Stamp v The Queen [2012] NTCCA 15

PARTIES:	**STAMP, Phillip Mark** 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 1 of 2012 (20729580)
DELIVERED:	19 September 2012
HEARING DATES:	3 September 2012
JUDGMENT OF:	RILEY CJ, SOUTHWOOD J, and OLSSON AJ
APPEALED FROM:	KELLY J

CATCHWORDS:

CRIMINAL LAW - application for extension of time to seek leave to appeal against conviction– admissibility of identification evidence – conduct of trial by counsel – interference with crime scene – consistency of evidence - application refused

CRIMINAL LAW - application for extension of time to seek leave to appeal against sentence - principle of totality – cumulative sentence - manifest excess – application refused

Green v The Queen (1989) 95 FLR 301; *TKWJ v R* (2002) 193 ALR 7 *Attorney- General v Tichy*(1982) 30 SASR 84; *Miles v the Queen* [2001] NTCA 9; *Hampton v R* [2008] NTCCA 5, followed

Sentencing Act s 50, 53.

REPRESENTATION:

Counsel:

Applicant:	Self Represented (as to conviction); Mr Roper and Mr Baldry (as to sentence only)
Respondent:	Mr Usher

Solicitors:

Applicant:	Self represented
Respondent:	Office of the Director of Public Prosecutions

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

Stamp v The Queen [2012] NTCCA 15
No. CA 1 of 2012
(20729580)

BETWEEN:

PHILLIP MARK STAMP
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, SOUTHWOOD J and OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 19 September 2012)

Riley CJ:

[1] On 28 May 2010, following a trial by jury, the applicant was found guilty of eight offences. On 10 June 2010 he was sentenced to imprisonment for a total of 11 years with a non-parole period of seven years. On 17 January 2012 he filed an application for an extension of time within which to appeal against conviction. On 3 May 2012, almost 2 years after having been sentenced, he filed a further application seeking an extension of time within which to apply for leave to appeal against sentence.

[2] The applicant was self represented in relation to the application for an extension of time to appeal against conviction. He was represented on a *pro*

bono basis by Mr Roper and Mr Baldry in relation to the application for an extension of time for leave to appeal against sentence.

The offending

[3] The offences of which the applicant was found guilty occurred in October and November 2007. There was no dispute that the victim, Timothy Sachse, was violently attacked in his home, that he was robbed and then, over the following days, was the subject of threats of further violence as a consequence of which he paid money to his assailant. The principal issue at trial was whether the Crown had established beyond reasonable doubt that the applicant was the assailant.

[4] The Crown case was that on 30 October 2007 the victim was at home alone and using his computer. He was wearing headphones. A male person entered his home and approached him from behind before striking him with force to the left hand side of his head with the bottom half of a pool cue. This caused Mr Sachse to fall from his chair to the floor. The intruder then jumped on him and punched him several times to the head whilst telling him to be quiet. Thereafter the victim did not resist. The intruder told Mr Sachse to wrap a shirt around his head as a blindfold. Mr Sachse complied. The intruder held him to the ground with one knee firmly planted in his back. The intruder then stole a credit card from Mr Sachse and, under threat of further violence, obtained the PIN for the card from him. Mr Sachse was instructed not to call the police.

[5] The Crown case was that after the attack the assailant left the premises and drove to an ATM at the Hibiscus Shopping Centre where he used the credit card to obtain $1000 from an account of Mr Sachse.

[6] After the assailant left his home Mr Sachse contacted a friend and then obtained medical treatment for the injury to his head. He later contacted police and reported the robbery. He cancelled his credit card.

[7] The victim was unable to identify his assailant. He was only able to give a general description which included that the assailant was a male who had a strong voice that sounded like someone trying to put on an Aboriginal accent.

[8] On 31 October 2007 Mr Sachse was contacted by telephone by the same person who demanded a further sum of $1500 from him. The assailant contacted Mr Sachse on two further occasions demanding payment of $1500 and making threats including that Mr Sachse should pay up because "it is better than getting your legs broken". There was further contact by text message directing Mr Sachse to take the money to the Moil shops and providing instructions as to what he should do on arrival. The following day there were more telephone calls and threats of violence. Mr Sachse was concerned for his safety and he resolved to comply with the directions. He obtained $1500 and, in accordance with fresh instructions, took this money to the Wagaman shops. There the money was collected from him by a co-offender of the assailant, Simon Westcott, who subsequently gave evidence

that he was acting on behalf of the applicant. Mr Westcott was paid $50 by the applicant for his efforts.

[9] Mr Sachse was spoken to by police after this occurrence and he recounted what had taken place. Mr Sachse gave his mobile telephone to Detective Hodge. Later that day the assailant again contacted the number and in a series of calls demanded a further sum of $500. On the occasions of these calls he was in fact talking to Detective Hodge posing as Mr Sachse. Detective Hodge was directed to withdraw $500 and to drive to a service station in Wanguri. The Detective borrowed the motor vehicle of Mr Sachse and drove to the service station. Mr Westcott had again been engaged by the assailant to collect the money and when he approached the vehicle Detective Hodge passed a parcel containing $500 through the window of the vehicle to him. Mr Westcott was then arrested by another officer. He spontaneously advised the officers that he was collecting the parcel for the applicant and that the applicant was waiting around the corner in a white Triton ute. The police followed the directions of Mr Westcott and found the applicant and another man in a white Triton ute. The applicant was arrested.

[10] Following his trial the applicant was found guilty of aggravated unlawful entry of the home of Mr Sachse, aggravated robbery of Mr Sachse, depriving Mr Sachse of his personal liberty, stealing $1000 from Mr Sachse, demanding $1500 with menaces from Mr Sachse, stealing $1500 from Mr Sachse, demanding $500 with menaces and attempting to steal the sum of $500.

[11] In sentencing the applicant, the learned trial Judge imposed an aggregate sentence of imprisonment of nine years in relation to the aggravated unlawful entry, the aggravated robbery, the deprivation of liberty and the stealing of $1000 from the ATM. In relation to the remaining offences an aggregate period of imprisonment of four years was imposed. It was directed that the two sentences be served concurrently as to two years giving a total head sentence of imprisonment for 11 years. A non-parole period of seven years was set.

The applicable principles

[12] The relevant general principles applicable to an application for an extension of time within which to appeal from conviction were conveniently summarised by Rice J in *Green v The Queen*[1] as follows:

> (1) An extension of time within which to appeal from conviction will not be granted as a matter of course. In every case the court will require substantial reasons to be shown why an extension should be made.
>
> (2) Where an appeal is lodged after the lapse of a considerable period of time, exceptional circumstances have to be established before the court will be justified in granting an extension of time.
>
> (3) After a lengthy delay, the court will require exceptional circumstances before granting an extension unless there has been a manifest miscarriage of justice or unless the court is satisfied that there are such merits in the proposed appeal that it would probably succeed.
>
> (4) The greater the delay which has occurred before the application is made, the more difficult becomes the task of the applicant.

[1] (1989) 95 FLR 301 at 312.

(5) The court itself, in the administration of justice, has its own interest in seeing that time limits are observed and that an application for the extension of time is properly justified.

Explanation for delay

[13] The applicant provided an affidavit supported by copies of correspondence in which he spelled out his efforts to commence the appeal process. The correspondence reveals that the applicant instructed the Northern Territory Legal Aid Commission (NTLAC) to apply for leave to appeal against sentence. On 15 July 2010 the NTLAC advised the Director of Public Prosecutions it had received those instructions and was considering whether to grant aid to the applicant. On 19 July 2010 the applicant was advised that aid had been granted to assess the merits of an appeal against sentence. On 24 August 2010 the applicant was advised that an officer of the Commission had determined that an appeal was unlikely to succeed and therefore aid was refused. On 23 December 2010 the applicant was advised that consideration was being given to whether aid would be granted for an appeal against conviction. A copy of the relevant transcript was then being obtained. On 31 January 2011 he was advised that an appeal against conviction was unlikely to succeed and aid was therefore refused. The applicant then appealed to the Review Committee of the Legal Aid Commission. Delays in the review process were experienced and those delays were beyond the control of the applicant. It was not until a letter of 20 December 2011 that the applicant was advised by NTLAC that the Review Committee had determined not to

grant him aid. The applicant filed his first application for an extension of time on 17 January 2012.

[14] The applicant informed this Court that up until late in 2011 he understood that he was dependent upon the NTLAC to lodge any appeal and that he was not aware that he could, or should, do so himself. The Court was advised by an officer of the NTLAC that "all applicants for appeal funding are advised right from the beginning about the time within which to appeal and the fact that it is up to them to commence proceedings". There was no documentary evidence that the applicant had been so advised and he denied receiving such advice. In my view it would be prudent for the NTLAC to provide advice of that kind in writing. In this case there is no direct evidence to contradict the claim of the applicant that he was unaware that he was able to lodge an appeal or an application for leave to appeal in person.

Extension of time – Appeal against conviction

[15] The applicant identified seven proposed grounds of appeal should he be given leave to appeal against conviction. It is necessary to address each of those in turn.

[16] The first proposed ground was that evidence of recognition of the applicant by Constable Derksen should not have been admitted into evidence. The Crown case was that the assailant who attacked Mr Sachse in his home had then travelled to the Hibiscus Shopping Centre where money was withdrawn from the account of Mr Sachse. The police obtained CCTV footage at the

location of the relevant ATM. The footage revealed a ute of similar appearance to one belonging to the applicant and also captured the transaction in which the person withdrew the money. The footage did not provide a clear view of the person. The footage was subsequently shown to Simon Westcott and to Constable Mark Derksen. Both recognised the person conducting the transaction as the applicant.

[17] Constable Derksen had been shown the footage without being told of the reason for so doing. He had known the applicant for a period of 8 to 10 years and they played AFL football together. He had observed the applicant over that period and was familiar with the way he walked and squatted and moved. He gave evidence that he immediately recognised the applicant by reason of:

> "... the way the person walked, body shape and size, and even the head, just the person's general build, the way he squats down. I have seen Philip squat down like that at football training on many occasions, he is getting dressed or whatever and that is what I base my opinion on".

[18] Constable Derksen was cross-examined on the *voir dire*. In the course of his evidence he acknowledged that he could not be "absolutely certain" that the person in the footage was the applicant but he believed it was the applicant. His recognition of the applicant was spontaneous. He reached a conclusion based upon the general body structure, the manner of walking and the way the person held himself along with the way "he squats".

[19] The trial Judge admitted the evidence of Constable Derksen. The applicant submitted that the evidence should have been excluded because, at the time of identification, Constable Derksen knew of the charges against the applicant. The evidence revealed that whilst Constable Derksen did know that his former football colleague had been charged with an offence he did not know that it was anything to do with this particular matter. Whether the recognition of the applicant by Constable Derksen was tainted by some information that had been provided to him was a question for the jury to determine. All of the necessary evidence in this regard was placed before the jury. There is no merit in the proposed ground of appeal.

[20] The second proposed ground of appeal was that counsel acting on behalf of the applicant conducted his defence in a manner different from the way in which the applicant instructed. The applicant gave written instructions to counsel "outlining three key points he wanted to focus on in the trial" and the applicant complained that the points were not "assertively pursued" during the trial. In the course of submissions made to this Court the applicant acknowledged that each of the matters the subject of instruction were raised in the trial but his complaint was that counsel did not do so with sufficient vigour.

[21] In *TKWJ v R*[2] the High Court considered an appeal in which it was claimed that counsel failed to lead certain evidence on behalf of his client. In his judgement McHugh J emphasised the importance of the role of counsel in a

[2] (2002) 193 ALR 7 at [74]

criminal trial and noted that where an applicant contends that the conduct of his or her counsel has caused a criminal trial to miscarry the applicant carries a heavy burden. Ordinarily a party is held to the way in which his or her counsel has presented the case. Counsel is effectively the agent of the party. The discretion retained by counsel in the running of the case is very wide. In that case Gaudron J[3] pointed out that the question which arises for determination does not involve an enquiry into counsel's conduct but rather requires consideration of whether there has been a miscarriage of justice, that is, whether the act or omission in question deprived the accused of a chance of acquittal that was fairly open.

[22] In the present case the applicant was represented at the trial by very experienced counsel who, in turn, was instructed by an experienced solicitor. The matters which the applicant sought to have placed before the jury were in fact placed before the jury and the only complaint is as to the vigour with which that was done. In the circumstances there was no miscarriage of justice arising out of the conduct of counsel and the proposed ground of appeal cannot be sustained.

[23] The next ground of appeal was that there were "conflicting" photos of the scene which, the applicant submitted, suggested interference with the crime scene. The particular focus of the submission was the assertion that the early photographs taken of the scene by a friend of the victim, Mr May, before police arrived did not show the presence of a cap. It was submitted that

[3] At [25] et seq.

subsequent photographs taken by the police photographer showed the cap in a central location. The relevance of the cap was that it was subsequently tested and found to have DNA consistent with that of the applicant.

[24] In fact, as was revealed in the course of argument, a close inspection of the photographs taken by the friend does reveal the presence of an item which appears to be the cap. The evidence of Mr May[4] was that before the police arrived Mr Sachse had a shower and then, on returning to the relevant room, moved some things and showed Mr May the cap. Mr Sachse said to Mr May that the cap had not been there before. The difference in the photographs is explained by that evidence. The proposed ground of appeal is without merit.

[25] It is convenient to deal with the remaining grounds of appeal together. In summary form these were that:

(a) Mr Sachse made inconsistent statements and changed his evidence;

(b) the evidence of the officer in charge, Constable Hodge, changed in the course of the trial;

(c) Detective Hodge failed to include in an early statement of Mr Sachse that Mr Sachse knew the applicant who had previously visited his house providing an opportunity for him to leave his cap at the premises;

(d) there were conflicting statements and evidence given by Mr Westcott regarding his identification of the applicant in the CCTV footage.

[4] Transcript page 345.

[26] In each case the applicant complained that some of the evidence changed from the early part of the investigation through to the time that the matter was heard before the jury. For example the applicant pointed to the fact that in his first statement Mr Sachse referred to the assailant having his face and head covered by a light cloth. It was only later that he also referred to a cap being present. Similarly Mr Sachse originally referred to his assailant as having a "strong male voice, Aboriginal perhaps" and later referred to the assailant having "put on" an Aboriginal accent. In each of these cases, as with the other examples provided by the applicant, the fact that the evidence had, arguably, changed was placed before the jury. Each relevant witness was cross-examined and provided an explanation as to how any difference came to be. It was plainly a matter for the jury to consider whether or not to accept the explanation provided and whether any difference that may have existed gave rise to a reasonable doubt as to the case for the prosecution. This observation applies to each of the examples provided by the applicant. The matters raised by the applicant do not provide sustainable grounds of appeal.

[27] In this matter the case for the prosecution, whilst circumstantial in nature, was very strong. There is nothing in the material raised by the applicant which suggests that there may have been a miscarriage of justice or that there is any merit in the proposed grounds of appeal against conviction.

[28] In my opinion the proposed grounds for appeal against conviction identified by the applicant are without merit and the application for an extension of time should be dismissed.

Extension of time to seek leave to appeal against sentence

[29] The applicant was represented by counsel in this application. It was submitted on behalf of the applicant that:

> (a) the sentencing Judge erred in failing to apply the principle of totality;
>
> (b) the Judge erred in making the sentences on counts 1 to 4 cumulative on the sentence for counts 5 to 8 in the amount of two years or at all; and
>
> (c) the sentence was manifestly excessive.

[30] It is convenient to deal with the second of those grounds first. It was submitted on behalf of the applicant that the offending occurred as part of one course of conduct and involved one victim. In those circumstances, so it was submitted, the sentences imposed by her Honour should have been ordered to be served wholly concurrently.

[31] In support it was pointed out that s 50 of the *Sentencing Act* creates a *prima facie* rule that terms of imprisonment be served concurrently unless the court "otherwise orders". However there is no fetter upon the discretion exercised

by the court and the *prima facie* rule can be displaced by a positive decision.[5] In *Attorney- General v Tichy* [6] Wells J observed:

> It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively… What is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterised, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the causes of criminal conduct may coincide with technical offences or may not. Sometimes, the process of characterisation rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been (found) guilty."

[32] In my opinion, in this case, there were two separate but proximate courses of offending demanding a degree of cumulation of sentence. The first was the home invasion involving a violent attack upon the victim followed by the taking of the credit card, the obtaining of the PIN number with further threats of violence and the withdrawal of the money from the ATM. The second course of offending occurred in the following days and was of a different kind. It involved threats of violence directed to the same victim as

[5] *Miles v the Queen* [2001] NTCA 9 at [35]-[40]; *Hampton v R* [2008] NTCCA 5 at [35]-[36].
[6] (1982) 30 SASR 84 at 92.

a consequence of which money was obtained or sought to be obtained from him. In this offending the applicant used the telephone to convey the threats and he engaged others to receive the money. The offending involved intimidation through fear rather than direct violence. It was separately planned. Whilst there was some commonality in that the offending was against the one victim and within a short space of time, it was separate offending of a different kind.

[33] In imposing sentence her Honour said:

> On counts one, two, three and four, that is, the home invasion, deprivation of liberty, aggravated robbery and stealing $1000 from the ATM, you will be convicted and sentenced to an aggregate term of imprisonment for nine years.
>
> The crimes of extortion, theft of $1500 and theft of $500, followed swiftly after the earlier crimes. However, they did constitute separate offending and I do not think the sentences for the two sets of offending should be wholly concurrent.
>
> On counts five, six, seven and eight, you will be convicted and sentenced to an aggregate period of imprisonment for four years. I direct that the two sentences be served concurrently as to 2 years only.
>
> That brings a total sentence to 11 years imprisonment. I fix a non-parole period of seven years. The sentence is to commence on March 17, 2010.

[34] I see no error on the part of her Honour in making this order for cumulation.

[35] The remaining grounds can be considered together. Counsel for the applicant submitted that her Honour fell into error in considering irrelevant matters as

aggravating the circumstances of the offending and failing to take into consideration relevant matters which should have weighed in the applicant's favour.

[36] Specific reference was made to a passage in the sentencing remarks where her Honour said:

> You had very good prospects of employment, including a job interview on the same day of the attack. You had a devoted wife and information and ability to get help for your drug addiction. You were a person who had many advantages in comparison to other drug addicted offenders who have been before this Court on robbery charges and other similar offences, but you chose to commit violent crime on an innocent and vulnerable person.

[37] It was submitted that these observations suggested her Honour treated adversely, for the purposes of assessing prospects for rehabilitation, the matters referred to in those remarks. In my opinion a fair reading of the remarks makes it plain that her Honour was simply giving consideration to the circumstances in which the applicant committed the offences rather than looking at his prospects for rehabilitation which were dealt with separately and later in the sentencing remarks. The comments reflect the situation that existed at the time the offending occurred.

[38] Further reference was made to the following passage from the sentencing remarks:

> The offending was obviously planned. It occurred at a time when the victim had recently arrived from work. You disguised yourself and your voice to commit the offending, and forced him to blindfold himself so he would not recognise you. You put on a fake Aboriginal

> accent, no doubt hoping the victim would report that his attacker had been Aboriginal. This is another despicable and aggravating factor in your offending.

[39] It was submitted that the adoption of a fake Aboriginal accent in order to disguise the identity of the applicant as the offender could not amount to a "despicable and aggravating factor". It is not clear to me that her Honour was drawing that conclusion in her sentencing remarks. However, if she was, then I agree with the submission. Nevertheless, in my opinion, the conclusion did not lead to a sentence which was other than appropriate in all the circumstances.

[40] In my opinion the sentence was not manifestly excessive and it was appropriate to both the offence and the offender in the circumstances that prevailed. I see no basis upon which a court would interfere with the sentence.

[41] In my opinion the application for an extension of time within which to lodge an application for leave to appeal should be dismissed.

Southwood J:

[42] I agree with the Chief Justice and with his Honour’s reasons.

Olsson AJ:

[43] I agree with the Chief Justice and with his Honour’s reasons.
