s 132 of the *Criminal Code*) s 78BB of the *Sentencing Act* provides that the court must order that the offender serve –

> "(a) a term of actual imprisonment; or
>
> (b) a term of actual imprisonment that is suspended by it partly, but no wholly".

[26] In Mr Lawrence's submission, in all the circumstances of the appellant's case, the requirement of s 78BB could have been met by the learned magistrate ordering that the sentence of imprisonment for 2 years and 6 months be suspended after, say, one day.

[27] In imposing a suspended (or partly suspended) sentence, a court must first take into account that a suspended sentence should only be imposed if a sentence of imprisonment of the relevant length, if unsuspended, would be appropriate in all of the circumstances. A suspended sentence should be no greater than the length of the sentence of imprisonment that would have been imposed if no suspension was permitted: *McKaye* (1982) 30 SASR 312; *Marsh* (1983) 35 SASR 333 at 336, even though the sentencing court is aware that immediate imprisonment is, in practical terms, more severe: *Weetra v Beshara* (1987) 46 SASR 484.

[28] The appellant's complaint that the sentence was manifestly excessive is, in substance, a complaint that the period which the appellant was ordered to serve in custody was manifestly excessive rather than a complaint that the sentence itself was manifestly excessive.

[29] Whether a sentence of imprisonment should be suspended in full or in part will depend upon a number of different factors. Perry J in *Wacyk* (1996) 66 SASR 530 at 537 commented:

> "It will never be possible to isolate any single factor in a given case as being determinative of the exercise of the discretion whether or not to suspend. The exercise of that discretion one way or the other must turn upon a careful evaluation of the overall circumstances of the particular case, which will include consideration of the circumstances of the offending and the circumstances personal to the offender."

[30] In the present case, it is not submitted on behalf of the appellant that the learned magistrate failed to consider the circumstances of the offending and the circumstances personal to the offender. The complaint is that the learned magistrate, having identified all of the relevant circumstances failed to give sufficient weight to those identified in appeal grounds 2 and 3 – plea, remorse, assistance to authorities (ground 2) and/or the effect the incarceration would have on the victim and other children of the family (ground 3). In the alternative, the appellant's submission is that the length of the custodial part of the sentence is such that the sentencing discretion must in some way have miscarried even though no specific error can be

identified: *Raggett, Douglas and Miller* (1990) 50 A Crim R 45, *Cranssen* (1936) 55 CLR 509 at 519.

[31] At para [16] I have set out the learned magistrate's remarks in relation to the appellant's plea, remorse and assistance to the authorities. It is apparent that after adopting a notional starting point of 5 to 6 years, the learned magistrate has afforded the appellant a discount of some 50 to 58% to arrive at a head sentence of 2 years and 6 months. The appellant has made no complaint about the length of that head sentence. The learned magistrate then continued:

> "Once again, having regard to the same factors, I order that sentence be suspended after the service of nine months imprisonment."

[32] The learned magistrate ordered the appellant to serve 30% of the heavily discounted head sentence – and this in relation to an offence subject to a mandatory period of actual imprisonment. Taking into account all the circumstances of the offences and the offender, I am quite unable to agree that the learned magistrate failed to give sufficient discount for the appellant's plea, remorse and assistance to the authorities.

[33] The appellant's serious crimes against her daughter were not some isolated lapse in an otherwise law-abiding life. The first four offences were committed over a period of 6 months and the fifth offence occurred some 9 months later. The appellant's record of interview (page 8) indicates that she became aware of a sexual relationship between the victim and P during

the stay at the Darwin serviced apartment (1-8 October 2001) where she committed the fifth offence of indecent dealing. It is an admitted fact that she continued in a de facto relationship with P until late August 2002 and that on 26 August 2002 the appellant reported that the victim had disclosed to her that she had been sexually abused by P for an extensive period.

[34] While the appellant was a 'first-offender', the number of offences that she committed over an extended period disentitled her to the consideration which might be afforded to an offender who commits a single out-of-character offence.

[35] The mitigating factors in favour of the appellant were strong – in particular the appellant's action in (belatedly) bringing matters to the attention of the Police and undertaking to give evidence against P – but the submission that such factors required something akin to a fully suspended sentence cannot be sustained, particularly having regard to the seriousness of the offending and the Legislature's intent expressed in s 78BB of the *Sentencing Act*. It is also noteworthy that had the learned magistrate declined to exercise his discretion in ordering a partly suspended sentence, he would have been obliged, pursuant to s 55A of the *Sentencing Act* to fix a non parole period of not less than 70% of the appellant's head sentence (that is 21 months in the appellant's case).

[36] In the course of his submissions, Mr Lawrence referred me to the case of *H* (1995) 81 A Crim R 88. There, the appellant had been convicted of three

serious sexual offences against his wife involving forced anal and oral sexual intercourse, bodily harm and serious and substantial humiliation. The principal ground of appeal was that the learned sentencing judge failed to have sufficient regard for the victim's wishes and to the manner in which the charges came to court. The victim was the mother of two children (aged 5 and 2 years) and pregnant with a third. The appellant was the father. The appellant and the victim had reconciled. The appellant had given up alcohol. The victim had sought to have the charges dropped. She gave evidence that in her view imprisonment of her husband would have a more devastating and lasting effect upon her and the children than the offences which he had committed against her.

[37] The Court of Criminal Appeal by majority (Malcolm CJ and Kennedy J; Murray J dissenting) set aside the appellant's sentence of imprisonment for 2 years and 11 months, substituting an order for probation on strict conditions, including abstinence from alcohol and random urine testing for alcohol. The majority held that courts must ensure that the victims of domestic violence are protected and that sentences mark the community's disapproval and serve the ends of personal and general deterrence. However, they also held that full regard should also be paid to the prospects of rehabilitation and maintaining the family unit. The majority held that the question was whether the gravity of the conduct and the need for personal and general deterrence outweighed the wishes of the complainant, the continuity of the family unit and the rehabilitation of the offender.

The majority also held that a prison sentence would inflict a significant punishment upon the victim by depriving her of her breadwinner as well as the support and assistance she needed as the mother of young children. In the view of the majority, the case fell within the exceptional circumstances in which a non-custodial disposition was justified.

[38] In the present case, the victim, the appellant's daughter, made in her victim impact statement (Exhibit No 2) a very strong and emotional plea that the appellant should not be imprisoned. The victim blamed herself for not telling the appellant earlier of her sexual relationship with P. She attributed all blame to P, asserted that the family would be destroyed if "Mum was taken away" and submitted that the appellant deserved a chance.

[39] In my view, it is entirely proper, as the learned magistrate did, to take into account the effect on the appellant's children in deciding whether, and for how long, she should serve an actual term in custody. However, I do not consider that the approach of the majority in *H* can be applied directly in the appellant's circumstances.

[40] In *H*, Malcolm CJ observed at p 103:

> "… the victim was a mature adult and the respondent's wife, who had not only fully forgiven him and reconciled with him, but had sufficient faith in his capacity to abstain from alcohol and further acts of violence that she was prepared to have another child by him".

[41] Significantly, Malcom CJ also held at p 104:

> "In my opinion, as serious as the offences were which were committed by the applicant, the immediate consequences and impact upon the complainant was apparently not great. It seems that the complainant made a quick recovery …".

[42] The same cannot be said here. Disturbingly, the appellant's daughter says of her mother in her victim impact statement:

> "I think that she didn't do anything wrong".

[43] The psychological damage to the victim from the appellant's conduct (combined with all that occurred between P and the victim) is likely to be very substantial and long-lasting, if not permanent. Section 132 of the *Criminal Code* is one of a number of provisions which exists to protect children from exploitation by adults, and in particular exploitation by those who have a duty of care in relation to a particular child.

[44] The wishes of a child victim in relation to a relative who indecently deals with the child may be taken into account in sentencing, but quite clearly cannot be decisive. The community generally has a very real interest in cases where children are sexually exploited. General deterrence is an important consideration in the determination of an appropriate sentence in all such cases.

[45] Mr Lawrence acknowledged that the learned magistrate had expressly referred to the hardship that the appellant's incarceration would impose on her children, including the victim. His Worship expressly referred to taking

into account the principles of *R v Nagus* (1995) 5 NTLR 45. In that case, the Court of Criminal Appeal held at p 54:

> "Family hardship may be a ground for mitigation of the sentence where the particular circumstances of the family are such that the degree of hardship is exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of imprisonment. A second exception to the principle that family considerations do not have mitigating effect is the case of an offender who is the mother of young children. The third situation in which family hardship may mitigate a sentence is where both parents have been imprisoned simultaneously or other family circumstances mean that the imprisonment of one parent effectively deprives the children of parental care."

[46] In evidence before the learned magistrate, the victim said, in effect, that her maternal grandparents would not be physically and mentally able to care for her (then 16½ years old), her sister (aged 14) and her brother (aged 11) if the appellant was imprisoned. She added: "And as much as I love them it's – we don't like it there". The victim also gave evidence that her paternal grandparents live in Darwin but "… we haven't seen them for ages. They don't like us".

[47] The appellant gave evidence to the effect that her parents could not care properly for her 3 children if she was imprisoned. The appellant was not asked and gave no evidence about whether the children's father (her former husband who lives in Melbourne) or his parents (the children's paternal grandparents) could care for the children if necessary.

[48] In answer to a question about on-going care for the children from the learned magistrate, the appellant's then counsel asserted from the bar-table that the "… reality is there simply isn't any other avenues save welfare".

[49] In *Mawson v Nayda* (1995) 5 NTLR 56 at 57, Kearney J held:

> "To establish one of the exceptions set out in *R v Nagas* (supra) it is necessary in my opinion that a defendant produce cogent evidence to the sentencing Court to establish that his imprisonment would impose exceptional hardship upon his family, one which is considerably more severe than normal for a family where the father is imprisoned; or that his imprisonment would effectively deprive his children of parental care. No adequate evidence directed to these matters was palced before the Court; Mr Dalrymple, in the passage emphasized on p 5, appeared to submit to the Court that the appellant's de facto wife might not be capable of looking after their two children on her own, 'because of her drinking'. Accepting that she might not be so capable does not go far enough to establish that there were 'particular circumstances' in the appellant's family which demonstrated that an 'exceptional' degree of hardship would flow from the appellant's imprisonment, or that it would effectively deprive his two children 'of parental care'."

[50] As in the case before Kearney J, no adequate evidence directed to these matters was placed before the learned magistrate. Doubts about the capacity of the children's maternal grandparents to look after the children and the complete absence of evidence about the willingness or capacity of the paternal grandparents and the children's natural father to care for the children do not establish that there were "particular circumstances" in the appellant's family which demonstrated that an "exceptional" degree of hardship would flow from the appellant's imprisonment or that it would effectively deprive her three children "of parental care".

[51] For the purposes of this appeal, what the appellant must show in order for this Court to interfere is not merely that the sentence is high in the sense that I would have imposed a less severe sentence, but that it is plainly and unarguably so high that the excessiveness is obvious. The appellant has failed in that task. The appellant committed a gross breach of trust against her daughter on five occasions over an extended period.

[52] Section 132 of the *Criminal Code* exists for the protection of children. The Legislature takes such a serious view of the provision that it has provided for mandatory actual imprisonment. Having regard to all the circumstances of the offences and the offender, I am not able to agree that the sentence imposed on the appellant is manifestly excessive. Accordingly the appeal is dismissed.

———————————————————