

PARTIES: WADE, Antony Francis
v
THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL (NT)

JURISDICTION: APPEALS from SUPREME COURT

FILE NOS: No. CA 7 of 1993

DELIVERED: Darwin 7 April 1994

HEARING DATES: 4 March 1994

JUDGMENT OF: Angel, Priestley and Gray JJ

CATCHWORDS:

Criminal law and procedure - Sentencing - Armed robbery -
Sentence manifestly excessive - Sentence outside range -
Not safe to infer from evidence that victim was stabbed
or cut with knife -
Appeal - Appeal against sentence - Manifestly excessive -
Sentence outside range - Not safe to infer from evidence
that victim was stabbed or cut with knife -

REPRESENTATION:

Counsel:

Appellant: M Weinberg QC and S Cox
Respondent: C Cato

Solicitors:

Appellant: NT Legal Aid Commission
Respondent: Director of Public Prosecutions

Judgment category classification: A

Court Computer Code:

Judgment ID Number: ang94007

Number of pages: 15

ang94007

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

No. CA 7 of 1993

ON APPEAL from ASCHE CJ
SCC No 193 of 1991

BETWEEN:

ANTONY FRANCIS WADE
Appellant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, PRIESTLEY JJ and GRAY AJ

REASONS FOR JUDGMENT

(Delivered 7 April 1994)

ANGEL J: I agree with Priestley J that the appellant committed 'a very nasty crime' warranting a severe sentence. I also agree with his reasons and conclusion that leave to appeal should be granted, and that the appeal should be allowed, and with the orders he proposes.

PRIESTLEY J: This case was heard immediately after the cases of Spicer, Tartaglia and Fotiades and the cases of the Lilliebridge brothers. In all of them, the decisions were reserved. As in the earlier cases, the offence in the present case was armed robbery.

Mr Wade pleaded guilty and was sentenced by Asche CJ to ten years imprisonment for the armed robbery offence, two years concurrent upon a plea to another charge and was given a non-parole period of four years. He has applied to this court for leave to appeal against his ten year sentence and four year non-parole period. I will call him the appellant.

In dealing with this case I have the same factual matters concerning the history of sentences for armed robbery in the Northern Territory in mind as I did in reaching my conclusions in the other cases. It does not seem necessary to repeat here the details available in my reasons in those other cases, although it seems convenient to attach the Table, giving very bare details of sentencing history, used in that case, to these reasons also.

The appellant, who had a long history of alcoholism, drug addiction and criminal convictions, including some for assault, had been drinking in the home of some friends with whom he had been staying, when, in the early hours of 1 September 1991 he rang for a taxi to take him from the Driver Supermarket in Palmerston to Darwin. He was drunk at

the time. The taxi which responded to his phone call was driven by Miss Shaw and arrived to pick him up at about 2.08am.

As the taxi was going along the Stuart Highway towards Darwin, the offender told Miss Shaw to pull over. From here, I set out the critical part of the rest of the story in the words of the Crown to Asche CJ:

"Miss Shaw looked at him and noticed that he was holding a serrated edged stainless steel kitchen knife with an 8 inch blade about 4 inches from the left side of her face. She said: 'What's that?' and he replied: 'That's a knife. I'll use it, too.' She continued to drive and the accused moved the knife away from her face and jabbed her left thigh at a point about 6 inches above the knee with the point of the knife.

Miss Shaw pulled off the side of the Stuart Highway about halfway between BP Palms and Palmerston and left the motor running. She turned to the accused and grabbed his right hand in which he was holding the knife, attempting to push the hand away from her. The accused pulled the knife from her thigh and thrust it towards her left ribcage area saying: 'I've got another one; it's even sharper.' He then produced a second knife and held it in his left hand. This knife was a stainless steel kitchen knife with a sharp straight edged blade measuring about 4 inches.

At this time he was holding two knives, with the large one pointed towards her body. He said: 'I'll slash your fucking face if you don't hand over the money.' He also said: 'Hurry up and turn all the lights off.' Shaw then turned the outside and inside lights off and at that time attempted to activate the emergency alarm located under the taxi dashboard with her left foot.

The accused then became impatient and began waving the large knife about 4 inches from her face, saying: 'Hurry up.' Miss Shaw reached down to remove her purse from her lap, reached into the purse and gave the accused the bundle of notes. The accused replied: 'Come on, where's the rest? Where's your tin?' Miss Shaw said: 'I don't have a tin. What do you want?' All my silver as well?' The accused replied: 'No,' and removed the knife from her face, looking under her legs for more money.

At this point he said: 'Come on, where's the rest of it or I'll slash your face, believe me.' Miss Shaw then saw headlights in the distance in her rear vision mirror and removed her seat belt. The accused once again held the large kitchen knife up to her face, saying: 'Come on.' Miss Shaw then wrenched open the driver's door of the taxi, alighted and ran into the path of an on-coming car, waving it down."

Miss Shaw made good her escape. The offender then himself made off in the taxi, ending up by losing control of it and causing extensive damage to it in collision with some trees. He was arrested some hours later and admitted, for the most part, the facts I have set out.

The charge to which he pleaded guilty in addition to that of armed robbery was of unlawfully using a motor vehicle. Asche CJ sentenced him on 19 August 1992, after considering the circumstances of the two offences as they were presented by the Crown and after giving detailed consideration to the offender's very troubled past and bad criminal record. The appellant had been in custody for some time. The starting time of the sentences was fixed as 19 January 1992.

There are a number of features about the sentence requiring comment. The first and most obvious, and the one upon which principal reliance was placed on the appellant's behalf by counsel arguing that the sentence was excessive, was that it was the highest sentence anyone could recall for an armed robbery carried out by a single person. This contention is borne out by reference to the Table attached to these

reasons, although I should point out I do not know whether that Table is complete, and suspect it is not.

The second feature relating to the sentence is that the appellant's counsel, in urging the mitigating circumstances said to exist in the case because of his client's difficult personal history, submitted to the judge that ordinarily the range for such an offence would be eight to ten years. On the materials available to this court, which although they may be incomplete, are all the court has to go on, that seems to have been a mistake, and one which may well have influenced his Honour in taking the approach that he did.

The third feature is that it may well be that his Honour was under the impression that the appellant had inflicted a knife wound on Miss Shaw. In his reasons for sentence Asche CJ repeated the words from the statement of facts to the court which I have reproduced above, "jabbed her left thigh" and, later, "pulled the knife from her thigh". Clearly the judge would have been minded to impose a severer penalty upon the appellant if he had wounded Miss Shaw with the knife than if he had not.

It is because of this third consideration that I earlier set out the exact words of what the court was told. What happened at the sentencing hearing was that counsel for the Crown from the Bar table told the court what the Crown said were the facts, without objection from the appellant. So far

as I have been able to see from the appeal papers, nothing more was put before his Honour than appears in what is set out above, concerning the jabbing of the knife into the thigh. Nowhere in the materials is there any reference to skin having been broken or any evidence by Miss Shaw that she was physically wounded. Counsel for the Crown mentioned no such thing in his address to the court. There is no medical report in the appeal papers mentioning any such thing. Indeed, the concluding part of the statement of "crown facts" was that Miss Shaw's evidence was

"that during the entire incident she felt terrified and in fear of her life. She said that: 'I believed that if I did not comply with his demands for the money, the man would have stabbed and killed me.'"

In light of the absence of any mention of any wounding of Miss Shaw, I have read again the references in the statement of facts to the jabbing in the thigh and the pulling of the knife from the thigh and have come to the conclusion that it would not be safe for the court to infer from those statements that the appellant stabbed or cut Miss Shaw with the knife. That he had done so would be a natural enough inference simply from the two references in the statement that I have isolated, but in view of the other matters I have mentioned, it does not seem to me a safe inference in the wider context of the materials as they were left before his Honour.

The three matters I have mentioned as requiring comment in regard to the ten year sentence have, in combination, led

me to conclude that the sentence imposed by the Chief Justice was appealably excessive. The first of the three matters, that the sentence was the highest of its kind ever imposed, so far as anyone has been able to check, in the Northern Territory, for such an offence, would not necessarily be a reason in itself for concluding that it was excessive. Nevertheless, after surveying as well as I can the cases from the Table attached to these reasons most readily comparable to the present case (and I have not been able to find any very exact match) the sentence does seem to be distinctly more severe than any imposed in the past. The explanation for this seems to me to lie, very probably, in the second and third matters.

The result is that the sentence seems to me, with respect to the Chief Justice, to have been manifestly excessive, and should, in my opinion, be reduced. The appropriate term, in my opinion, would be seven years. This would reflect the court's reaction to what was a very nasty crime. It is wholly believable that Miss Shaw was, as she said, in terror throughout the episode. What she was subjected to was drunken, ferocious threats of disfiguring violence by a man giving every appearance of intending to carry them out, and a severe sentence seems to me to be necessary.

In regard to the non-parole period, the appellant's past history seems to me to be very relevant. I rely upon the

details set out by Asche CJ in his reasons of which I give only a brief summary.

The appellant had come from a broken home and from at the least the age of thirteen had had recurring problems with alcohol and his relationships with other people. The opinion of a psychologist was that the pattern of Mr Wade's relationships with his parents, his brothers and the women with whom he married or formed relationships showed that his method of dealing with conflict was to create distance from those with whom he was in conflict; that he then used alcohol and drugs to boost his self-confidence and to escape from the worry and anxiety that goes with unresolved conflict; that he had more unresolved conflict than most people; that the drugs did nothing to resolve the conflict and were associated with acts of violence; and that the result of losing inhibition from violence when under the influence of alcohol and/or drugs had led not only to conflict with the law and imprisonment but even more stress and acts of uncontrolled violence. The same psychologist was of opinion that the appellant was beginning to recognise his basic problems and that he would continue, if in a position to do so, to make good use of drug rehabilitation counselling and support services. There was, however other evidence appearing in a pre-sentence report suggesting that the appellant went through cycles in which his condition appeared to improve and he made some use of rehabilitation opportunities, only to relapse again.

Asche CJ's conclusion was that although there were some indications that the appellant at least had the intention of trying to control his drugs and drinking there really was not much to make him confident in any sentence which contemplated early release (which was what the appellant's counsel was asking for) in order to allow the appellant to continue his rehabilitative treatment. Asche CJ summarised his view of the evidence:

"I think the best I can say for the accused is that he does hold an intention, at this point, to endeavour to grapple with his drug and alcohol addiction and, I trust, with his general behaviour in society; but that his behaviour previously; his previous convictions; and, indeed, the assessment of the writer of the pre-sentence report with which I tend to agree, indicates that intentions may not be sufficient here; that he may well commence a course of reform but one can have little confidence that he will follow it through."

On this basis he concluded that he could not accede to the appellant's counsel's submission that an order should be made under the Conditional Release of Offenders Act.

I agree with what Asche CJ said about these matters. It seems to me that in the circumstances of the case a non-parole period of three years and six months is appropriate given the head sentence is reduced from ten years to seven.

I would propose that leave to appeal be granted, that the appeal be upheld, and that orders be made imposing the sentence and non-parole period I have suggested.

ARMED ROBBERY

Number	Supreme Court Number	Name	Type	Date of Sentence	Sentence	Notes
1	309/80 311-312/80	Valentini Garvie	Food Bar at Service Station	4. 7.80	2 yrs suspended GBB	Appeal dismissed (1980) 48 FLR
2		Pesti	Car	Mentioned by Judge in Da Costa (No 8 below)	5 yrs, NPP 2.5	
3	93-5/84 96-8/84	Davies Aden	Veterinary Clinic	13.06.84	4.5 yrs, NPP 1.5 4.5 yrs, NPP 1.5	
4	167/83	Molina Co-offender	Supermarket	24.08.84	5 yrs suspended GBB 8 yrs, NPP	Appeal dismissed (1984) 2 FCR 508
5	171-173/84	Clowes	Supermarket	18.10.84	5 yrs, NPP 1.5	
6	150-151/85	Winter	Service Station	18. 7.85	6 yrs, NPP 2.5	
7	334/85	Boyd	Blg Co Payroll	12.11.85	5 yrs, NPP 2.5	
8	239-40/86	Da Costa	Service Station	2. 9.86	4 yrs, NPP 1.5	

9	385/86	Perkins	Restaurant	10.11.86	4 yrs, condit release after 12 months. Sentence reduced from 6 yrs, NPP 2.5 yrs, accused to give evidence against co-offender.	
10	2/93	Duffy Sheehan	Casino	21. 5.87	10 yrs, NPP 4.5 4 yrs, NPP 1.5	Concurrent with many others
11	4/88	Peters	Bank	20. 7.88	Bond without sentence (schizophrenic)	
12	188-9/88	Armstrong McLean	Service Station	5. 6.89	4.5 yrs, NPP 2 5 yrs, NPP 2yrs 3m	
13	90/89	Garden	Shop	19. 7.89	9 mths - released forthwith	
14	158/89	Lethborg	Supermarket	30. 1.90	6 yrs, NPP 2	
15		Price	Dwelling House	10. 5.90	8 yrs, NPP 3.5	Part of 11 yrs total for a number of offences, 3.5 NPP for the lot

16		Ella	Motel rooms	25. 6.90	3.5 yrs, NPP 1	
17	143/89 141/89 142/89 144/89	Rosas Macaw M. Lui T. Lui	Service Station	12. 7.90	7 yrs, NPP 3.5 18 m rel after 4m 2 yrs, NPP 9 m 1 yr, NPP 6 m	
18	23/90	Roper	Dwelling House	19. 7.90	8 yrs, NPP 3	Same robbery as Price (No 15 above) with fewer further offences
19	51/89 52/89 53/89	S. McMahon Harmon B. McMahon	Post Office	25. 7.90	7 yrs, NPP 3 4 yrs, NPP 1.5 5 yrs, NPP 2	
20	94/90	O'Neil	Bank	7. 9.90	3 yrs, NPP 1.25	
21	115/90	Belpario	Service Station	14.11.90	2.5 yrs, NPP 1.25	
22	79/90	Espie		19.11.90	5 yrs, NPP 2	
22	93/90	Cumayi		19.11.90	2 yrs, NPP 1	
23	1/90 35/90	Brister	Takeaway Store	12. 3.91	4 yrs susp HDO 8 m	

24	3/91	Wells	Bank	15. 3.91	4 yrs, NPP 2	
25	16/91	Burke	Service Station	15. 3.91	3 yrs, NPP 1	
26	28/91	Gittins	Takeaway Store	25. 3.91	2.5 yrs, NPP 1.25	
27		C. Brister		25. 3.91	2yrs 2m, NPP 3 m	
28	57/91 58/91	Parnell Daly	Supermarket	15. 5.91	5 yrs, NPP 2 2 yrs, release after 4.5 m	
29	141/91	Wiggins	Bank	28. 5.91	7 yrs, NPP 3	
30	69/91	Langford Manser	Bank	28. 8.91	9 yrs, NPP 5 9 yrs, NPP 5	
31	163/91 164/91 165/91	Peters Callicazaros Milton	Youth refuge	3.12.91	1 yr suspended 1 yr suspended 3 yrs, NPP 1.5	
32	197/91	MacSkimin	Service Station	5. 3.92	4 yrs x 2, conc, NPP 2	
33	223/91	Moores	Smith Street Mall	18. 5.92	3 yrs, NPP 9m then GBB	

34	39/92	Tsaknis	Service Station	12. 8.92	4 yrs, NPP 1.5	
35	193/91	Wade	Taxi	19. 8.92	(10 yrs) 2 yrs conc, NPP 4	
36	40/92	Lewfatt	Shop in Mall	2. 4.93	3 yrs susp HDO 9m then GBB 3 yrs	
37	23/93 25/93	Schmidt Walker	Bus stop	8. 4.93	3.5 yrs NPP 15 m 6 yrs, NPP 2	
38	2/93 3/93	Widdison Reinders	Taxi	21. 6.93 14. 5.93	5 yrs, NPP 2.5 3 yrs, NPP 2	In addition to this Reinders was sentenced to serve the remainder of sentences he was serving when paroled on 12 October 1992.

GRAY AJ: I agree with Priestley J's reasons for judgment
and the orders he proposes.
