Shearn v Rowbottam [2003] NTSC 78

PARTIES:	CHRISTOPHER JOHN SHEARN
	v
	HELEN MAREE ROWBOTTAM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 54 of 2003 (20119257)
DELIVERED:	18 July 2003
HEARING DATE:	14 July 2003
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	T. Berkley
Respondent:	T. Austin

Solicitors:

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

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

Shearn v Rowbottam [2003] NTSC 78
No. JA 54 of 2003 (20119257)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

CHRISTOPHER JOHN SHEARN
Appellant

AND:

HELEN MAREE ROWBOTTAM
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 18 July 2003)

[1] On 13 March 2003 the appellant appeared in the Court of Summary Jurisdiction and pleaded not guilty to charges of having assaulted Shirleen Clancy (count 2) and Desmond Currie (count 3). At the same time he pleaded guilty to criminal damage (count 4). At the conclusion of the hearing the learned magistrate convicted the appellant of all charges. In relation to count 2 the appellant was sentenced to imprisonment for one month. In relation to count 3 he was sentenced to imprisonment for 4 months and in relation to count 4 he was sentenced to imprisonment for

27 days. Each of the sentences was directed to be served cumulatively upon the others, giving a total sentence of 5 months and 27 days imprisonment.

[2] The appellant appeals against his conviction and against the sentences imposed. In relation to the convictions it was submitted that the learned magistrate failed to direct himself correctly as to the application of s 34 of the Criminal Code, which deals with provocation and provides for circumstances in which an accused person may be thereby excused from criminal responsibility. The appeal against sentence is based upon the submission that the sentences were manifestly excessive in all the circumstances.

[3] The convictions arose out of events that occurred on 11 December 2001 at Kurringal Flats in Darwin. Shirleen Clancy was the de facto wife of the appellant and Desmond Currie was his friend. All three had been resident at Kurringal Flats. The appellant and Ms Clancy lived for a time in the flat next door to Mr Currie and, it seems, they spent a good deal of time socialising together and, more particularly, drinking together. At the time of the events with which we are concerned, the appellant and Ms Clancy had moved to the YMCA and had been there for about 3 or 4 days.

[4] On the night in question Ms Clancy had been drinking with Mr Currie and they had also been smoking cannabis. A substantial quantity of alcohol had been consumed. Ms Clancy asked Mr Currie whether she could "camp" in his flat because she had nowhere else to sleep and she was "too drunk and

stoned to move". He agreed. The appellant had been drinking elsewhere and Ms Clancy had left messages with friends and relatives requesting they inform him that she was waiting for him at Mr Currie's flat.

[5] Mr Currie was the first to go to bed and he went to sleep on a double mattress, the only mattress in the premises. He was dressed, as his Worship found, in a pair of boxer shorts. Ms Clancy went to bed about an hour after Mr Currie. She slept on the same mattress. Ms Clancy was hot and removed her top. She was naked from the waist up. There is no suggestion that there was any sexual relationship between Mr Currie and Ms Clancy. There was no suggestion that Mr Currie was even aware that Ms Clancy shared the mattress with him. However, both parties admitted that they had engaged in sexual intercourse on one occasion some months beforehand and that the appellant had become aware of that.

[6] In a record of interview which was admitted into evidence, the appellant said that he attended at the flat to collect his de facto wife. He said: "When I found her in the raw with him, that was it". He said that he was in a "rage" and he slapped his wife across the mouth and attacked Mr Currie.

[7] The attack on Mr Currie consisted of a number of blows to the ribs, forehead and in the area of his right eye. In addition, the appellant placed his elbow on Mr Currie's neck causing him difficulty with breathing. At the time of the attack upon each of the victims they had been asleep and they were woken by what took place.

[8] It was submitted to the learned magistrate that the appellant should be excused from criminal responsibility for the attacks on each of the victims because they resulted from provocation. Section 34 of the Criminal Code provides that a person is excused from criminal responsibility for an act or its event, if the act was committed because of provocation, upon the person or the property of the person who gave him that provocation. "Provocation" is defined in the Criminal Code in the following terms:

> "Any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control."

[9] The learned magistrate declared himself satisfied that the application of force to Ms Clancy and Mr Currie was "not excused as provocation". He set out the definition of "provocation", to which I have referred, and then focused upon whether or not what had taken place was a "wrongful act" as defined in the Criminal Code. That definition is in the following terms:

> "'Wrongful act' and like terms mean an act that is wrong by the ordinary standards of the community; a lawful act may be a wrongful act, but any act expressly declared to be lawful cannot be a wrongful act."

[10] His Worship declared that he was not satisfied that there was a wrongful act and he did so for the following reasons:

> "Mr Currie made his premises available, to use Ms Roussos' words, 'for Ms Clancy to crash there'. Ms Clancy chose to sleep there. Neither Ms Clancy or Mr Currie saw anything wrong in their behaviour. I am not satisfied by the standards of this society in which Mr Currie and Ms Clancy live, that there was anything wrong.

> And neither am I satisfied in the context of the standards of society in general that there was a wrongful act."

[11] His Worship therefore declined to find that provocation provided an excuse. He went on to say:

> "I have to say that if I had been satisfied that it was a wrongful act – and I am not satisfied, but if I had been satisfied – the prosecution would not have been able to rule out the excuse of provocation. In particular the prosecution would not have been able to rule out that an ordinary person in a similar circumstance would have acted in the same or a similar way."

[12] The appellant complains that his Worship failed to consider whether or not there was an "insult" arising from the circumstances that confronted the appellant when he entered the flat. It was not argued that his Worship was in error in concluding that what had occurred did not amount to a "wrongful act" but rather emphasis was placed upon the submission that his Worship did not consider the whole of the definition and, in particular, failed to turn his mind to whether or not an insult arose.

[13] The concept of provocation in circumstances similar to those found in the present matter has been considered in both Western Australia and Tasmania. The Criminal Codes in those States differ in significant respects from that in the Northern Territory, however, in each Code, provocation is available following a "wrongful act or insult".

[14] In *Hutton* (1986) 20 A Crim R 314 the Court of Criminal Appeal in Tasmania considered a case where the appellant fatally shot his de facto wife and her friend after finding them together in a sexually compromising

position. In that case there existed the additional factor that, upon being discovered, the de facto wife rolled away from her friend and "laughed at the appellant in a sarcastic and scornful manner". The laughter was treated as a matter capable of being regarded as an insult for the purposes of provocation. In his judgment Green CJ held that the friend "was a participant in the episode which gave rise to the insult and it was his presence and actions which gave colour and significance to that insult". In those circumstances, Green CJ and Cox J held that provocation should have been left to the jury. The provisions of the Criminal Code in Tasmania differ from those in the Northern Territory in that the Tasmanian Code does not require that the unlawful act or insult must emanate from the victim.

[15] In the Northern Territory the terms of s 34(1) of the Criminal Code restrict the scope of provocation to excuse only those acts in which the victim is the person "who gave (the accused) that provocation". As Kearney J observed in *Jabarula & Ors v Poore* (1989) 68 NTR 26 at 30, the definition excludes provocation as an excuse in a situation involving misdirected retaliation such as an assault by the accused person upon someone other than his provoker.

[16] In *Roche* (1987) 29 A Crim R 168 the Court of Criminal Appeal in Western Australia considered a case where the appellant, who was separated from his wife, found her in bed with another. Both were naked. They endeavoured to resist but the friend was fatally stabbed. The appellant was convicted of the murder of the friend and having unlawfully attempted to kill his wife. In

that case Brinsden J observed that "from time immemorial … it has been held that a husband finding his spouse in the act of adultery may be found to have acted under provocation". His Honour went on to note:

> "The Crown makes the concession, if there need be one, that finding a man in bed with his wife could amount to provocation to the husband as being a wrongful insult within the meaning of s 245 of the Criminal Code (WA) … I propose for the purposes of this case at least, to accept that the conditions observed by the appellant when he went into the bedroom could amount to a wrongful act or insult within the meaning of s 245 though in this regard it is interesting to note in *Hutton* the appellant did not contend that similar conduct constituted a wrongful act within the meaning of s 160 of the Criminal Code of Tasmania. The case seemed to proceed on the basis that the conduct amounted to an insult."

[17] In *Stingel v R* (1990) 171 CLR 312 the High Court held that the expression "wrongful act or insult" in the Tasmanian Criminal Code were words of "wide general import which should be given their ordinary meaning". The court observed that the word "insult" can denote an insulting word or gesture which is neither accompanied by nor in the context of physical violence or the conveyance of information. The provocative conduct must be considered in the context of all of the surrounding circumstances, including the relationships between those involved.

[18] Turning to the present case, the fact that the appellant found his victims together on a mattress in a state of undress and in circumstances where they had, on a previous occasion to his knowledge, had sexual intercourse was capable of amounting to provocation. In particular it was capable of

amounting to an "insult" for the purposes of s 34(1) of the Criminal Code (NT). His Worship did not consider this issue.

[19] On the available evidence it could not be said that Mr Currie intended to insult the appellant. In terms of s 34(1) of the Criminal Code it could not be said that he "gave (the accused) the provocation". He did not commit a provocative act directed at the accused. The evidence is that he went to bed well before Ms Clancy joined him on the mattress. There was no suggestion that he was aware of the presence of Ms Clancy on the mattress or even that she had taken up his offer of hospitality. He went to sleep and woke up under attack by the appellant. However the situation must be considered through the eyes of the appellant. In that regard s 34(1) of the Criminal Code must be read in light of the excuse of honest and reasonable mistake found in s 32 of the Code: *Jabarula & Ors v Poore* (supra at 32). As Kearney J made clear in that case, the two provisions must be read together. If the appellant held an honest and reasonable but mistaken belief that Mr Currie had, individually or jointly with Ms Clancy, insulted him by having sexual intercourse then the issue of provocation would arise for consideration. If such an insult arose, the court would then consider whether the insult which the appellant believed was given to him by Mr Currie was of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive that person of the power of self-control. The court would also consider whether the appellant was deprived by the provocation of the power of self-control.

[20] Similar comments may be made in relation to Ms Clancy. She went to bed after Mr Currie and there is no suggestion that she was involved in any way in any sexual activity. She simply went to sleep. She had previously alerted her de facto husband, the appellant, as to where she was and she may have expected a visit from him. Notwithstanding that no insult may have been intended by her to the appellant, he again may have formed the mistaken but honest and reasonable belief that sexual activity had occurred and that he had thereby been insulted by Ms Clancy.

[21] In all the circumstances it was necessary for the learned magistrate to direct his attention to these issues before finding that provocation was not available. Rather than do this, his Worship concentrated solely upon the narrower issue of whether or not there was, in all the circumstances, a wrongful act. There has been no challenge to his finding that there was no wrongful act and I make no comment in that regard. However, it was necessary for him to consider the issue of the presence of an insult from each of the victims and whether that gave rise to a defence of provocation for one or both of the charges. He did not do so and erred in failing to do so.

[22] In the circumstances the appeals against conviction must be allowed and the convictions in relation to counts 2 and 3 set aside. The learned magistrate did not address the issue of whether an insult occurred from one or both victims, nor did he address the other aspects of a possible defence of

provocation. I am unable to resolve those issues. I direct that there be a retrial.

[23] It remains to deal with the appeal against sentence in relation to count 4. The appellant was sentenced to imprisonment for a period of 27 days for criminal damage. The damage occurred to the door of the premises when the appellant endeavoured to gain access to allow his de facto wife to leave. He said in his record of interview: "I ripped the door off". A security officer who was called described the damage to the door as being that the security grille "was three-quarters pulled out from the frame".

[24] The general principles applicable to an appeal based upon the ground that a sentence is manifestly excessive are well known. In the absence of identified error, an appellant seeking to establish that a sentence was manifestly excessive 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 & anor* (1994) 94 NTR 1. The presumption is that there is no error. It is not enough that 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. Error may appear in what the sentencing magistrate said in the proceedings or the sentence itself may be so excessive as to manifest such error.

[25] In the circumstances of this matter, including that the appellant had prior convictions for similar offending, I am unable to find that the sentence was manifestly excessive. The appeal in relation to this count is dismissed.

[26] The appeal in relation to counts 2 and 3 is allowed and the convictions are set aside. I direct a retrial. The appeal in relation to count 4 is dismissed.

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