The Queen v Morton [2001] NTCCA 6

PARTIES:	THE QUEEN
	v
	ALBRECHT MORTON
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA21 of 2000
DELIVERED:	19 OCTOBER 2001
HEARING DATES:	2 AUGUST 2001
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

REPRESENTATION:

Counsel:

Appellant:	W. J. F. Karczewski and I. Rowbottam
Respondent:	D. Bamber

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	Northern Australia Aboriginal Legal Aid Service

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Morton [2001] NTCCA 6
No. CA21 of 2000

BETWEEN:

THE QUEEN
Appellant

AND:

ALBRECHT MORTON
Respondent

REASONS FOR JUDGMENT

(Delivered 19 October 2001)

MARTIN CJ

[1] For the reasons given by Mildren J, I agree with the orders he proposes.

MILDREN J*:*

[2] The facts and circumstances which give rise to this appeal are set out in the judgment of Riley J which I have had the advantage of reading.

[3] As has often been said, the circumstances which give rise to a conviction for manslaughter are so various, that there is no established sentencing tariff. Manslaughter may be divided into two broad categories often referred to as voluntary and involuntary manslaughter. The significant difference between these two categories is that in the former case there is nearly always an intention to kill or to cause grievous harm, whereas in the latter there is not. Murder, which is reduced to manslaughter because of provocation is an

example of voluntary manslaughter. In provocation manslaughter cases, the intent to kill or cause grievous harm is an aggravating factor which often, although not inevitably, places it in a more serious category than cases of involuntary manslaughter. In the Northern Territory, because of the effect of S 31 of the *Criminal Code*, in cases of involuntary manslaughter there must always be proved actual foresight that the accused's acts could result in the deceased's death. In this respect, Territory law relating to manslaughter differs from the common law which also includes manslaughter by criminal negligence where no foresight is required. Such a case is dealt with by the *Code* as an aggravated dangerous act contrary to S 154(1) and (3) of the *Code*, to which s 31 does not apply. At common law, if there is foresight amounting to recklessness, this would be murder. But in the Northern Territory there is no such thing as murder by recklessness. The provisions of S 162(1) of the *Code* establish what mental element, if any, need be proved by the Crown to establish murder: see *Charlie v The Queen* (1998) 7 NTLR 152; (1998) 99 A Crim R 232. Consequently the essential difference in the Northern Territory between voluntary and involuntary manslaughter is the nature of the mental element required. Clearly an intent to kill or to cause grievous harm is more culpable than mere foresight of the possibility that the accused's acts might cause death.

[4] It is well established that in arriving at an appropriate sentence in provocation manslaughter cases, not only must the sentencer bear in mind

that a human life has been taken in circumstances where there has been an intent to kill or an intent to cause grievous harm, but also, when assessing the objective gravity of the offence the sentencer must pay regard to three key factors identified by Hunt CJ at CL in *R v Alexander* (1995) 78 A Crim R 141 at 144:

> "(1) the degree of provocation offered (or, alternatively, the extent of the loss of self–control suffered), which when great, has the tendency of reducing the gravity of the offence;
>
> (2) the time between the provocation (whether isolated or cumulative in its effect), and the loss of self–control, which when short also has the tendency of reducing the objective gravity of the offence; and
>
> (3) the degree of violence or aggression displayed by the prisoner, which when excessive has the tendency of increasing the objective gravity of the offence."

[5] *R v Alexander* or the principles referred to in that case, has been followed by single Judges of the Supreme Court of the Northern Territory on a number of occasions: see, for example, *R v Wilson* (1995) 81 A Crim R 270 per Kearney J; *R v Rudge* (unreported, SCC 9626174, Mildren J 3/6/98); *R v Farley* (unreported, SCC 9923602, Thomas J, 12/10/2000).

[6] Whilst the learned sentencing Judge's remarks are consistent only with a finding that the degree of provocation offered was very much at the bottom of the scale, his Honour made no specific findings as to the other factors, although his Honour referred to the facts of the case in such a way that his Honour must have had those other factors in mind. Similarly, whilst it may be said that his Honour did not place any specific emphasis as an aggravating factor that the weapon used was a knife, and the victim was a defenceless woman who offered no resistance, I am not persuaded that his Honour overlooked those matters.

[7] In this respect notwithstanding Mr Bamber's submissions to the contrary, I agree with Riley J that the degree of provocation offered was not substantial, that there was time for the respondent to have reconsidered his position whilst he obtained the knife and whilst his relatives asked him to desist, and that the degree of violence displayed was excessive. I also agree with the conclusion of Riley J that the sentence imposed by the learned sentencing Judge was manifestly inadequate.

[8] In cases where, as here, the objective gravity of the offence is very serious, less weight can be given to factors personal to the respondent: see *R v Krosel* (unreported, SCC 18 of 1986 Nader J); *R v Farley* (supra); *R v Lupoi* (1984) 15 A Crim R 183 at 190. That is not to say that no weight should be given to them. It is appropriate to bear in mind that the respondent had pleaded guilty and was immediately remorseful, had no prior convictions for violence, and there was a finding, not now challenged, that there was no

need for special deterrence. Taking all of those matters into account I consider that the appropriate head sentence in this case ought to have been one of imprisonment for 10 years.

[9] Counsel for the respondent, Mr Bamber, submitted that this being a Crown appeal, the appeal ought not to succeed where the prosecution has failed to assist the sentencing judge, and that in this case no submissions were made dealing with the matters referred to in *R v Alexander*, or any of the other matters of principle now relied upon by Mr Karczewski for the Crown. Mr Bamber referred us to the decision of this Court in *R v Anzac* (1987) 50 NTR 6 at 14-15 where the duties of prosecutors at the sentencing stage were discussed. As was there pointed out, there is a difference between what is expected of a prosecutor following a plea of guilty and that which is to be expected following a trial. This was a plea of guilty and thus the principles referred to by the Full Court of the Federal Court of Australia in *R v Tait and Bartley* (1979) 24 ALR 477 applied. In that case the Court (Brennan, Deane and Gallop JJ) said:

> "Although the existence of error is the common ground which entitles the appellate court to intervene in appeals by the Crown and by a defendant (cf *R v Butler* [1971] VR 892; *R v Liekefett*; *ex parte Attorney–General* [1973] Qd R 355), there would be few cases where the appellate court would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error, or if the defendant were unduly prejudiced in meeting for the first time on appeal the true case against him."

[10] I do not necessarily accept that submission because Mr Bamber, who appeared for the appellant at first instance, addressed the relevant issues and in particular, referred his Honour to *R v Wilson,* supra. But even assuming Mr Bamber's submission to be correct, I do not accept that in that case the appellant is precluded from asking this Court to intervene.

[11] In *R v Zhen Qi* (1998) 102 A Crim R 172, a decision of the Court of Criminal Appeal of New South Wales, a Crown appeal succeeded where the Crown had acquiesced in the sentence and had informed the sentencing judge that the sentence he proposed would not result in appellable error. The sentence imposed was 2 years periodic detention. The Court held that the sentence imposed was demonstrably and seriously inadequate, and that the degree to which the sentencing judge fell into error was substantial. The Court followed *Allpass* (1993) 72 A Crim R 561 at 566 where it was said:

> "The Crown is not debarred, on appeal, from taking a stance different from that taken at first instance, but this Court, in the exercise of its discretion, is entitled to take account of the fact that, at first instance, the Crown acquiesced in the course that was taken by the sentencing judge: *Jermyn* (1985) 2 NSWLR 194; 16 A Crim R 269; *Malwaso* (1989) 168 CLR 227; 43 A Crim R 451. The weight to be given to such a consideration depends upon the circumstances of the particular case, but it may be of considerable significance if the respondent was given a non–custodial sentence at first instance. Its weight may also vary with the degree to which the appellate court thinks that the sentencing judge fell into error."

[12] Similar principles would apply where, although the error has not been acquiesced in by the Crown, it is the result of a failure to draw to the sentencing court's attention to relevant authorities dealing with matters of

principle. In this case, the sentence originally imposed clearly falls into the category of being demonstrably and seriously inadequate.

[13] Where an appeal by the Crown is successful it is not inevitable that this Court might impose a lesser sentence than that which the Court considers should have been imposed at first instance. In *Anzac*, supra at 16, this Court said:

> "There has not been an inordinate period between the imposition of sentence on 2 June and the hearing of this appeal; although the respondent has been in jeopardy twice as regards sentence, there is no reason for the sentence which this court should now impose to be more lenient than the sentence which should have been imposed in June."

[14] However, in the present case the respondent's sentence was backdated and he was released forthwith upon a partially suspended sentence. In those circumstances, as was observed by Muirhead J in *Davey* (1980) 2 A Crim R 254 at 261:

> " … there is no person so likely to become, not only bewildered, but embittered, as a person who has been sent back to his work and his family under probation by the judge he has seen considering his case, only to find himself re–arrested to serve a custodial sentence imposed elsewhere, a sentence he will not regard as just. Respect for the law is very much at risk under such circumstances."

[15] That factor, and the fact that the respondent has been twice placed in jeopardy, requires this Court to exercise restraint in re–sentencing the respondent, and justifies the imposition of a sentence which is less than the minimum sentence which ought to have been imposed at first instance. I

would allow the appeal and quash the sentence imposed on 8 December 2000. In lieu thereof I would impose a sentence of imprisonment for 7 years and fix a non–parole period of 3 years 6 months, such sentence and non–parole period to be back–dated by a period of 11 months as from the date he is taken into custody.

RILEY J

[16] On 6 December 2000 the respondent pleaded guilty to a charge that on 7 January 2000 he unlawfully killed Jayne Morton, his sister. That offence carries a maximum penalty of life imprisonment. On 8 December 2000 he was sentenced to imprisonment for a period of 3 years with a direction that the sentence be suspended after he had served a period of 11 months imprisonment. The sentence was backdated to 7 January 2000 to take into account time spent in custody and the respondent was released on 8 December 2000.

[17] The Crown appeals against that sentence. The principal ground of appeal is that the learned sentencing Judge erred in imposing a sentence which was manifestly inadequate in all the circumstances of the case. There were other grounds of appeal but they were, in effect, presented in support of the principal ground of appeal.

A Crown Appeal

[18] The principles that apply to a Crown appeal are well understood and have been addressed in many decisions of this Court. They are conveniently summarised by the Full Court of the Federal Court in *R v Tait* (1979) 46 FLR 386 at 388 as follows:

> "An appellate Court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error…".

[19] In *R v Raggett* (1990) 50 A Crim R 41 at 47 Kearney J said of a Crown appeal based upon the ground that the sentence was manifestly inadequate:

> "In general, then, to establish the existence of the necessary (unidentified) error the Crown must show that the sentences are not just arguably inadequate but so very obviously inadequate that they are unreasonable or plainly unjust."

The History

[20] The death of Ms Morton occurred on 7 January 2000. On that day the respondent and members of his family were eating breakfast. The respondent and the victim had been drinking heavily through the previous day and night and there was an ongoing argument between them. That argument flared up during the course of breakfast and the respondent told the victim to stay away. She continued to argue and was yelling and

swearing. There was a scuffle where each pushed the other and the victim scratched the respondent. The victim was pushed causing her to fall to the ground. She threw a tin of canned meat at the respondent. The respondent then picked up his grandmother's walking stick and, using both hands, began to strike the victim about the head and legs. It was a thin stick and splintered after a couple of blows. The victim fell to the ground and the respondent then picked up a vehicle starter motor which was situated nearby and weighed 15 kilograms and, with his arms raised above his head, threw it at the victim striking her in the upper back region. Others present at the scene called upon the respondent to stop however he responded "No, I'm going to teach her a lesson". The respondent then walked to his bedding which was nearby and obtained a 25 centimetre boning knife. He stabbed the victim once in the victim's upper right back. He then left the area, walking some 85 metres before dropping the knife.

[21] Female relatives of the victim attempted to stem the flow of blood however she continued to bleed. The respondent became concerned and obtained the keys to a community vehicle. The victim was wrapped in a blanket and they set off for the nearby Ti Tree health clinic with the respondent driving. The victim died before they reached the health clinic.

[22] The victim died from injuries received during the assault. The knife was measured at 25 centimetres with a 15 centimetre blade. The wound was measured at 15 centimetres in depth and the knife had been driven to the hilt

into the victim's back with a moderate to severe degree of force. A lung was punctured and the pulmonary artery was severed.

[23] The Crown accepted that the respondent did not intend to kill the victim but rather intended to cause her grievous harm. A plea of guilty to manslaughter was accepted on the basis that provocation applied. It was said that the provocation consisted of hurtful words and insults coupled with verbal and physical goading of the prisoner. In that regard the learned sentencing Judge observed:

> "The prisoner may count himself fortunate that the Crown has adopted what appears to be a generous interpretation of what is sufficient to deprive a prisoner of power of self-control and also how an ordinary person would have acted in similar circumstances. I consider the community, generally, would be appalled to think that an ordinary person, and that is an ordinary sober Aboriginal person, would stab a woman with a boning knife in the back intending to cause her grievous harm in circumstances where that ordinary person was provoked by verbal abuse, goading, scratching and a near miss from a thrown can of meat. Nevertheless, whatever opinion I have as to the basis of the prisoner's plea is irrelevant. I am bound to proceed in accordance with the DPP's decision that the provocation of the prisoner was, in law, sufficient to justify acceptance of a plea to manslaughter rather than murder."

[24] In proceeding to sentence the respondent the learned sentencing Judge took into account the early plea of guilty, the genuine remorse felt by the respondent for causing the death of his sister, the fact that his actions were out of character and that personal deterrence was not a factor in the sentencing process in this particular case. His Honour also took into account that the prisoner had been in custody on remand since the date of

his arrest and "it is well recognised that conditions in remand custody are worse than those for convicted prisoners".

[25] A distinction was drawn by his Honour between the "usual alcohol fuelled violence involving weapons, which is so often seen in this jurisdiction directed at female Aboriginals" and the circumstances of this particular offence which involved provocation.

Sentencing in Manslaughter Cases

[26] In *R v Blacklidge* ((1995) NSWSC 12 December 1995) Gleeson CJ speaking for the Court of Criminal Appeal said:

> "It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the range of degrees of culpability is so wide, that it is not possible to point to any established sentencing tariff which can be applied to such cases. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability.
>
> At the same time, the courts have repeatedly stressed that what is involved in every case of manslaughter is the felonious taking of a human life. That is the starting point for a consideration of the appropriate penalty, and a key element in the assessment of the gravity of the objective circumstances of the case."

[27] In *R v Alexander* (1994) 78 A Crim R 141 Hunt CJ at CL dealt with a case in which the offender was found not guilty of murder and a plea of guilty to manslaughter on the ground of provocation was accepted. In discussing the sentencing process his Honour observed that there are three "particular

matters which have been taken into account in provocation manslaughter cases" and these are:

> "(1) the degree of provocation offered (or, alternatively, the extent of the loss of self-control suffered), which when great has the tendency of reducing the objective gravity of the offence;
>
> (2) the time between the provocation (whether isolated or cumulative in its effect) and the loss of self-control, which when short also has the tendency of reducing the objective gravity of the offence; and
>
> (3) the degree of violence or aggression displayed by the prisoner, which when excessive has a tendency of increasing the objective gravity of the offence."

[28] The degree of provocation offered in this matter must be regarded as slight. In my view his Honour was correct in his characterisation of the respondent as being in a position where he should regard himself as "fortunate that the Crown has adopted what appears to be a generous interpretation of what is sufficient to deprive a prisoner of power of self-control and also how an ordinary person would have acted in similar circumstances". In the circumstances of this matter the degree of provocation was not substantial and the loss of self-control suffered by the respondent was not great.

[29] On the other hand the degree of violence that followed the provocation was excessive. The respondent pushed the victim to the ground, he struck the victim about the head and legs with the walking stick, he then threw a 15 kilogram starter motor at the victim striking her in the upper back region, and finally he obtained a knife and stabbed her burying the knife up to the

hilt. All of this occurred in circumstances where others present endeavoured to prevent him proceeding and he responded by indicating he was going to "teach her a lesson". There was time for the respondent to reconsider his position whilst he obtained the knife and when his relatives had asked him to desist.

[30] Further, this is not a case where the victim offered significant resistance to the respondent. She initially acted in a way that was accepted by the Crown to be provocative but then her resistance was overcome by the use of the stick, the starter motor and, finally, the knife.

[31] In cases such as this, where the offence is reduced from murder to manslaughter by reason of provocation, it is necessary to give proper weight to the fact that the act causing the death was done with intent to kill or to cause grievous harm. It is recognised as a major crime and one calling for a "correspondingly grave measure of criminal justice being meted out to the guilty party": *Morabito v R* (1992) 62 A Crim R 82 at 85. In this particular case the Crown accepted that the respondent did not intend to kill his sister. However the sentence must reflect the objective seriousness of the case including that what was involved was the felonious taking of human life with intent to cause grievous harm: *R v Blacklidge* (supra). In *R v Lupoi* (1984) 15 A Crim R 183 the Court of Criminal Appeal in South Australia observed (at 190) that:

> "… the sentence must reflect the gravity of what he did, not only to punish him adequately for what he did but also to deter others from

> doing likewise. Spouses, both husbands and wives, have to be protected from this kind of violence. The bringing of a loaded gun or any gun or weapon into a domestic quarrel, especially where there has been a history of past violence, must be deplored and deterred as strongly as possible. The punishment and deterrent aspects of sentencing weigh heavily in the scales in this case. They outweigh factors personal to the respondent".

[32] As was observed by Martin CJ in *Najpurki v Luker* (1993) 117 FLR 148 at 153:

> "Assaults with weapons which have the capacity to maim, mutilate, disfigure, incapacitate or disable another are of a most serious kind. Such an assault is aggravated if the person perpetrating it goes out of his or her way to become armed with the weapon, and it is worse if the person upon whom the assault is perpetrated is defenceless for whatever reason."

The use of a knife in the circumstances of this matter makes the offending more serious. The courts have observed that the community and the courts abhor the use of knives in the commission of crimes.

[33] The courts have on many occasions addressed the issue of violence in Aboriginal communities and have observed that the weaker members of such communities, particularly women and children, must be protected from excessive violence. Some of the concerns of the courts are discussed in *R v Wurramara* (1999) 105 A Crim R 512 at 520-522.

[34] In my view the head sentence and the period of imprisonment the respondent had to serve prior to release were clearly inadequate. The sentence does not adequately reflect the serious nature of the circumstances surrounding the offending and the fact that the victim died as a consequence. The sentence

failed to reflect the seriousness of the conduct of the respondent and was so far removed from an appropriate sentence that it demonstrated that the exercise of the sentencing discretion has been unsound: *Cranssen v R* (1936) 55 CLR 509 at 520.

[35] In my opinion an error in principle has been demonstrated and that error is manifested by the inadequacy of the sentence. That being so the duty resting upon the Court is to impose a sentence appropriate to the circumstances. In so doing it is necessary to consider the impact of what has been described as the "double jeopardy" faced by the respondent. In *R v Tait* (supra) it was observed (at 388):

> "Although an error affecting the sentence must appear before the appellate court will intervene in an appeal either by the Crown or by a defendant, a Crown appeal raises considerations which are not present in an appeal by a defendant seeking a reduction in his sentence. Crown appeals have been described as cutting across 'time honoured concepts of criminal administration'… A Crown appeal puts in jeopardy 'the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal'… The freedom beyond the sentence imposed is, for the second time, in jeopardy on a Crown appeal against sentence. It was first in jeopardy before the sentencing court."

[36] In the event that a Crown appeal is upheld it is not necessarily the case that the Court on appeal will impose the sentence that should have been imposed at first instance. The fact that the successful appeal places the respondent in the position of being "twice in jeopardy" often leads to a discount being applied to the sentence: *R v Hallocoglu* (1992) 29 NSWLR 67 at 80. In many such cases, in order to reflect this approach, the courts have imposed

sentences somewhat less than would be appropriate if it were not a Crown appeal. The extent of the discount will vary according to the circumstances of the particular matter and will range from substantial to none at all. These observations have particular application in the present matter where the offence occurred on 7 January 2000 and the respondent was taken into custody on that day. He was dealt with in December 2000 and was released from prison on 8 December 2000. He has now been at large for a period of approximately 10 months. He is an Aboriginal man who lives a traditional lifestyle in a remote community. He has reached the age of 32 years with no prior history of violence. To return him to prison would be a bewildering experience for him and an experience, I suspect, unable to be adequately explained. It would be unjust and probably counterproductive to now require him to return to prison.

[37] I would allow the appeal and set aside the sentence appealed from. Although in my opinion it is necessary for the Court to intervene rather than leave the sentence undisturbed it seems to me that any further sentence should be structured so that the conditional release should not be affected. I note that a majority of the Court does not agree that should be so and I say nothing more as to the appropriate sentence to be imposed in the special circumstances of this matter.
