Williams v The Queen [2013] NTCCA 12

PARTIES:	WILLIAMS, Donathon v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 12 of 2013 (21131552)
DELIVERED:	12 September 2013
HEARING DATE:	3 September 2013
JUDGMENT OF:	RILEY CJ, SOUTHWOOD and HILEY JJ
APPEALED FROM:	KELLY J

CATCHWORDS:

CRIMINAL LAW — Sentencing — Provocation manslaughter — Sentencing judge considered provocation manslaughter generally more serious than reckless or negligent manslaughter — No error where facts of individual case considered.

CRIMINAL LAW — Sentencing — Provocation manslaughter — Degree of provocation a mitigating factor — Prisoner discovered deceased spouse and second victim engaging in act of sexual intercourse — Sentencing judge erred by finding a moderate degree of provocation.

CRIMINAL LAW — Sentencing — Manifest excess — Provocation manslaughter — Unlawfully causing serious harm — Sentencing standards

— Sentence imposed significantly out of step with sentences imposed for similar offending — Appellant re-sentenced.

Criminal Code (NT) s 161, s 181
R v Alexander (1994) 78 A Crim R 141, referred to

REPRESENTATION:

Counsel:

Appellant:	P Callaghan SC with G Betts
Respondent:	S Geary

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Ril1311
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Williams v The Queen [2013] NTCCA 12
No. CA 12 of 2013 (21131552)

BETWEEN:

DONATHON WILLIAMS
Appellant

AND:

THE QUEEN
Respondent

CORAM: Riley CJ, Southwood and Hiley JJ

REASONS FOR JUDGMENT

(Delivered 12 September 2013)

The Court:

[1] On 12 December 2012 the appellant pleaded guilty to one count of manslaughter and one count of unlawfully causing serious harm. He was sentenced to imprisonment for a period of 17 years with a non-parole period of 12 years. He has been granted leave to appeal against sentence on three grounds and seeks to add a fourth. The application is not opposed and leave to appeal on ground 4 was granted at the hearing.

Circumstances of offending

[2] The appellant and the deceased had been in a de facto relationship for approximately one year before the offence. They usually lived in Ali Curung but, on 15 September 2011, they travelled to Alice Springs.

[3] On the afternoon of 19 September 2011 the deceased appeared to be yelling at the appellant on a public Street in Alice Springs. Thereafter the appellant purchased alcohol and, along with others, drank it in the bed of the Todd River. At about 8 pm he told a witness that he was looking for the deceased and said: “If I find her I am going to bash her”.

[4] That evening, the appellant saw the deceased get into a taxi with Rodney Tracker at a taxi rank near the Yeperenye Shopping Centre. CCTV footage played at the trial showed the appellant chasing the taxi down the street at 8:46 pm. The appellant was seen by a witness who thought he looked upset. The witness asked what was wrong and the appellant said: “I am looking for my wife. She jumped in a taxi. I’m going to bash her with my fists”.

[5] Later in the evening the appellant found the deceased with Mr Tracker at the Todd River. They were, or at least appeared to the appellant to be, engaging in sexual intercourse.

[6] The appellant became angry. He was wearing steel-capped boots and he assaulted Mr Tracker by kicking him to the face approximately four times. Mr Tracker did not resist. He received several serious injuries, including a broken nose and broken teeth. He suffered internal bleeding and required

treatment and hospitalisation for several days. It was not contended that the appellant intended to cause him serious harm.

[7] After assaulting Mr Tracker, the appellant assaulted the deceased. The deceased was lying down and did not resist. He kicked her hard to the face four times with the heel and toe of his steel-capped boots. He also kicked her two or three times to the ribs with force he described as “pretty hard”. At some point he struck her with a stick, which broke on the second strike. It was acknowledged by the Crown that the blows from the stick did not cause the death.

[8] The appellant then dragged the deceased to a nearby tree and he lay next to her. He thought she was asleep. At some time during the night he left her for a period and when he returned he again thought she was asleep.

[9] In the morning, the appellant dragged the deceased away from the tree and out into the sun, as her body was cold. He pulled her while she was lying face down. According to the forensic pathologist, the injuries to her ears were consistent with her being dragged and her head lolling from side to side. The lacerations to the front of her torso were consistent with her being dragged over a rough surface. The appellant left her lying face down in the sand. It was the Crown case that the deceased was dead at the time she was dragged to the point where the body was located.

[10] The police observed drag marks consistent with heel/toe marks from the point of the initial assault over a distance of 17.75 m to the tree. They also

observed drag marks from the tree over a further distance of 31.37 m to the position where the body of the deceased was found.

[11] In his record of interview the appellant said that after he had pulled the deceased into the sun he left her and recommenced drinking. He said he later asked a witness to help take the deceased to the hospital but the witness' car had broken down.

[12] The deceased suffered extensive injuries. She suffered a subdural haemorrhage over the left cerebral cortex with further subdural bleeding over the base of the brain. She suffered a closed fracture to her left upper arm and three broken ribs. A wound to the right scalp was noted to extend deep into the periosteum. Her bowel was perforated.

[13] The cause of death was a subdural haemorrhage to the brain following blunt force trauma. It was concluded the deceased would have remained alive for at least two hours following the assault and that, with medical attention, she may have lived. It is not clear whether, after being assaulted, she was rendered unconscious or she maintained a level of consciousness for some time.

[14] The appellant did not at any time seek medical attention for the deceased. Her body was discovered lying face down in the sand. The appellant was present at the scene when ambulance officers placed a blanket over her head. He did not identify himself to police or ambulance officers.

[15] After the offending the appellant asked a witness for his shirt and placed that shirt over the shirt he was wearing. He threw his black cap on the ground and walked off into the Todd Mall. At about 10am he went to an opportunity shop and purchased some cream coloured jeans and disposed of the blue jeans he had been wearing at the time of the offending. Later, the appellant washed his boots and left them in a flat at Amoonguna, where they were subsequently located by police. When tested, the boots bore traces of the blood of the deceased. The sentencing judge concluded all of these acts were attempts on the part of the appellant to avoid detection.

[16] Her Honour observed that the attitude of the appellant to the deceased during and after the attack was "marked by unbelievable callousness." It was also noted that Mr Tracker was left unconscious in the riverbed and the appellant made no attempt to get medical help for him.

[17] By any measure this was a serious and prolonged attack on two victims who could not and did not resist. The violence was horrifying. The consequences for Mr Tracker were serious. The consequences for the deceased were fatal. The actions of the appellant following the assaults were callous and reflected a disregard for his victims. These were serious offences.

[18] The appellant was arrested on 22 September 2011. He cooperated with the police, making admissions in relation to his involvement in the offending. The appellant was originally charged with murder but the Crown eventually accepted a plea to provocation manslaughter. Whilst his pleas to the

offences on the indictment did not come at the earliest opportunity, they were, in the circumstances, timely and indicated some acceptance of responsibility. However, there was no sign of any feelings of remorse on the part of the appellant before the sentencing court.

[19] The sentencing judge was told that the appellant had a lengthy criminal history extending over many years. The history included seven prior convictions for aggravated assault, with five of those assaults being upon women. In 2000 he was sentenced to imprisonment for four months for assaulting a female; in 2006 he was sentenced to imprisonment for two months for assaulting a female; in February 2008 he was sentenced to imprisonment for four months for assaulting a female; in November 2008 he was sentenced to imprisonment for five months for assaulting a female; in June 2010 he was sentenced to imprisonment for five months for assaulting a female; in November 2010 he was sentenced to imprisonment for six months for aggravated assault and, again in November 2010, he was sentenced to imprisonment for three months for aggravated assault.

The sentences

[20] On 12 December 2012 the appellant was sentenced.

[21] In relation to the offence of manslaughter, the judge identified a starting point of imprisonment for 18 years and, in relation to the charge of causing serious harm, identified a starting point of imprisonment for six years. Her Honour then discussed the need for concurrency and directed that the

sentence for causing serious harm should be served cumulatively upon the sentence for manslaughter to the extent of two years, giving a total sentence of imprisonment for 20 years. This term was reduced by a further 15% to recognise the utilitarian value of the plea of guilty entered by the appellant. The appellant was sentenced to imprisonment for 17 years with a non-parole period of 12 years.

Ground 1: The sentencing judge erred in her approach to the partial defence of provocation for the purpose of punishment

[22] The appellant gave particulars of this ground, being that the sentencing judge erred by:

(a) sentencing on the basis that provocation manslaughter is generally more culpable than other forms of manslaughter;

(b) sentencing on the basis that the degree of provocation was not any more than "moderate"; and

(c) singling out, as something that put the appellant's case towards the more serious end of the scale, the degree of violence displayed by the appellant.

[23] In relation to the issue of provocation manslaughter her Honour observed in the course of her sentencing remarks:

> There is not an established tariff, an established length of sentence for the crime of manslaughter, because circumstances in the various crimes of manslaughter are different, they can vary almost infinitely, but the starting point is always that manslaughter involves what has

> been described by another judge as, "the unlawful taking of a human life, one of the gravest offences against ordered society".
>
> Although it is impossible to make absolute statements about these matters because of the range of different possibilities, provocation manslaughter, that is, the kind of crime that you have committed, is generally more culpable, more serious and more blameworthy, than reckless or negligent manslaughter because the intention was to either kill or cause serious harm. I accept, and the Crown has not disputed this, that your intention was to cause serious harm to [the deceased].

[24] It is apparent from this passage that her Honour first made reference to a general proposition and then focused on the circumstances of the particular offence. The judge sentenced on the basis that the offender intended to cause serious harm to his victim. That was a conclusion consistent with the evidence placed before the court and is not challenged on appeal. The judge did not proceed to compare or contrast this particular case with any case of reckless or negligent manslaughter. The sentence was determined on the basis of the particular facts in the matter before the court.

[25] In this regard we see no error on the part of the sentencing judge.

[26] It is convenient to deal with particulars (b) and (c) together. In relation to the issue of provocation the judge said:

> Now in cases like this, I need to take into account the degree of provocation involved, that is, the lack of self-control that you suffered at the time. The higher the degree of provocation then that has a tendency to reduce the gravity, the seriousness of the offence.
>
> I have to take into account the time between the provocation, that is, what you saw that caused you to lose self-control, and the loss of self-control, what you did. The shorter the period of time, the shorter

> the gap, then that has a tendency also to reduce the severity, the gravity of the offence.
>
> I am also obliged to take into account the degree of violence or aggression that you displayed because the more violent, the more aggressive, the more extreme your reaction then that has a tendency to increase the seriousness of the offence.

[27] Those observations are unexceptional and are consistent with the propositions articulated by Hunt CJ at CL in *R v Alexander*.[1] The judge went on to observe that the appellant did lose his capacity to exercise self-control as result of what he either saw or thought he saw, being that his two victims were engaging in sexual intercourse. Her Honour accepted that the appellant acted immediately and had no time to calm down. It was noted that the degree of violence and aggression displayed by the appellant was extreme and placed the case towards the more serious end of the scale of offences of its kind. The appellant was said to have "acted with savage fury as demonstrated by the number and nature of the injuries" inflicted upon both victims.

[28] In relation to the degree of provocation her Honour said:

> So while I do accept that you did lose control, I do not regard the degree of provocation as very serious, I do not regard it as any more than moderate, which means that it does not much reduce the gravity of your offence.

[29] It was the submission of the appellant that this observation is contrary to human experience. It was argued that the very thought of spousal infidelity

[1] (1994) 78 A Crim R 141 at 144.

can have a profound effect on the behaviour of otherwise rational individuals and, in this case, the appellant had actually observed what he understood to be infidelity. It was submitted that to characterise such provocation as "moderate" gives insufficient recognition to the importance of trust and intimacy in a committed relationship.

[30] In considering the degree of provocation it is necessary to take into account all the circumstances of the particular case. In this matter the appellant had expressed the desire to assault the deceased long before the assault occurred. To the extent that the appellant intended to assault his victim there was a degree of premeditation. However, that expressed intention was overwhelmed by the appellant finding the deceased and Mr Tracker in a compromising position. Her Honour observed that:

> The savagery of the attack, that is, the intention to cause serious harm was not planned, it was a result of that loss of control.

[31] In our opinion, the description of the provocation as being no more than "moderate" and not "very serious" fails to acknowledge and accord due weight to the confronting circumstances which led to the appellant losing control. The appellant was met with conduct that amounted to a significant provocation.

[32] The offence was attended by a serious degree of violence and it was appropriate for this to be identified as a factor in determining an appropriate sentence. However, it was necessary for the judge to also consider the

degree of provocation and the extent to which the appellant lost control as a consequence when determining whether the offending was "towards the more serious end of the scale". In our opinion it was necessary to consider all of the attending circumstances in determining the seriousness of the offending. We agree with the assessment of her Honour that, in the circumstances of this case, the offending was towards the more serious end of the scale.

Ground 2: The sentencing judge erred in finding that the assaults were "to a certain degree, premeditated"

[33] The appellant submitted that there was no basis to conclude that there was any premeditation in relation to the assault on Mr Tracker. That is so. It was argued that the effect of the earlier statements of the appellant regarding an intention to "bash" the deceased was limited.

[34] In our opinion there was a sufficient basis for her Honour to reach the conclusions expressed. The appellant had made a number of threats to "bash" the victim before the offence. In addition, he had seen both Mr Tracker and the deceased get into a taxi and he chased the taxi down the street. The appellant was aware that the deceased and Mr Tracker were together and, when he found them in the Todd River, he attacked Mr Tracker first and then the deceased. The attack was part of the same course of conduct. The use by her Honour of the expression "to a certain degree" qualifies the finding of premeditation. It does not suggest that there was significant premeditation. The degree of premeditation consisted of the

matters her Honour had described in the course of her sentencing remarks. Read in context we see no error in that description.

Ground 4: The sentencing judge erred in sentencing the appellant for the charge of "intentionally causing serious harm"

[35] It is convenient to deal with Ground 4 before dealing with Ground 3.

[36] The appellant was charged with causing serious harm to Mr Tracker under the provisions of s 181 of the *Criminal Code* (NT). The offence carries a maximum penalty of imprisonment of 14 years. In the course of her sentencing remarks the judge referred to the charge of "intentionally causing serious harm"," which is an offence under s 177 of the *Criminal Code* and carries a maximum penalty of imprisonment for life. The appellant submitted that the sentencing judge erred in sentencing the appellant in relation to the charge of "intentionally causing serious harm".

[37] In our opinion this ground of appeal cannot be sustained. A fair reading of the sentencing remarks makes it plain that her Honour was dealing with the offence of unlawfully causing serious harm contrary to s 181 of the *Criminal Code*. Her Honour identified that as the relevant offence at the commencement of the sentencing remarks. Although her Honour referred to "the charge of intentionally causing serious harm" when imposing sentence at the end of those remarks, it would seem this was a slip of the tongue. When reciting the facts her Honour did not refer to an intention to cause serious harm either directly or by necessary inference.

[38] Apart from the one reference to “intentionally causing serious harm” there was nothing in the sentencing remarks to suggest her Honour proceeded under any misapprehension as to the true nature of the offence to which the appellant pleaded guilty. It was a slip of the tongue. This ground of appeal is not made out.

Ground 3: The sentence is manifestly excessive

[39] It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error and the appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is 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 as to manifest such error. In relying upon a ground of manifest excess it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously and not just arguably excessive.

[40] There is no tariff for the offence of manslaughter as the offence may involve a wide variety of circumstances and degrees of culpability. This Court was referred to a wide range of sentences in other matters of a similar kind and, although there is no tariff, the sentence imposed on this occasion was significantly out of step with the sentences to which reference was made.

Similarly, the sentence imposed in relation to the offence of unlawfully causing serious harm was also out of step with sentences imposed for similar offending.

[41] In our opinion, and bearing in mind all of the matters identified by the sentencing judge, the sentence imposed was manifestly excessive. There was a significant disparity between the sentences imposed and current sentencing standards for such offences. The appeal is allowed.

Resentence

[42] In relation to the offence of manslaughter it is our view that the appropriate starting point would be a sentence of imprisonment for 15 years. In relation to the offence of unlawfully causing serious harm a starting point of imprisonment for four years would be appropriate. Bearing in mind the need for concurrency identified by the sentencing judge and the totality principle, we direct that the sentence in relation to the offence of unlawfully causing serious harm be served cumulatively upon that for the offence of manslaughter to the extent of one year, giving a total of 16 years.

[43] The appellant was initially charged with murder and it was not until the day of the plea that an indictment charging manslaughter was presented. The appellant then entered a plea of guilty to the charge. Although this followed a committal hearing at which witnesses were called, the plea of the appellant to the charge of manslaughter came at a relatively early time. It followed a change of heart on the part of the prosecution. The appellant had made

admissions as to his conduct at the time of the offending and had been cooperative with the authorities. In our opinion a discount of approximately 20% for the plea is appropriate.

[44] We sentence the appellant to imprisonment for a period of 13 years. We set a non-parole period of seven years.

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