Booth v The Queen [2002] NTCCA 1

PARTIES:	BOOTH, Tony
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	CA2 of 2001
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HEARING DATES:	20 March 2002
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

CATCHWORDS:

CRIMINAL LAW

Appeal – Appeal against sentence – sentence manifestly excessive.

Criminal Code 1983 (NT), s 131A(2), s 131A(3), s 131A(4), and s 139A

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	R Wild QC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecution

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Booth v The Queen [2002] NTCCA 1
No. CA2 of 2001

BETWEEN:

TONY BOOTH
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 24 April 2002)

MARTIN CJ AND MILDREN J:

[1] The appellant was granted leave to appeal against sentence imposed on him by the Supreme Court upon grounds set out in the affidavit in support of the application for leave. That affidavit disclosed, and it is common ground upon the appeal, that the appellant pleaded guilty to one count, that between 1 November 1999 and 30 June 2000, at Katherine, he maintained an unlawful relationship of a sexual nature with a child under the age of 16 years, and that the unlawful relationship involved a circumstance of aggravation, namely, that in the course of the relationship he had unlawful sexual intercourse with the child. The maximum penalty for such an offence

with that circumstance of aggravation is 14 years imprisonment (*Criminal Code* 1983 (NT) s 131A(2) and (4)).

[2] In this context the word "unlawful" means that the parties were not husband and wife (s 126), and consent of the victim is no defence (s 139A).

[3] The particular type of offence falls within a range of offences against morality which carry maximum penalties of imprisonment as fixed by the Parliament of 5, 10, 14 years and for life.

[4] He was sentenced on 20 December 2000 in the Supreme Court sitting at Darwin to imprisonment for eight years, and the learned sentencing Judge fixed a period prior to which he would not be eligible to be released on parole at four years.

[5] The agreed facts placed before the learned sentencing Judge are that the child, a female, was born on 18 November 1987 and the appellant on 17 April 1974. The child's mother had been in a de facto relationship with the appellant for about four years. Early in December 1999, the appellant commenced to have sexual intercourse with the child. In his record of interview he says that he had intercourse with her at least five times and another passage in the record indicates that he had intercourse with her once a week from December 1999 to July 2000 (s 131A(3)). The first of those acts occurred in early December 1999 when the appellant put a finger in the victim's vagina and then penetrated her with his penis and had sexual intercourse, only stopping when she said that it hurt. The other acts of

sexual intercourse involved penile penetration. The girl became pregnant and as a result the matter was reported to authorities. The appellant was interviewed on 10 August 2000 and made admissions upon which the case against him rests. He said that he believed the child was 12 years old and he knew that what he was doing was wrong.

[6] The appellant has no prior convictions, and as the learned sentencing Judge pointed out, he was before the Court as a person of good character as evidenced by references indicating that he was held in high regard and had demonstrated himself to be a very capable employee and a significant contributor to the community. The appellant's father gave evidence at the hearing. He holds a significant position in the aboriginal community where the appellant and victim resided and says that when the appellant is released from gaol he will take him out bush for three or four months and punish him in the aboriginal way by keeping him out of town and giving him cultural instruction. The appellant's relationship with his de facto wife is at an end.

[7] The learned sentencing Judge, having reviewed the circumstances of the offence and of the offender, said that he was to be given credit for the fact that he had no prior convictions and has in other aspects of his life been a positive contributor to the community, but pointed to what was termed "a serious aspect of the case", being the disparity in age between the victim and appellant, she being 12 at the time when the offence was committed and 13 when she gave birth to the child. The accused was a mature man of 25 years when the relationship began.

[8] Upon sentence, the Court was provided with a victim impact statement in which the victim said that when she first had sexual intercourse with the appellant she was frightened, that she had bled and that sex had hurt her and that she was told by the appellant not to tell anyone about it. She eventually told her mother. Although her mother was angry with the appellant, he continued to have sex with the victim. When the girl found she was pregnant she was scared of what was happening to her, worried about having a baby and had stopped going to school. The baby was born by caesarean section and the victim said she had been scared during the operation, but that she was happy once the birth was over. She said that she would not be able to continue regular schooling until the baby was older and that she was unable to do the same things as other girls of her age. She believed that having a child to care for would make it difficult to have future relationships with young men who would not want to take on the additional responsibility of another person's child. She was concerned about the attitude which other men may have towards her knowing of her history. She had been placed under the joint guardianship of the Minister and her maternal uncle as a child in need of care, the baby was also placed in care.

[9] Notwithstanding the information in the victim impact statement, the learned sentencing Judge found that the appellant felt guilty about what he had done and told his wife who directed him to stop. The evidence was that he did so of his own accord well before the matter was drawn to the attention of the authorities.

[10] The learned sentencing Judge remarked that the effect of the offence was to rob the victim of her childhood, had placed on her the responsibility of motherhood at a time when she should be free to continue her own pursuits and education and mature as a normal child. Her formal education had been severely disrupted, she had been isolated from her family and made to undergo significant, physical and emotional trauma and she felt vulnerable and alone. No criticism is made of the learned sentencing Judge's remarks in that regard and there is evidence to support all that was said. Clearly, the victim suffered physical, psychological and emotional harm (*Sentencing Act* s 5(2)(b)).

[11] The learned sentencing Judge also considered the consequences for the baby, which were regarded as more difficult to gauge, there was necessarily a degree of speculation in that regard. But, in our opinion, it was reasonable to conclude that the baby would not have in childhood the affection and support of his natural father and that the victim had been isolated from her immediate family, both she and her child being placed in care.

[12] In summary, the learned sentencing Judge repeated that the offence was a serious example of its type because of the disparity in ages between the offender and the victim, the very young age of the victim and the respective positions between them, he being effectively her stepfather. On the other hand, the appellant was given a discount in his sentence for his plea of guilty and cooperation with authorities given that he had spared the child the ordeal of giving evidence and the community the cost of a trial. It was

accepted that the appellant was remorseful for his actions. Particular attention was rightly given to the role of the courts in protection of young children from such acts of abuse and the role of general deterrence.

[13] The learned sentencing Judge was referred to a number of sentences imposed upon male offenders for sexual intercourse with children under the age of 16. The sentences varied widely, reflecting, as they must, a range of circumstances attracting varying penalties. There were distinguishing features such as the relative age of the offender and victim and the relationship between them. Those in a boyfriend-girlfriend relationship could be seen as having been punished less severely than those in relationships such as that as existed between the offender and the victim in this case. And so it should be. Adult male offenders in a relationship of trust with children and who have responsibility for their nurture and grossly abuse that relationship can normally only expect and deserve severe punishment by way of a lengthy custodial sentence.

[14] The grounds of appeal relied upon are that the sentence was manifestly excessive, it being put that the learned sentencing Judge failed to give adequate weight to matters going to mitigation such as the plea of guilty, remorse, absence of prior convictions and good character. It was acknowledged, however, that reference had been made to all of those matters in the course of sentencing remarks.

[15] It is true that the sentencer did not indicate the extent to which, and the manner in which, the plea of guilty had been given weight as a mitigating factor, but that is not an error. In the Court of Criminal Appeal, in *Kelly v The Queen* (2000) 113 A Crim R 263, it was said that that indication was desirable for a number of reasons, including transparency in the sentencing process and to enable appellate courts more closely to scrutinise sentencing. It was submitted by counsel for the appellant that given a discount of the order of 25 per cent, which might normally be expected to be allowed on a plea of guilty in the circumstances of a case like this, then the starting point for the head sentence must have been somewhere between 11 and 12 years.

[16] Given that the maximum penalty is imprisonment for 14 years, a starting point somewhat in excess of eight years in the circumstances of this case, indicates to us that the learned sentencing Judge fell into error in fixing a sentence which was not proportionate to the circumstances of the offence. That is so, notwithstanding the relative age of the offender and victim and the relationship between them. They are both serious, aggravating circumstances of the offence, but not such as to elevate it to the level which is indicated by the nominal sentence before allowing for the plea and all other mitigating circumstances.

[17] In argument, counsel for the appellant rightly drew particular attention to the penalties provided for in the *Criminal Code* for different grades of criminal conduct reflected in the range of penalties in relation to offences against morality. He invited the court to consider not only where this

offence fell within that gradation of offending, but also, where it fell within the range for offending of its type. We are not satisfied that there has been any range established in respect of offending of this type, that is, under s 131A(2) and (4) of the *Criminal Code*, there have been too few recorded cases from which any reasonable conclusion can be drawn as to such a range. Nor do we think that by bringing into account in trying to fix that range attention should be paid to cases for which the maximum penalty is life imprisonment. This Court's attention was drawn to but one such case, *R v Delrosario,* SCC 9806426, 10 September 1999, in which the same sentence was imposed where the circumstances relating to the relationship between the offender and the victim and the age difference between them were said to aggravate the circumstances of the offence to a greater degree than in this case. Nevertheless, we are not convinced that *Delrosario* provides a benchmark for establishing the upper end of the range for offences involving sexual assault by adult males upon girls under the age of 16.

[18] We consider the sentence imposed in this case to be manifestly excessive. We would reduce the head sentence to six years and fix the non-parole period at three years.

RILEY J

[19] I have had the benefit of reading the draft judgment prepared by Martin CJ. The relevant history is therein summarised and I will not repeat it here.

[20] In the course of submissions this Court was referred to a small number of sentences imposed under s 131A(2) and (4) of the *Criminal Code*. A consideration of those cases revealed that they involved a wide range of circumstances regarding the offences and the offenders and, consequently, significant differences in the sentences imposed. As was noted in the Court below the penalties for offences against s 131A are wide ranging. In my view it cannot be said that the sentences referred to establish a "tariff" or range of sentences applicable to offences of the kind now before the Court.

[21] The approach to sentencing in matters such as this has been discussed in other jurisdictions. It must be borne in mind that the offences are differently described in those jurisdictions and that the applicable maximum penalties vary. In *Podirsky* (1989) 43 A Crim R 404 Malcolm CJ (with whom Pidgeon J agreed) noted (at 411) that "a 'tariff' in relation to sexual offences remains as elusive as ever". The maximum penalty in that instance was imprisonment for 20 years. His Honour observed:

> "In the case of a single act of aggravated sexual assault by penial penetration much depends on the circumstances of aggravation, but where the relevant circumstance is that the complainant is under the age of 16 years, a sentence of about eight years is commonly imposed. Again this could be reduced by particular mitigating factors. Where there is a series of offences of aggravated sexual assault involving a girl under 16 years there is more room for variation, but sentences within the range of nine to 11 years are commonly imposed. … Once again this is subject to particular mitigating factors."

[22] In *D* (1997) 96 A Crim R 364 Doyle CJ discussed the application of s 74 of the *Criminal Law Consolidation Act (SA)* which section dealt with the

offence of persistent sexual abuse of a child. There the penalty was expressed in the following terms:

> "A person convicted of persistent sexual abuse of a child is liable to a term of imprisonment proportionate to the seriousness of the offender's conduct which may, in the most serious of cases, be imprisonment for life."

Doyle CJ distinguished between sexual offences relating to children under the age of 12 years and those relating to children over the age of 12 years. He said (374):

> "In my opinion offences involving unlawful sexual intercourse with children under 12 years of age, when there are multiple offences committed over a period of time, should attract as a starting point a head sentence of about 12 years imprisonment. In saying that I refer to a sentence imposed under s 74(7) of the Act and to a single sentence imposed under s 18A of the *Criminal Law (Sentencing) Act* 1988 (SA). That starting point would be subject to reduction on account of a plea of guilty, co-operation with the police, genuine contrition and so on. It is impossible to be precise in these matters and I do not wish to be taken as suggesting a precise figure. In an appropriate case a starting point might be higher or lower.
>
> When the child in question is over 12 years of age, in my opinion the starting point in such cases should be a head sentence of about 10 years imprisonment."

[23] In the present matter it was not suggested by the appellant that the learned sentencing Judge erred in any identified way by misapprehending the law or the facts or acting on a wrong principle. Rather it was submitted that the sentence was so manifestly excessive as to demonstrate error. In support of that submission it was put that the learned sentencing Judge failed to give any or any sufficient weight to the age of the appellant, the fact that he did

not have a prior criminal history, the fact that he was of positive good character, that he had been of assistance to police and also the fact that he had entered a plea of guilty. Reference to the sentencing remarks reveals that there was express reference to each of the matters identified by the appellant. There is nothing in the remarks themselves that would suggest that those matters were undervalued.

[24] In the absence of identified error and in order to establish that the sentence was manifestly excessive the appellant must show that the sentence was not just arguably excessive but that it was so "very obviously" excessive that it was "unreasonable or plainly unjust": *Raggett, Douglas & Miller* (1990) 50 A Crim R 41 at 47; *Salmon v Chute & Another* (1994) 94 NTR 1. As we are often reminded it is not enough that the members of this Court would have imposed a less or different sentence. There must be some reason for regarding the sentencing discretion as having been improperly exercised: *Cranssen v The King* (1936) 55 CLR 509 at 519-520.

[25] The maximum penalty for the offence to which the appellant pleaded guilty is 14 years imprisonment. In my view this was a serious example of that offence. The appellant engaged in penile penetration of his 12 year old step-daughter on a regular basis over a period of some six months. The first act of sexual intercourse took place in early December 1999 at a time when the child had just attained 12 years of age and continued over the succeeding six months. It was not disputed that the sexual relationship ceased when the

appellant discussed his conduct with the mother of the child and thereafter, at her request, sexual intercourse stopped.

[26] It was some time after this discussion that the police first became involved. By that time the victim was pregnant to the appellant and on 22 September 2000 she gave birth to a son by caesarean section. Prior to the birth of the child the appellant had been interviewed by police and made admissions. He pleaded guilty to the offence and co-operated with the authorities. He was remorseful. These matters were taken into account to his credit in the sentencing process.

[27] As I have observed the offence is a serious example of its kind. This was an offence against a 12 year old girl committed over a significant period of time by a man aged 25 years. The appellant was a member of the household and occupied the position of stepfather to the child. He stood in a position of trust and authority regarding his victim. Given her age and the nature of the relationship there can be no suggestion of consent. The impact of his conduct upon his victim and her child was and continues to be substantial. It will affect the victim on an on-going basis. She has been separated from her own mother and young siblings and placed under the care of the relevant Minister in a foster home. Her schooling has been "severely disrupted". As was observed by the learned sentencing Judge the offence robbed the victim of her childhood, isolated her from her own family and led to her undergoing significant physical and emotional trauma. She now has the responsibility of motherhood at a time when she would otherwise be able to

mature as a normal 12 and 13 year old. She feels vulnerable and alone. The impact upon her life is long term.

[28] Offences of this kind cause feelings of outrage and revulsion in the community and call for a penalty that reflects those feelings. Deterrence is a most important factor in the sentencing process. Courts must do what they can to protect young children from such conduct committed by those who occupy positions of trust in relation to them.

[29] Whilst it is significant that the appellant is a relatively young man with no prior convictions who is remorseful and, apart from this offence, of good reputation, and those matters are important in the sentencing process, the serious and on-going nature of the offending must be borne in mind.

[30] In relation to the submission that the learned sentencing Judge did not indicate the weight given to the plea of guilty in imposing sentence I note that whilst it may be desirable that such an indication be given it is not required: *Kelly v The Queen* (2000) 113 A Crim R 263. Counsel for the appellant submitted that a discount of the order of 25 percent would be expected in the circumstances of this case. In my view it is not appropriate to assume that a discount of a particular percentage will be provided by the court and to thereby seek to determine the sentence the sentencing Judge had in mind at a particular stage of the sentencing process. The extent to which, and the manner in which, credit for the plea is to be provided is a matter for the exercise of a judicial discretion. As is acknowledged in *Kelly v The*

Queen (supra at 270) the value of the plea may be reflected in a variety of ways. It may be reflected in the partial suspension of the sentence. It may be reflected in a discount applied to what otherwise would be the head sentence. It may be recognised by a combination of matters.

[31] I note that in the present case the appellant received the minimum non-parole period available under the *Sentencing Act*. Further, any discount applied to the head sentence may have been in a range that stretched above and below the figure suggested by the appellant. By way of example, if the sentencing Judge had in mind a discount of 20 percent, the head sentence would have been in the region of 10 years before discount and not the 12 years suggested by the appellant.

[32] In my view, in a case such as this where the nature and extent of the credit allowed for the plea of guilty is not identified, it is unhelpful to speculate on such matters. Rather it is necessary to consider the sentence actually imposed by the learned sentencing Judge in light of all of the surrounding circumstances to determine whether that sentence is manifestly excessive.

[33] The learned sentencing Judge characterised this offence as "a serious example of such offending" and made particular reference to the disparity in ages between the offender and the victim, the young age of the victim, the position of responsibility occupied by the offender and the consequences for the victim and her child. I agree. Although the sentence in this case may be

said to be stern in my view it cannot be said to be manifestly excessive. I would dismiss the appeal.

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