Moore v The Queen [2006] NTCCA 6

PARTIES:	MOORE, ANDREW JAMES 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 20 of 2004 (20322965)
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JUDGMENT OF:	ANGEL, MILDREN & RILEY JJ

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CRIMINAL LAW – Sentence – general principles – sexual offence against sleeping woman – factors to be taken into account – role of appellate court – appeal allowed – applicant resentenced

Criminal Code s 192(3)

Liddy v R [2005] NTCCA 4; *R v Hope*, unreported, 30 October 2001, CA 215/01; *R v Sullivan*, unreported, VICCCA, 13 May 1998, BC98020760; *Wiren v R* (1996) 89 A Crim R 356; referred to

REPRESENTATION:

Counsel:

Applicant:	P Elliott
Respondent:	A Elliott

Solicitors:

Applicant:	Withnalls
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

Moore v The Queen [2006] NTCCA 6
No. CA 20 of 2004 (20322965)

BETWEEN:

ANDREW JAMES MOORE
Applicant

AND:

THE QUEEN
Respondent

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 23 February 2006)

THE COURT:

[1] This is an application for leave to appeal against a sentence imposed upon the applicant. The sole ground of the proposed appeal was that the sentence imposed was manifestly excessive in all of the circumstances of the offence and the offender.

[2] The applicant was indicted for having had sexual intercourse with one A A without her consent, contrary to s 192(3) of the Criminal Code. The applicant entered a plea of not guilty to that charge. He admitted that sexual intercourse occurred, but he put consent in issue. By its verdict of guilty the jury was satisfied beyond reasonable doubt that the applicant had sexual

intercourse with Ms A at a time when she was either asleep or had blacked out and that accordingly she had not given her consent to sexual intercourse.

[3] The learned trial Judge found that Ms A had fallen asleep on the bed in the bedroom with her boyfriend, J C. Mr C lived in a unit. Ms A had been drinking heavily during the day. She became ill and vomited. She then went to bed. She fell asleep on Mr C's bed. She was naked at that time. Her boyfriend, Mr C, was asleep in the bed beside her.

[4] Mr C had also been drinking heavily and had passed out at an earlier time in the day. Neither Ms A nor Mr C were aware that the applicant had had sexual intercourse with Ms A until some days later when DNA and other evidence identified sperm found in the vagina of Ms A as being that of the applicant.

[5] The learned trial Judge found that Ms A woke up some time around 4.00 pm on the day in question. She was lying on her back naked. The applicant was seated straddling her across her groin area, playing with her breasts. She screamed out “Fuck off” or “Get off”. The applicant got off the bed and ran out of the bedroom into the living room of the unit.

[6] The screaming woke up Mr C who saw the applicant move away from the bed and out of the door of the bedroom. Mr C chased the applicant into the living room demanding to know what had happened. He then returned to the bedroom and felt the crotch area of Ms A and found it to be wet, moist and gooey consistent with sexual intercourse having taken place. Mr C then

returned to the living room but the applicant had left. Mr C then returned to the main bedroom. Ms A was still asleep. Mr C had great difficulty in waking her. She seemed to him to be groggy. Mr C had to shake her and yell at her to wake her. He told her he thought that the applicant had tried to have sex with her while she was asleep. Ms A said: “You're fucking joking”.

[7] The following day that matter was reported to the police. Ms A was referred to the Sexual Assault Referral Centre. She underwent a physical examination. Tests were made to ascertain if sexual intercourse had taken place. As a result the identity of the offender and the fact that sexual intercourse had occurred was confirmed by DNA evidence and other tests.

[8] While there was evidence that Ms A had complained of certain other minor injuries, the learned sentencing Judge was not prepared to draw the inference that the applicant was the cause of these injuries.

[9] Ms A had submitted a victim impact statement. The learned trial Judge observed:

> “As a consequence to the offence she has had difficulty in sleeping, suffers from depression and feels acute embarrassment. It has placed a considerable strain on her relationship with her boyfriend, Mr C, although they are still together. She has suffered panic attacks and acute concern about how she should dress and behave. She has feelings of aggression towards men and suicidal feelings. The offence has had a profound impact upon Ms A. It has impinged upon her ability to continue employment in the hospitality industry and had undermined her confidence to socialise and to interact normally.”

[10] So far as the applicant was concerned, the learned trial Judge noted that he had been drinking heavily and was affected by alcohol and also an illegal substance. At the time of the offence, he was 23 years of age. He is the youngest of three sons. He was born and educated in Darwin. He completed year 12. He then obtained employment as a labourer with Henry and Walker. In 1999 he obtained a security licence and worked in the security and hospitality industries. For the past four years he worked for various clubs. For the last nine months before trial he had worked at the Casino. The applicant has had continuous employment since leaving school. He is single with no dependants. At the time of sentence he was in a permanent relationship.

[11] Shortly after taking up employment in the security industry he commenced taking speed. The learned trial Judge observed that the applicant recognised that his use of this substance and his, at times, heavy drinking, contributed to the offending, and it was the applicant's intention to seek counselling in respect to the problems he had with the use of alcohol and other drugs.

[12] In November 2003 the applicant's employment was suspended. He was not able to obtain work in the security industry. He has had employment as a driver and a courier at a substantially lower salary which had caused him difficulty in maintaining his mortgage payments. His future prospects of employment will be affected because of the conviction for this offence.

[13] The applicant has no prior convictions. A number of references were tendered on his behalf attesting to his honesty and reliability. He was regarded by four persons who provided references as trustworthy, considerate and respectful towards women and well regarded. He also had strong local family ties and support. The learned trial Judge considered that he had good prospects of rehabilitation.

[14] Her Honour said that whilst general deterrence was an important factor, specific deterrence, although also a factor, was of lesser importance. Her Honour observed that there was no remorse to be taken into consideration and that Ms A had been required to go through the ordeal of giving evidence at the trial. She was not required to give evidence at the committal proceedings.

[15] After referring to a number of decisions which had been referred to her by counsel, her Honour imposed a sentence of seven years and six months imprisonment and fixed a non-parole period of five years and three months.

[16] The general principles applicable to an appeal against sentence on the ground that it is manifestly excessive are well settled. It is fundamental that the exercise of the sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error. An appellate court does not interfere with a sentence imposed merely because it is of the view that it would have imposed a lesser sentence. It interferes only if it is 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, although the sentence itself may be so excessive as to manifest such an error. In relying upon this ground it is incumbent upon the applicant to show that the sentence is not just excessive but manifestly so. The sentence must be clearly and obviously and not just arguably excessive, see *Liddy v R* [2005] NTCCA 4 at [12].

[17] In this particular case it was submitted that there were virtually no aggravating features. There was no element of any gratuitous violence apart from the intercourse itself. There were no further acts of degradation of the victim. The victim of the offence was not aware of the offence occurring until after it was completed. The offending was of short duration. The offending was opportunistic rather than premeditated and was committed whilst under the influence of alcohol and illicit drugs. The victim was not placed in the fear that often accompanies offences of sexual intercourse without consent. The applicant desisted immediately when he was told to "fuck off". Further, the applicant was without any prior convictions. He was only 23 years of age at the time of the offence and was still a youthful offender. He had good family support and the learned sentencing Judge found that he had good prospects of rehabilitation.

[18] Both counsel referred the Court to a number of authorities relating to sentences and offences of this kind. We think it is only necessary to refer to

two of them. In the case of *Wiren v R* (1996) 89 A Crim R 356 at 367, this court said:

> "We observe that the range of sentencing for this offence is wide, and each case falls to be dealt with on its own facts: see *Ah Sam* (unreported NTCCA 15 March 1995 at pgs 36-37 per Angel J.) It follows that there is little utility in examining the sentencing in a few cases…involving similar charges, and it would be wrong to attempt to "slot" into an appropriate place in the lists of nine sentences at pp 16-21 the sentence in the case before the Court. Nevertheless, as best as can be achieved, there must be even-handedness in sentencing, in the sense of attaining as far as possible, equal punishment for persons of the same culpability, so as not to erode public confidence in the integrity of the administration of justice. This object is furthered by paying due regard to the collective wisdom of other sentencing judges, which is manifested by any current general pattern of sentencing disclosed in relevant cases. It is a particular function of this Court to minimise disparities of sentencing standards while nevertheless maintaining the reasonable and just area of discretion of the sentencing judge: see *Allinson* (1987) 49 NTR 38. As was pointed out in *Visconti* (1982) 2 NSWLR 104, the orderly administration of the criminal law necessitates, in rape no less than other crimes, the preservation of relativity in fixing head sentences and non-parole periods, whilst recognising the width of the range of criminality in rape and the consequent extent of the variation between sentences in individual cases."

[19] It is the experience of each of the Judges of this Court that the sentence imposed by her Honour by way of a head sentence for an offence of this character is too high and well outside the range of sentences that have been imposed in like cases. In our opinion an appropriate sentence for an offence of this kind in circumstances of this kind following a trial, is in the order of approximately six years. That view of the case is reinforced by reference to cases from other jurisdictions of a similar nature.

[20] It is interesting to observe that in an almost identical case, *R v Sullivan*, (unreported, VICCCA, 13 May 1998, BC98020760) on resentencing the court imposed the same sentence for rape which had been imposed by the County Court judge, namely imprisonment for six years, although there were other offences taken into account in that case and which remained concurrent.

[21] A similar result was achieved in the New Zealand Case of *R v Hope*, (unreported, 30 October 2001, CA 215/01) where a sentence of six years was held to be well within the permissible range. The sentencing decisions of Judges of this Court to which we were referred are consistent with our collective experience.

[22] Counsel for the respondent emphasised that this was a case involving breach of trust and the preying on a vulnerable woman. The breach of trust arose, it was said, because the victim went to sleep, she trusted the applicant to behave himself and had not asked him to go home. The victim was vulnerable, so it was said because she was asleep and intoxicated. This may be so. There is, however, no aggravating feature which often arises in cases where breach of trust is alleged where the victim was in the care of the applicant. Nor did the sentencing Judge find that the applicant had set out to get the victim drunk with a view to taking advantage of her.

[23] Counsel for the Crown conceded that it is not difficult to find in almost every case of this kind that the victim was, to some extent, unable to defend

herself for one reason or another or that, to some extent, the victim had placed herself in a situation where she trusted the applicant. These are common features of almost every rape case of this kind. We agree, however, with his submission that these features are present here, albeit only to a very limited degree. Nevertheless, we are of the opinion that the sentence imposed is manifestly excessive and demonstrably so. We would grant leave to appeal, allow the appeal and quash the sentence imposed. It then falls upon us to resentence the applicant.

[24] We have heard submissions from counsel as to that. We will not go into the submissions in detail except to say that we have been provided with information as to his circumstances at the gaol and the courses that he has pursued and this material shows, as was anticipated by the learned sentencing Judge, that the applicant has excellent prospects of rehabilitation.

[25] On resentencing, we would impose a sentence of imprisonment of five years six months, backdated to commence from 6 October 2004. A new non-parole period is fixed at three years 11 months, also backdated to 6 October 2004.