The Queen v Martyn [2011] NTCCA 13

PARTIES:	THE QUEEN
	v
	MICHAEL SIMON MARTYN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 10 of 2011
DELIVERED:	16 November 2011
HEARING DATES:	4 November 2011
JUDGMENT OF:	RILEY CJ, MILDREN & SOUTHWOOD JJ
APPEALED FROM:	JUSTICE BARR

CATCHWORDS:

CRIMINAL LAW – Crown appeal – that the sentence was manifestly inadequate – that the learned sentencing Judge erred by considering the impact of imprisonment on offender's family.

Criminal Code s 160, s 411(4), s 414(1A) and s 414(1)(c); *Sentencing Act* s 40(1)

R v Blacklidge (unreported) NSWCCA 12 December 1995, applied.

Mather v R (2009) 25 NTLR 152; Mawson v Nayda (1995) 5 NTLR 56; *R v Nagas* (1995) 5 NTLR 45; *R v Wilson* [2011] NTCCA 9, followed.

REPRESENTATION:

Counsel:

Appellant:	Dr G Lyon SC
Respondent:	R Wild QC and B Wild

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

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

The Queen v Martyn [2011] NTCCA 13
No. CA 10 of 2011

BETWEEN:

THE QUEEN
Appellant

AND:

MICHAEL SIMON MARTYN
Respondent

CORAM: RILEY CJ, MILDREN & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 16 November 2011)

The Court:

[1] This is a Crown appeal against sentence.

[2] Following a trial before a jury, the respondent was convicted of the manslaughter of Brett Meredith. On 20 July 2011 he was sentenced to imprisonment for a period of three years and eight months with a non-parole period of one year and ten months. The Crown appeals as of right on the principal ground that the head sentence and the non-parole period were manifestly inadequate. There were additional grounds of appeal claiming that the learned sentencing Judge failed to give sufficient weight to:

(a) the objective seriousness of the offending;

(b) the principle of general deterrence; and

(c) the requirement for specific deterrence.

[3] Further grounds of appeal were that his Honour gave too much weight to:

(a) matters personal to the respondent;

(b) the gap between offending;

(c) the respondent's change in character and prospects for rehabilitation; and

(d) the impact of the offender's imprisonment upon his family.

[4] Save for the complaint regarding the impact of the offender's imprisonment upon his family, the remaining grounds of appeal were all argued as part of the principal ground that the sentence was manifestly inadequate.

The Offending

[5] The learned Judge reviewed the circumstances of the offending in light of the verdict of the jury. His Honour excluded the offence of reckless manslaughter and concluded that this was a serious case of negligent manslaughter. There is no challenge to that conclusion.

[6] The facts as found by the Judge, which have not been challenged, were as follows. The respondent and Mr Meredith were both present at a nightclub in Katherine in the early morning of 1 January 2010. They were in separate groups and there was little contact between the two groups until just after 2:46 am. At that time the respondent approached close to Mr Meredith and said something to him. A short time later Mr Meredith approached the respondent in what appeared to be an angry manner. Friends intervened and

Mr Meredith then rejoined his own group. At 2:49 am Mr Meredith revisited the respondent's group and spoke and acted aggressively. There was a heated conversation and Mr Meredith appeared angry. The respondent then pushed Mr Meredith causing him to fall to the ground. The respondent was seized and restrained by a third person. Mr Meredith became more and more agitated and was described as being "angry and on edge". He resisted attempts by others to restrain him. He pushed or thrust some people out of the way and he struck a female security guard on the chest. He was described by the sentencing Judge as being "agitated, angry, physically aggressive and very persistent" in his approaches to the respondent. Shortly after the respondent was released from the grasp of the third person he delivered the single punch to Mr Meredith.

[7] The direct injuries caused by the punch were not fatal, however the punch did cause Mr Meredith to fall. His Honour concluded that the cause of Mr Meredith's death was a fracture of the skull suffered when his head hit the hard floor. His Honour went on to conclude that at the time the blow was struck:

(a) the respondent and Mr Meredith were both standing on a hard concrete floor;

(b) Mr Meredith was not engaged with the respondent and was not looking at the respondent;

(c) Mr Meredith had, seconds earlier, been attempting to remonstrate with others and a female person had taken hold of his arm so that his attention was directed towards her;

(d) the respondent was aware that Mr Meredith was distracted and was not looking at him;

(e) Mr Meredith was unguarded and not prepared or ready to defend himself against the respondent; and

(f) the respondent was aware that Mr Meredith was unguarded and not ready to defend himself.

[8] In those circumstances the respondent punched Mr Meredith to the face with his right fist. The punch was “opportunistic and calculated” and was deliberate and intended by the respondent to be "a knockdown punch" that would send Mr Meredith to the ground.

[9] The learned Judge determined that the actions of the respondent were negligent as to causing the death of Mr Meredith. The punch gave rise to a high risk of death resulting and there was, on the part of the respondent, a gross lack of reasonable care and a great falling short of the standard of care that a reasonable person would have exercised in the circumstances. His Honour concluded this was a serious case of negligent manslaughter because it involved a deliberate and intentional heavy blow.

The Principles

[10] 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 insufficient or 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 or inadequate as to manifest such error. In relying upon manifest inadequacy it is incumbent upon the appellant to show that the sentence was not just inadequate but manifestly so. The appellant must show that the sentence was clearly and obviously, and not just arguably, inadequate.

[11] The right of the Crown to appeal against a sentence is conferred by s 414(1)(c) of the *Criminal Code*. Section 411(4) provides that the Court, if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefore and in any other case shall dismiss the appeal.

[12] With effect from 27 April 2011 s 414(1A) of the *Criminal Code* provides:

> In exercising its discretion on an appeal made under subsection (1)(c) involving a sentence imposed after the commencement of this

subsection, the Court must not take into account any element of double jeopardy involving the respondent being sentenced again when deciding whether to do either or both of the following:

(a) allow the appeal; and

(b) impose another sentence.

[13] This provision was considered in *R v Wilson*[1] where it was said that s 414(1A) of the *Criminal Code* has the following effect upon Crown appeals in the Northern Territory:

(a) The section removes any need for the Court of Criminal Appeal to give consideration to ensuring that Crown appeals are "rare and exceptional". Responsibility in that regard rests with the Director of Public Prosecutions.

(b) The Court must not take into account any element of double jeopardy involving the respondent being sentenced again when deciding whether or not to allow a Crown appeal.

(c) The Court must not take into account any element of double jeopardy involving the respondent being sentenced again when deciding whether to impose another sentence.

(d) The Court must not reduce the sentence which it otherwise believes to be appropriate on the basis of double jeopardy arising from the respondent being sentenced again.

(e) Apart from double jeopardy considerations, the Court retains a residual discretion to determine that, despite error having been established and being satisfied that a different sentence ought to have been passed, a Crown appeal should be dismissed or a reduced sentence should be imposed.

(f) Factors that may be relevant to the exercise of the residual discretion to dismiss an appeal, despite inadequacy of sentence,

[1] [2011] NTCCA 9

include the presence of unfairness arising from such matters as delay, parity, the totality principle, rehabilitation and fault on the part of the Crown.

The impact of the sentence upon the family of the respondent

[14] In the course of his sentencing remarks the Judge observed:

> You are in an established long-term relationship with your partner and you have four children. I *must* take into account that your imprisonment will deprive your partner and your children not only of your physical presence and emotional support, but also the financial support and protection which you provide. (emphasis added)

[15] In so concluding his Honour erred. The hardship caused to an offender's family is not normally a circumstance to be taken into account. However, as is noted in *The Queen v Nagas*,[2] there are exceptions to this policy including where the particular circumstances of the family are such that the degree of hardship is exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of imprisonment. It is necessary for the defendant to produce cogent evidence to the sentencing court to establish that imprisonment would impose exceptional hardship upon the family of the offender.[3] In the present case there were no submissions made on behalf of the respondent with respect to family hardship and there was no basis for a conclusion that exceptional hardship would be suffered by the family of the respondent. It was not a matter to be taken into account by the learned sentencing Judge in the circumstances.

[2] *The Queen v Nagas* (1995) 5 NTLR 45.
[3] Mawson v Nayda (1995) 5 NTLR 56.

Characterising the offence

[16] The respondent has been convicted of manslaughter. The learned sentencing Judge pointed out that the crime of manslaughter encompasses a wide range of situations. As Gleeson CJ observed in *R v Blacklidge:*[4]

> It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the range of degrees of culpability is so wide, that it is not possible to point to any established sentencing tariff which can be applied to such cases. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability.

[17] Although the appellant referred in submissions to "one punch" manslaughter cases, it is inappropriate to regard cases with that feature as constituting a particular category of manslaughter. Such offending may occur in such a wide range of circumstances as to make the label unhelpful and, possibly, misleading. The consequent manslaughter may be characterised as either reckless manslaughter or negligent manslaughter. [5] The offence may arise in circumstances where the altercation which led to the "one punch" were such that the culpability of the offender is relatively low. On the other hand the offending may reflect gratuitous and extremely dangerous acts of violence or be of the serious kind found in the present case where the conduct of the offender consisted of a significant and intentional blow, delivered with considerable force upon a victim who was unguarded, and where the punch was intended as a knockdown punch. As observed by the learned Judge offences of manslaughter, including where the offence arises out of one

[4] NSWCCA, 12 December 1995 adopted in *Mather v The Queen* (2009) 25 NTLR 152 at [19].
[5] Section 160 of the *Criminal Code*.

punch, may range from “a joke gone wrong” to offending which is close to murder.

[18] In this case the Court was taken to a number of sentences from around Australia delivered in circumstances where the death of the victim was as a consequence of a single punch. Those cases revealed a wide variety of sentences reflecting the diversity of circumstances in which such offending can occur.

[19] In determining an appropriate sentence it is necessary to take into consideration a large range of matters relating to both the nature of the offence and the circumstances of the offender. It adds nothing to the process to describe the offence as a "one punch" manslaughter.

The sentence

[20] Leaving aside the error identified above regarding the impact upon the family of the respondent, there has been and can be no criticism of the observations made by the sentencing Judge and the conclusions drawn by his Honour. There was no challenge to the conclusions and no suggestion that his Honour acted on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The final submission on behalf of the appellant was that reference to the overall result revealed that error must have occurred because the sentence was simply manifestly inadequate.

[21] The respondent emphasised that the sentencing Judge took into account all appropriate sentencing principles which were then carefully weighed and applied. His Honour gave proper consideration to matters personal to the offender as was required. It was submitted that the sentence was an appropriate one in all the circumstances and could not be described as manifestly inadequate. Counsel for the respondent urged the Court not to "tinker" with the sentence.

[22] In our opinion the sentence was manifestly inadequate. It is necessary to bear in mind that the starting point for a sentence in every case of manslaughter is the felonious taking of human life. That is "the starting point for a consideration of the appropriate penalty, and a key element in the assessment of the gravity of the objective circumstances of the case".[6]

[23] In the present case the offending was correctly described by the learned Judge as a serious case of negligent manslaughter because it involved a deliberate and intentional heavy blow. The blow was described as a “king hit" delivered in circumstances in which "it was a very dangerous thing to do". His Honour concluded that the punch involved a high risk of death to Mr Meredith and constituted a gross lack of reasonable care and a great falling short of the standard of care that a reasonable person would have exercised in the circumstances.

[6] *R v Blacklidge* NSWCCA, 12 December 1995 adopted in *Mather v The Queen* (2009) 25 NTLR 152 at [19].

[24] In determining an appropriate sentence the respondent does not receive the leniency due to those who plead guilty and accept responsibility for their conduct. The personal circumstances of the respondent are contained in the sentencing remarks and need not be repeated here. Of significance is the fact that the respondent had a history of violent offending although offences of violence had not been committed by him for some years prior to the time of this offending. The prospects for rehabilitation of the respondent were assessed by his Honour as being reasonably good but that assessment was qualified by the need for him to "genuinely participate" in appropriate rehabilitation programs for violent offenders and for offenders who have offended while under the influence of alcohol. As his Honour observed, the respondent had a tendency to engage in violent behaviour.

[25] In all the circumstances of both the offence and the offender it seems to us that the sentence was manifestly inadequate and did not reflect the objective seriousness of the offending. We allow the appeal.

Resentence

[26] In determining an appropriate sentence it is necessary to bear in mind the requirements of s 414(1A) of the *Criminal Code* discussed above. In this case there are matters arising out of the fact that this is an exercise of resentencing. It was submitted on behalf of the respondent, and accepted on behalf of the appellant, that the respondent has suffered anxiety and distress as a result of the appeal process and that he has been subjected to less

favourable conditions in prison by virtue of the institution of the appeal. He has been unable to participate in rehabilitation programs that would otherwise have been available to him.

[27] In addition the Court retains a residual discretion to impose a reduced sentence based upon the fact that unfairness to the respondent arises from submissions made on the part of the Crown in the proceedings below. The Crown made submissions to his Honour regarding the nature and terms of a suspended sentence. A suspended sentence is only available in the Northern Territory in relation to a sentence of less than five years imprisonment.[7] The effect of the submission was that his Honour would not fall into error in imposing a sentence of less than five years. The Crown did not submit that a sentence in excess of five years was required and therefore a non-parole period had to be imposed. But for that submission this Court would have imposed a sentence higher than that which is now to be imposed.

[28] The appeal is allowed. The sentence imposed by the sentencing Judge is set aside. The respondent is convicted and is sentenced to a period of imprisonment of five years deemed to have commenced on 27 May 2011 being the date on which he was taken into custody. In our opinion a non-parole period is appropriate and we set a non-parole period of two years and six months.

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[7] Section 40(1) Sentencing Act.