Alderson v The Queen [2002] NTCCA 10

PARTIES:	KENNY ALDERSON
	v
	THE QUEEN
TITLE OF COURT:	IN THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	CA22 of 2001 (20018453)
DELIVERED:	30 September 2002
HEARING DATES:	7 August 2002
JUDGMENT OF:	MARTIN CJ, MILDREN and THOMAS JJ

CATCHWORDS:

CRIMINAL LAW & PROCEDURE – SENTENCING –whether sentence imposed by sentencing Judge was manifestly excessive –whether sentencing Judge erred in not giving sufficient discount for plea of guilty by the appellant – whether the sentencing Judge erred in the way in which he took into account the appellant's prior convictions – whether the sentencing Judge erred in affording too much weight to the protection of members of Aboriginal communities from violence such that it offended the basic principle that all people stand equally before the law – whether the sentencing Judge erred by not taking into account the special impact of imprisonment upon Aboriginal people who live largely a traditional life - sentence on the face of it manifestly excessive.

Criminal Code 1999 (NT) ss 188(1), (2)(b) and (2)(m)
Veen v R (2) (1988) 164 CLR 465, *Cranssen v R* (1936) CLR 529, referred to.
R v Mulholland (1991) 1 NTLR 1; *Innes Wurramara* (1999) 105 A Crim R 512, applied.

REPRESENTATION:

Counsel:

Appellant:	T. Berkley
Respondent:	J. Adams

Solicitors:

Appellant:	Diana Elliott
Respondent:	Office of the Director of Public Prosecutions
Judgment category classification:	C
Judgment ID Number:	tho200210
Number of pages:	7

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

Alderson v The Queen [2002] NTCCA 10
No. CA22 of 2001 (20018453)

BETWEEN:

KENNY ALDERSON
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 30 September 2002)

THE COURT

[1] This is an appeal against sentence.

[2] The appellant pleaded guilty to a charge of aggravated unlawful assault, the circumstances of aggravation being that the appellant was a male and his victim was a female, and that the victim was threatened with an offensive weapon, viz., a stick, contrary to s 188(1), (2)(b) and (m) of the Code. This offence carries a maximum penalty of five years imprisonment.

[3] The facts in support of the charge as found by his Honour are as follows (Exhibit P1):

> "On the morning of 16 November 2000, the accused, Kenny Alderson drove with his brother-in-law, and others, including the victim, his defacto of some weeks, Marie Wesley, from Spring Peak Outstation into Jabiru town centre. On the return journey a carton of VB beer was purchased and some consumed during the journey home.
>
> Upon arriving at Spring Peak the group proceeded to the home of the accused's mother where they continued consuming alcohol while sitting on the verandah of the home.
>
> After a short time the brother in law of the accused returned to his own home and left the accused with his defacto. They both continued consuming alcohol on the verandah.
>
> An argument developed between the accused and his defacto. At this stage the victim was still sitting on the verandah of [the] home and the accused walked behind her with a stick and struck her on the back of the head causing a lump on the back of her head.
>
> The victim did not give permission for the accused to assault her in any way."

[4] A Victim Impact Statement was tendered (Exhibit P3). His Honour noted this and said (tp 58):

> "I have received a victim impact statement from Ms Wesley in which she tells me that her head was swollen; that she felt sick; and that she suffered a headache as a consequence of the assault. After that assault, she tells me, she left you because she was frightened of you."

[5] His Honour described the offence in the following terms (tp 58):

> "The offence to which you have pleaded guilty is, of course, serious. However, it is at the lower end of the scale of assaults of its kind. It was not ongoing. It did not cause the serious injuries that we often see in these courts."

[6] His Honour was presented with a record of the appellant's prior convictions (Exhibit P2). His Honour noted the prior convictions and stated (tp 60):

> "You have a long list of prior convictions, dating back to 1979. Unfortunately quite a few of those convictions are for assault and crimes of violence. Your first assault conviction was recorded in 1980. You have, in the past, been sentenced to lengthy periods of imprisonment for aggravated assault, unlawful wounding, assaulting a female, assaulting police, and offences of that kind.
>
> In November 1988 you were sentenced to 12 years' imprisonment for manslaughter. When you were released you continued to offend. It seems that your time in custody has not acted as a strong deterrent to violent behaviour on your part. This offence occurred in November 2000. Your last conviction for assault prior to this offence was in April 2000.
>
> Whilst you are not to be sentenced or punished again for your past conduct, your record makes it clear that the protection of the community and personal deterrence are matters that must feature prominently in the sentencing process. General deterrence is also an important matter.

[7] After taking into account other matters to which we will also make reference, his Honour imposed a sentence of three years imprisonment and fixed a non-parole period of two years and six months to commence from the date the appellant was taken into remand on 16 November 2000.

[8] The appellant complains first that his Honour erred in not giving sufficient discount for the plea of guilty by the appellant.

[9] The victim had been unavailable to give evidence at the committal and to the prosecution until the listing of the matter for trial on 4 September 2001. The victim was required to give evidence at a Basha Inquiry before the plea was made.

[10] On 4 September 2001 the prosecution offered no evidence with respect to Count 1 on the indictment, a charge of dangerous act involving another

person and quite different circumstances. The jury had been empanelled and returned a unanimous verdict of not guilty. Mr Alderson then entered a plea of guilty in regards to Count 2, the aggravated assault upon Marie Wesley.

[11] The appellant represented himself at earlier committal proceedings. He had an opportunity during the course of those proceedings to acknowledge his wrong doing and indicate an intention to enter a plea of guilty. He cannot be given full credit for entering a plea of guilty at the earliest opportunity. On this aspect his Honour made the following assessment (tp 59):

> "I am told that you have, in the past, not sought parole even when it was available to you. Reference to your prior criminal record does not support that claim. However, I accept that, at this time, you do not intend to take advantage of parole if it be granted. I will set a non-parole period, notwithstanding that indication, and the opportunity will be there for you if you seek to take it.
>
> Your only work history of which I am aware is a period of some months mango picking in Darwin. Your lack of a greater employment history probably reflects your traditional lifestyle.
>
> I am told that you are sorry for your offending on this occasion. If that be so, it is a sentiment that has only just occurred. It is not reflected in an early plea. Your victim had to give evidence yesterday.
>
> You have offered to pay money to your victim. That money is the money that you had intended to use for your defence. It becomes available because of the change of plea. I give that offer very little weight. The offer was not previously communicated to anyone. The victim does not know of it. The Crown learned of it this morning. If it happens, it will be to your credit. However, it has no impact upon the sentence I am about to impose.
>
> I accept that you may feel some sorrow for your victim, but only to a limited extent. The fact that you do feel that limited sorrow is a hopeful suggestion for rehabilitation in what is otherwise a very bleak landscape."

We do not consider his Honour has been shown to be in error in arriving at this conclusion.

[12] His Honour allowed a discount for the plea, of 15 per cent. We do not consider that this was inadequate.

[13] Next it was suggested that his Honour erred in the manner in which he took into account the appellant's prior convictions. In our opinion, no such error was shown. In *R v Mulholland* (1991) 1 NTLR 1 Angel J at p 13:

> "… The fact that the respondent was a convicted rapist at the time of the instant offence demonstrates, prima facie, an increased animus and culpability for the instance offence which ipso facto is deserving of greater punishment – and this is so quite apart from any question of a general propensity to re-offend after the time of sentencing. To impose a higher punishment a second time round is not a matter of adding anything to a so-called objective sentence; it is not a matter of punishing twice for the earlier offence: it is merely recognising that the prior offence is a circumstance relevant to the mens rea of the offender in committing the instance offence and that there is prima facie increased criminal culpability pertaining to the instant offence. The instant offence demonstrates an added disregard for the law, an added disregard for society in general and a further disregard for a particular member of society (the new victim) in particular. These matters reflect, in the absence of particular exculpatory facts, a more calculated animus in the case of the instant offence, and as I have said, this is so quite apart from any question of propensity to re-offend yet again. When courts speak of circumstances of the offence they do not mean what the hypothetical disinterested bystander sees and hears at the scene. That is not exhaustive of the circumstances of the offence. The offence is constituted by the actus reus and the mens rea of the offender."

See also *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at 477 – 478.

[14] It was further submitted that his Honour erred in affording too much weight to the protection of members of Aboriginal communities from violence such

that his Honour offended the basic principle that all people should stand equally before the law and that criminal sanctions should be applied uniformly (*Walker v NSW* (1994) 182 CLR 45 at 49 and *R v Woodley, Boogna and Charles* (1994) 76 A Crim R 302). We reject the suggestion that by his remarks his Honour was indicating that the appellant did not stand equally before the law. His Honour may well have borne in mind what fell from the Court of Criminal Appeal in *Inness Wurramara* (1999) 105 A Crim R 512 where the issue regarding sentencing of Aboriginal offenders for violent offences against members of Aboriginal communities was dealt with in detail. The Court there made it clear at p. 520 that Aboriginal offenders are not treated differently from other offenders in the wider community, but that usual matters considered in relation to the imposition of sentences will apply. The weight to be given to those matters, however, will usually vary from case to case (see the extract from the judgment of Justice Brennan in *Neal* (1982) 149 CLR 305 at 326 quoted in *Wurramara* at 522).

[15] It was also urged that his Honour erred in not taking into account the special impact of imprisonment upon Aboriginal people who live a largely traditional life, such as the appellant. Reference was made to *Leo Juli* (1990) 50 A Crim R 31. It is plain that his Honour referred to the appellant's personal circumstances including his largely traditional lifestyle and we are not satisfied that he failed to make due allowance for that factor.

[16] Whilst the appellant has not been able to identify any specific error on the part of the learned sentencing Judge, we consider that a sentence of three

years six months reduced to a head sentence of three years imprisonment with a non-parole period of two years six months is manifestly excessive in all the circumstances of this case (*Cranssen v R* (1936) 55 CLR 529).

[17] On 7 August 2002, we allowed the appeal and ordered that the sentence imposed by the sentencing Judge be quashed and, in lieu thereof, a sentence of imprisonment for 12 months be imposed. We also ordered that there be no order suspending any part of that sentence and declined to fix a non-parole period. The sentence was backdated to take effect from the date on which the appellant was taken into custody, viz., 16 November 2000.

[18] In imposing a head sentence of 12 months we allowed for a 15 per cent reduction in sentence for the plea of guilty. In declining to fix a non-parole period, it was our view that the past history of the appellant made this inappropriate: see s 55(1) of the Sentencing Act.

[19] On 7 August 2002 we stated that we would deliver reasons for our decision at a later date. These are our reasons.

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