

The Queen v Adrian Faulton [2004] NTSC 12

PARTIES: THE QUEEN

v

FAULTON, Adrian

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION

FILE NO: 20306738

DELIVERED: 27 February 2004

HEARING DATES: 8 July 2003, 9 July 2003, 14 January
2004 and 22 January 2004

JUDGMENT OF: MILDREN J

CATCHWORDS:

EVIDENCE – mental impairment – fitness to plead - suppression order – whether in public interest

CRIMINAL LAW – mental impairment – not fit to plead – special hearing to determine if accused committed offence – procedures taken – declaration accused liable to supervision – relevant factors

CRIMINAL LAW – mental impairment – not fit to plead – supervision order – procedures required – management plan - period of supervision order – relevant factors – whether regard should be had to the minimum term which would have been fixed if the accused had been found guilty

Criminal Code ss. 43, 43A, 43T(1), 43R(3), 43V(1)(a), 43(W)(1), 43W(2), 43X(3), 43Z, 43ZA, 43ZB, 43ZC, 43ZG, 43ZI(5), 43ZN, 43Z, 43ZJ, 133.188, 379

Parole of Prisoners Act s 5(2)

Veen v The Queen (No. 2) (1987-1988) 164 CLR 465 at 476-477, followed

REPRESENTATION:

Counsel:

Prosecution:	R. Wild QC and B. Harris
Accused:	A. Powell and B Cassells
CEO of Department of Health and Community Services:	D. Farquhar and S.Sievers
CEO of Department of Justice:	G. MacDonald

Solicitors:

Prosecutor:	DPP
Accused:	NAALAS
CEO of Department of Health and Community Services:	Cridlands
CEO of Department of Justice:	R. Coates

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Adrian Faulton [2004] NTSC 12
No. 20306738

BETWEEN:

THE QUEEN
Plaintiff

AND:

ADRIAN FAULTON
Defendent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 27 February 2004)

- [1] This matter involved the new provisions of Part IIA of the Criminal Code, dealing with mental impairment and unfitness to be tried. It is the first matter to go through all stages of the processes envisaged by those provisions and involved a special hearing by a jury as well as my making a number of orders consequential upon the jury's findings. I indicated that I would provide reasons for those orders. I do so now.
- [2] The accused, Adrian Faulton, was charged upon an ex officio indictment with having unlawfully and indecently assaulted the victim at Darwin on 30 April 2003, contrary to s 188(1) and s 188(2)(a), s 188(2)(k) and s 188(2)(m) of the Criminal Code. He was also charged with having

knowingly committed an act of gross indecency in public and in a public place contrary to s 133 of the Criminal Code.

- [3] It was agreed between the parties to the prosecution that the accused was unfit to plead or stand trial. According to the medical reports, the accused suffers from considerable intellectual impairment probably due in a large measure to substance abuse. On 8 July 2003, I made an order pursuant to s 43T(1) of the Criminal Code dispensing with an investigation into the fitness of the accused to stand trial, and I formally recorded a finding that the accused is unfit to stand trial. Having regard to the reports then tendered, I also determined pursuant to s 43R(3) of the Act that it was not likely that the accused will become fit to stand trial within the next twelve months. This meant that, in terms of s 43R(3), the Court was required to hold a special hearing within 3 months, i.e. by 3 September 2003.
- [4] Special hearings are dealt with under Division 4 of Part IIA of the Code. The purpose of the special hearing was to determine whether or not, on the evidence available, the accused is not guilty of the offences with which he was charged (s 43V(1)(a)) or whether he committed the offence he is charged with or with an available alternative offence (s 43V(1)(c)). The special hearing is required to be conducted as nearly as possible as if it were a criminal trial (s 43W(1)) and is subject to special procedural provisions (s 43w(2)) including a provision that the accused is taken to have pleaded not guilty.

[5] The special hearing before a jury of twelve was conducted on 8 July 2003. The jury found that the accused committed both offences on the indictment including the three circumstances of aggravation referred to in Count 1. I should mention that there was no dispute about the facts which were admitted and tendered pursuant to s 379(1) of the Criminal Code. The facts were as follows:

The offender in this matter is a nineteen year old male Aboriginal born on 13 June 1983 who originates from Port Keats. The offender has been placed under the care of the 'Office of Public Guardianship' due to his inability to care for himself. This guardianship necessitated psychiatric and psychologist reports being completed on the offender to establish his mental capability, the effect of these reports stating that he suffers intellectual impairment due to brain damage. Substance abuse is considered a contributing factor to this damage.

On 9 April 2003 the offender was living at 16 Rossiter Street Rapid Creek, this being a care facility run by the Territory Care and Support Services. This facility has permanent carers in residence.

During the afternoon of Wednesday, 30 April 2003, the offender absconded from 16 Rossiter Street Rapid Creek, using a bike belonging to the carer of this house. He then rode this bike to the Nightcliff shops.

First Count:

The first victim in this matter is a thirteen year old female who, at about 4:00pm on 30 April 2003, had just alighted from her school bus near the Nightcliff shops and was walking home along Gardenia Street Nightcliff. She was carrying her school bag in front of her and wearing her Kormilda College school uniform.

The offender rode up behind her, dropped the bike and grabbed her from behind, bringing his arms around her waist and placing his hands at the top of her thighs, with his fingers placed over her genital area. He then pulled her tightly to him. The victim turned her head so that could see who this was, and on seeing the offender she screamed loudly. She struggled slightly and the offender released her allowing her to run from him, yelling out for help and crying. She ran up to

her home where she called for her mother who came running out. She pointed down the street to where the offender was now walking out of a yard. The mother called for her mobile phone, dialled '000' and ran to where the offender was now coming towards her, pushing his bike along Gardenia Street. She was speaking to police on the phone by now and followed closely behind the offender as he walked onto Nightcliff Road. The mother described the offender closely, including the bike. She noted the bike was a 'Trek' brand and further noted a scar on the offender's scalp. She also described that he was wearing dark blue shorts only. The mother then confronted the offender. The offender stopped and became agitated. He then jumped on the bike and rode back down Gardenia Street, turning left onto Oleander Road. The mother ran down to this intersection but could not see the offender. She informed police via the mobile of this and gave her details.

Police attended and an immediate search of the area was conducted with the victim's clothing being seized.

Second Count:

The victim in this matter is a 17 year old female, who works at the Essington School After School Care, in the pre-school area of the school.

After the incident in Gardenia Street, the offender had ridden his bike from Oleander Road and up along Progress Drive to a dirt track that runs behind the NT Open Education Centre, 21 Crisp Street, Rapid Creek. He then got off his bike and walked across an oval area, this now being the school grounds of the Essington School. He stood near a fence that surrounds the pre-school area, where he saw the victim standing, talking to the children who were outside playing in this area. The offender climbed over this fence and went up and stood alongside the victim. He asked the victim her name and then pointed to her breast with his left hand, saying 'Sexy'. He then moved his left hand down and the victim saw that he was holding his exposed penis in his hand. At the time this occurred, a number of small children were standing nearby and also saw the offender's exposed penis. The victim immediately walked to the door and got her supervisor, telling her what had happened. The supervisor then came out and told the offender to leave, which he did, walking back across the lawn and climbing over a small fence running between the Essington School and the NT Open Education Centre.

The offender then returned to where the bike was, pushing it along the path, which runs to Rossiter Street, but had a high fence in this section. The fence has a large hole in it capable of allowing the

offender to climb though, however not large enough for the bike. The offender dropped the bike, climbed through and walked back to 16 Rossiter Street where he saw the owner of the bike and later took him where the bike was situated.

At 5:50pm on Thursday 1 May 2003, the offender was arrested in relation to these matters at 16 Rossiter Street Rapid Creek. He was conveyed to the Watchhouse and held under the provisions of s 137 of the Police Administration Act. Due to enquires with his guardian, a formal interview was declined on his behalf. The offender was charged with these offences on 2 May 2003 and conveyed to court at that time.

At no time was permission given to assault the first of the victims in this way. In relation to the Essington pre-school, numerous young children were in the immediate area when the offender exposed himself.

- [6] At the conclusion of the special hearing, the Crown tendered the accused's prior criminal history and a Victim Impact Statement from each of the victims. The accused's prior history showed that he had 34 convictions which included a conviction in March 2002 for behaving indecently in a public place and for assaulting a female. He also had a number of convictions for dishonesty offences.
- [7] Pursuant to s 43X(3) of the criminal Code, I was required either to declare that the accused was liable to supervision under Division 5 or to discharge the accused unconditionally. It was not in contention that I should make the relevant declaration. Having regard to the seriousness of the offences, the probable sentences I would have imposed had the accused been found guilty of the charges (see s 43ZG), the accused's mental problems as shown in the reports, his history of persistent offending, the need to protect the public and the absence of any countervailing considerations (see also s 43ZN), I

considered that it was appropriate that a declaration under s 43X(3) should be made, and a declaration was made accordingly.

[8] S 43Z of the Code provides that if a Court declares that an accused person is liable to supervision, the Court must make a supervision order under Division 5 of Part II of the Code. A supervision order may be a custodial or non-custodial supervision order (s 43ZA). A custodial supervision order committing the accused to prison must not be made unless there is no practical alternative (s 43ZA(2)). However the Court may make an interim order pending the making of a supervision order under s 43Y, including an order remanding the accused in custody. As it was desirable that I find out more about what options were available, I made an order under s 43Y remanding the accused in custody until the following day, the 9th of July 2003.

[9] On that date counsel sought leave to appear for the Department of Health and Community Services and also for the Department of Justice pursuant to s 43ZI(5) of the Act. I considered that I ought to grant leave in both cases. In the case of the Department of Health and Community Services, I am required not to make a supervision order providing for the accused's treatment unless I have an appropriate certificate from the Chief Executive Officer of the Department (s 43ZA(3)). I am required also to consider a report from "the appropriate person" under s 43ZJ (which is an expression which means the Chief Executive Officer of the Department of Health and Community Services in some situations and the Chief Executive Officer of

the Department of Justice in others: see s 43A). Also I note that if I make a supervision order, the Chief Executive Officer of the Department of Health and Community Services has a right to appeal to the Court of Criminal Appeal vide s 43ZB(2). I think that in these circumstances, and given that an interim assessment has been made by the Chief Executive Officer of that Department recommending that the accused be held at the Joan Ridley unit for a six week period to undertake behavioural assessment, I considered it appropriate to grant leave to Mr Farquhar to appear on his behalf. As the other potential stakeholder was the Chief Executive Officer of the Department of Justice, I considered it appropriate to grant leave to Mr MacDonald to appear on his behalf as well.

[10] After hearing submissions, I made the following orders on 9 July 2003:

1. Pursuant to s 43Y of the Criminal Code, pending making the supervision order, the accused person is to be remanded in custody in a prison, being the Darwin Correctional Centre or such place as may be determined by the Director of Correctional Services within the meaning of the Prisons (Correctional Services) Act, until the supervision order is made and subject to the following conditions:
 - (a) The accused person is to undergo a behavioural assessment to be conducted by the Department of Health and community Services (DHCS).
 - (b) DHCS is to provide to the court a report on its findings and any recommendations for a management plan for the accused. It is noted that DHCS will need approximately 8 weeks to prepare for the assessment prior to its commencement.
 - (c) That in respect of any illness or mental impairment, the accused person is to comply with all directions, medical treatment and assessments offered by DHCS staff or Corrections Health Service.

2. This matter is adjourned for the further hearing under Division 5 of the Criminal Code at a date to be fixed.
3. An application for a suppression order is refused.

[11] As to the application for a suppression order, the basis for this application was a fear that publication of information concerning the accused might make it more difficult for Disability Services personnel to carry out an assessment of his behaviour in the community and to have the Darwin community accept him, and may restrict his opportunities within the community by decreasing the willingness of community members to interact with him on a normal day to day basis and would affect the validity of any behavioural assessment to be undertaken by the Department of Health and Community Services staff. I did not then believe that this was a likely result of publication of the information sought to be suppressed. In my opinion it was important that the community knew what was going on and that they could choose to support the accused or not support the accused as they saw fit. I considered it more likely that the community would be cooperative and supportive if they knew the facts. Accordingly, I refused to make that order.

[12] The matter next came before me on 14 January 2004, by which time the reports envisaged in the order of 9 July 2003 had been prepared. The report of the Chief Executive Officer of the Department of Health and Community Services also included a behaviour assessment report (which included a suggested management plan), a behaviour support plan and a management plan for the accused's transition from a custodial prison to community based accommodation. The Chief Executive Officer provided the certificate

required by s 43ZA(3) for a period of 6 months from 22 January 2004. The reports and plans were very detailed. The proposal is that the accused be placed with his family at Port Keats. However, to obtain the family's support, there will need to be significant resources required together with extensive consultation with the Port Keats community. In the interim, the accused requires support in an environment in Darwin that will afford him with the management he requires to ensure that members of the general community are not placed at risk for his behaviour. At the moment, (notwithstanding the certificate of the Chief Executive Officer) there are no available placements for the accused within existing disability services. The accused needs a transition model in a structurally modified setting which will have the capacity to accommodate other members of his family from time to time. It will take some time to find suitable interim accommodation as the department proposes to put out to tender the housing, staffing and behavioural management services to be provided. As at 14 January 2004, the specifications for the tender had not been finalised. According to counsel for the Chief Executive Officer of the Department of Health and Community Services, this may take some months. The questions then arose as to whether or not I should now make a further interim order under s 43Y or whether I should now make a supervision order. In the end, after hearing counsel, I decided to ask the parties to prepare minutes of order and adjourned the further hearing until 22 January 2004. The interim order previously made was enlarged until then and the accused remanded in custody once again.

[13] On 22 January 2004, having considered the draft minutes prepared by counsel for the Minister and having heard the parties I made the supervision order which is attached to these reasons. The only matter which needs some explanation is the period of the supervision order, which, subject to s 43ZD and s 43ZE remains in force until 30 April 2005. Pursuant to s 43ZG(1) I am required to fix a term during which the supervision order is to be in force. The general rule is that the term “is the equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment or supervision) that would, in the court’s opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged”. Where, as here, there is more than one offence charged, the term is to be fixed by reference to the offence carrying the longest maximum period of imprisonment (see s 43ZG(4)). In this case, the longest maximum term is 5 years’ imprisonment vide s 188(1) and s 188(2) of the Code. The legislation does not make clear what is meant by “supervision” in s 43ZG(1). Fortunately, I did not have to decide that question. I considered that, in deciding what sentence was appropriate, I should take into account all of the circumstances of the offence and the offender in the same way as I would have done if he had been found guilty of the offence. In this case, there are no mitigating circumstances such as are commonly found in such cases, e.g. early plea of guilty, remorse, contrition, lack of prior convictions, etc. I did not regard the accused’s mental problems as warranting a shorter rather than a longer sentence: see

Veen v The Queen (No 2) (1987-1988) 164 CLR 465 at 476-477. I considered that I would have imposed a term of imprisonment for 2 years but backdated it to 30 April 2003 to take into account time already spent in custody. I would not have suspended any part of the sentence, but I would have fixed a non-parole period. In my opinion s 43ZG(1) does not permit me to have regard to the minimum term I would have fixed, but requires me to fix the period of the order by reference to the head sentence. The words “the period of imprisonment... that would, in the court’s opinion, have been the appropriate sentence to impose” cannot refer to the minimum term, because there is no automatic entitlement to release after having served the minimum term: see Parole of Prisoners Act, s 5(2).

[14] Finally, I should mention that counsel for the Minister has foreshadowed the possibility that a supervision order could remain in force indefinitely in certain circumstances. Counsel referred to s 43ZG(6) and s 43ZC. I make no comment on that submission at this time.

CUSTODIAL SUPERVISION ORDER

1. Adrian Faulton is declared to be the subject of a custodial supervision order.
2. Subject to this order, the Director of Correctional Services, within the meaning of the *Prisons (Correctional Services) Act* shall be responsible for his safe custody. In respect of any illness or injury, whilst in prison Mr Faulton shall be cared for and treated, if necessary without his consent, by the Corrections Medical Service.
3. The Management Plan comprising Exhibit 1 (see copy attached) is to be implemented as soon as practicable. Mr Faulton is permitted to participate in the Management Plan, including being granted leave of

absence from the prison for purposes consistent with the Management Plan.

4. In respect of any illness and his mental impairment (intellectual disability), Mr Faulton may be treated and managed by persons authorised by the Chief Executive Officer of the Department of Health and Community Services and in consultation with Mr Faulton's Guardian appointed under the *Adult Guardianship Act*.
5. The Department of Health and Community Services will liaise with Mr Faulton's Guardian as required regarding the implementation of the Management Plan.
6. Mr Faulton is not to drink alcohol, take illicit drugs or to sniff petrol.
7. Whilst participating in the Management Plan and on leave of absence from the prison pursuant to it:
 - (a) Mr Faulton is subject to the care, management, directions and supervision of personnel from the Department of Health and Community Services, including in relation to:
 - (i) his compliance with the approved management plan
 - (ii) where he will reside and with whom –
 - (iii) whether and when he may leave his place of residence and with whom
 - (iv) what activities he may or may not participate in.
 - (b) Mr Faulton will comply with lawful instructions given by those placed in supervision over him.
8. Community Corrections of Department of Justice will assist in the implementation of the Management Plan whilst Mr Faulton is on leave of absence, including through meeting with Mr Faulton on a regular basis and administering random breath testing and urine screening.
9. In the event that either the Department of Justice or the Department of Health and Community Services suspect that:
 - (a) Mr Faulton is failing or has failed to comply with a lawful direction, or is in breach of a term or condition of this supervision order; or
 - (b) the safety of Mr Faulton or the safety of the public would be at risk without a change to the Management Plan or the conditions of this supervision order

either agency:

(c) may seek the assistance of the Police to exercise their power under s 43ZF of the *Criminal Code*; or

(d) has liberty to apply to the Court to vary the terms of the supervision order.

10. Subject to sections 43ZD and 43ZE this supervision order will remain in force until 30 April 2005 being the equivalent to the period of imprisonment and/or supervision that would, in the Court's opinion, have been the appropriate sentence to impose on Mr Faulton if he had been found guilty of the offence charged. [s 43ZG]
11. This matter is adjourned for a review of the supervision order to take place in approximately 6 months, and the Chief Executive Officer of the Department of Health and Community Services, in consultation with the Chief Executive Officer of the Department of Justice (each being an appropriate person), is directed to submit a report to the Court in terms of s 43ZK in not more than 6 months. The actual date for the review of the supervision order shall be fixed by the Court in due course.
12. This matter is listed for mention on Tuesday 4 May 2004 at 10:00am.
13. Liberty to apply.