Mununggurr v The Queen [2006] NTCCA 16

PARTIES:	MUNUNGGURR, DARREN
	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 2006
DELIVERED:	18 JULY 2006
HEARING DATES:	14 JULY 2006
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ
APPEAL FROM:	NORTHERN TERRITORY SUPREME COURT, PROCEEDING SCC NO. 20408623

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	W J Karczewski QC

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Ang2006016
Number of pages:	11

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

Mununggurr v The Queen [2006] NTCCA 16
No. CA 1 of 2006 (20408623)

BETWEEN:

DARREN MUNUNGGURR
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL and SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 18 July 2006)

THE COURT:

[1] On 14 July 2006 we dismissed this appeal by leave against severity of sentence and now give our reasons for doing so.

[2] On 15 December 2005 the appellant was sentenced to ten years and six months imprisonment with a non–parole period of seven years and six months following his plea of guilty to one count of having sexual intercourse without consent contrary to s 192(3) Criminal Code Act 1983 (NT) for which the maximum penalty is life imprisonment.

[3] On 31 January 2006 the appellant was granted leave to appeal against that sentence on three grounds, first, "That the Learned Sentencing Judge did not

give sufficient weight to the [appellant's] significant intellectual disability with regard to moral culpability and the weight that should be attached to the sentencing considerations of specific and general deterrence"; secondly, "That the Learned Sentencing Judge gave too much weight to the Crown authorities put forward"; and, thirdly, that in all the circumstances the sentence was manifestly excessive.

[4] The appellant was born on 20 August 1981 and was 22 years of age at the time of the offending on 13 April 2004. The complainant who was born on 10 February 1993 and was 11 years of age. He lived in a house at East Woody community near Nhulunbuy with his mother, ND.

[5] On the day of the offence the complainant's mother went out hunting. She left her two children including the complainant asleep in her house while she did so. The complainant woke and went looking for her. He was wearing red shorts and greyish white underpants and a yellow singlet with socks on his hands and no shoes. He walked along the beach heading towards a creek where he thought his mother would be.

[6] In the course of the journey he saw the appellant. The complainant turned and ran back. The complainant thought the appellant was "full drunk". The appellant ran ahead of the complainant and blocked his escape saying "Don't go. Don't run." The complainant said: "I'm going home" but the appellant walked really fast and grabbed him with both hands and pushed him onto the

ground. The complainant was then lying on his back. The complainant cried out for his mother but was told "Go quiet. Quiet."

[7] The appellant removed the complainant's shorts and in doing so tore the pocket. He removed his shirt too. He lowered the complainant's underpants without taking them fully off. The appellant held the complainant down variously with one hand by the shoulders and also punched him. The complainant cried.

[8] The appellant tried to kiss the complainant on the face. The appellant spat on his hand and applied the saliva to his penis for lubrication. He masturbated himself so that he had an erection. The appellant then moved the complainant's legs apart and inserted his penis into the anus of the complainant without the consent of the complainant. The appellant thrust his penis inwards and outwards. The complainant said to the offender, "No. Don't touch me. I want to go home." The appellant told the complainant to "Wait here until I come on you" and said that he would take him back at nightfall. It does not appear that the appellant ejaculated.

[9] Meanwhile ND had returned to her house. She was told that the complainant had gone out looking for her. She went out to the car park and called out his name. The complainant came out from behind the smoking pipe tree. He was only wearing his greyish/white underpants. He was carrying his red shorts in his hand. He told his mother "I've been fucked by that man". ND saw the appellant get up off the ground and run away. She gave chase but

the complainant persuaded her that the better course was to go to the Police which they soon did. The appellant escaped through the mangroves but was later picked up by a Police patrol while he was walking across the nearby golf course. He was still covered with sand.

[10] The complainant was taken to Gove Hospital where swabs and stool samples were taken by Dr Votis and Nurse Paradise. The complainant was then conveyed to Darwin where he was examined by Dr Fitzsimmons from the Sexual Assault Referral Centre. The examination revealed abrasions of the epithelium and anal canal anteriorly, posteriorly and on the right side which were seen externally and stopped at the anal verge which suggested strongly that they resulted from penetration rather than from an injury from inside out. Those injuries had healed by 21 April 2004.

[11] Examination of swabs and smears from the sexual assault investigation kit and of the red shorts did not detect semen. A mixed DNA profile was found from blood staining on the back of the complainant's underpants. The major profile was identical to the DNA profile of the appellant. Further, there was a high probability that a mixed DNA profile found from the inside front area of the red shorts came from the complainant and the appellant.

[12] The appellant was arrested later that day. When first taxed with the allegation that he had assaulted a young boy at East Woody he said "Not me". The appellant was interviewed on the evening of the offence. When asked about the trouble the appellant said that he was "only touching it,

poking it with finger". He said it was a little boy that he didn't know. He told Police it happened at East Woody. He said he had been drinking with Alfred and his wife and that he was drunk. He admitted that he had grabbed a boy and that he was "poking in the bottom". He said that he "take that short off that little boy". When asked what he had to say about the allegation that he removed the complainant's shorts and put his penis in the complainant's bottom, the interpreter said "He's not sure of that".

[13] In addition to the admitted facts and circumstances of the offence the learned sentencing judge had before her a victim impact statement and a report from the Guidance Officer at the Arnhem Education Office which evidenced the complainant's emotional suffering as a consequence of the crime, the complainant's resultant inappropriate behaviour at school and the fact the complainant was at risk emotionally and psychologically. Additionally there was a report from the Programme Manager of the Youth Services Division of Anglicare at East Arnhem giving details of counselling of the complainant and his mother following the offence, which counselling continued until April 2005. Thereafter the complainant had reverted to his disruptive behaviour including violence in class at school and his continued expression of anger. The learning sentencing judge commented that at the time of sentence, the complainant continued to suffer emotionally and psychologically as a consequence of the offence.

[14] Also before the learned sentencing judge were a psychological report dated 12 July 2005 of Kim Groves and a psychiatric report of Dr Lester Walton of

18 March 2005. Each expressed the opinion that the appellant was intellectually disabled and each noted that the appellant understood that what he had done was wrong and that the appellant was able to express remorse by his plea of guilty. According to a pre–sentence report before the Judge dated 1 December 2005 the appellant expressed his shame for committing the offence and confirmed that he was "full drunk" at the time he committed the offence. Also before the Court was a letter from the appellant's grand father one Ngulpurr Marawili, an administration supervisor and community leader at Yilpara. In that letter Mr Marawili said: "Everyone is shocked and surprised at his offence. The only reason for this sort of offence would be due to the fact that he had been drinking alcohol at Nhulunbuy."

[15] In the course of her sentencing remarks the learned sentencing judge referred to the fact that the appellant was "still a very young man", a first offender of prior good character, that he had entered a plea of guilty which was accepted "as an expression of his remorse", that the appellant had made admissions when spoken to by Police and had expressed remorse. She then said:

> "In addition to these matters I have to take into account the very serious nature of the offence. It was the rape of an 11 year old child, a young boy whose trust had been shattered, who feels frightened and angry and who is experiencing ongoing emotional and psychological problems …
>
> It is an offence, the nature of which gives rise to feelings of revulsion by members of the community. The consequences of such

> offending can be long lasting, as far as the victim is concerned, the aspect of general deterrence is important as to a somewhat lesser extent in the case of Mr Mununggurr, is specific deterrence.
>
> Darren Mununggurr has an intellectual disability. However the psychiatric and psychological reports that have been tendered and the evidence given to the court by Mary Mununggurr make it clear Darren Mununggurr well understood that what he did was wrong … Darren Mununggurr's rehabilitation is one factor in the sentencing process. He is still a young man and I have assessed his prospects of rehabilitation as good, given the level of family and community support that he has. However, this is an offence of such a serious nature that it would not be appropriate to release Darren Mununggurr on a suspended sentence to return to his community.
>
> The objective seriousness of this offence is such that I consider the only appropriate sentence is a sentence of substantial imprisonment."

[16] Having said that she had the opportunity to read the two authorities referred to by the Crown and that she would allow a discount of the order of 25% for the plea of guilty, her Honour passed sentence.

[17] As to the first ground of appeal we perceive no error in the approach of the learned sentencing judge.

[18] There was no material before the learned sentencing judge suggesting that the offending was in any way contributed to by the appellant's intellectual disability. The learned sentencing judge's finding that the appellant well understood that what he did was wrong at the time he did it was supported by all the evidence. In order for a psychiatric illness or mental disability to be regarded as ameliorating the need for general deterrence, the onus was on the appellant to demonstrate how the illness or disorder related to the offending, that is, how its effect reduced the seriousness of the offences and

the appellant's moral culpability: see generally *Chambers* (2005) 152 A Crim R 164 at [26]–[28].

[19] It is not the law that a person suffering from a mental disorder is on that account alone necessarily entitled to a discount when being sentenced. So much is clear from the judgment of Gleeson CJ in *Engert* (1995) 84 A Crim R 67.

[20] In *Engert*, at 68, his Honour said:

> "Persons suffering from mental disorders frequently come into collision with the criminal justice system. Sentencing such persons commonly confronts judicial officers with the need to make a sensitive discretionary decision. Sentencing is essentially a discretionary exercise requiring consideration of the extremely variable facts and circumstances of individual cases and the application of those facts and circumstances to the principles laid down by statute or established by the common law. The principles to be applied in sentencing are in turn developed by reference to the purposes of criminal punishment. Those purposes were set by the High Court in *Veen (No 2)* (1998) 164 CLR 465 at 476; 33 A Crim R 230 at 237–238 as follows:
>
> > '… protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform.'
>
> A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of *Veen (No 2)*. Again, in a particular case, a feature which lessens what might otherwise be the

importance of general deterrence, might, at the same time increase the importance of deterrence of the offender.

It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise."

[21] His Honour, at 71, also said:

"In truth however, for the reasons given at the commencement of this judgment, the question of the relationship, if any, between the mental disorder and the commission of the offence, goes to circumstances of the individual case to be taken into account in the application of the relevant principles. The existence of such a causal relationship in a particular case does not automatically produce the result that the offender will receive a lesser sentence, any more than the absence of such a causal connection produces the automatic result that an offender will not receive a lesser sentence in a particular case. For example, the existence of a causal connection between the mental disorder and the offence might reduce the importance of general deterrence, and increase the importance of particular deterrence or of the need to protect the public. By the same token, there may be a case in which there is an absence of connection between the mental disorder and the commission of the offence for which a person is being sentenced, but the mental disorder may be very important to considerations of rehabilitation, or the need for treatment outside the prison system."

[22] In the same case Allen J said, at 72:

"General deterrence is simply the deterrence, of others and characteristics personal to an offender might make him an unpersuasive vehicle for the deterrence of others in the sight of those others. It must be emphasised that general deterrence is directed to deterring others. So one must look at the impact upon others. Even in a case where an offender has a mental disability which is unrelated to the commission of the crime the sympathy which his condition must attract in the eyes of others in the community generally may be such that to sentence him with full weight given to general deterrence might have no impact at all upon others. Human

> sympathy would say: 'Well, you would not expect him to get the same sentence as someone else.'
>
> In that respect there is no difference at all between mental disability and other personal characteristics or personal conditions which would attract sympathy. Assume, for example, that an offender is perfectly able mentally in all respects but, after the commission of the offence, he has become a quadriplegic as a result of a car accident, or he has contracted some dreadful disease which is in the process of shortening his life. In those circumstances, the same considerations of how members of the community would perceive the sentence would apply as in the case of mental disorder."

[23] We agree with the submission of the respondent that the present is not a case where necessarily, one, to use Allen J's words, "would not expect [the appellant] to get the same sentence as someone else". The learned sentencing judge in her remarks plainly thought personal deterrence was less of a factor on account of the intellectual disability of the appellant; not so general deterrence. We discern no error in the learned sentencing judge's consideration of the intellectual disability of the appellant.

[24] In our view there is no substance in the second ground of appeal. The learned sentencing judge mentioned that she had read two cases to which she had been referred by the Crown. There is nothing in the sentencing remarks that suggest that the learned sentencing judge was influenced by the two cases referred to. Counsel for the appellant rightly conceded there was no range or tariff in respect of offences under s 192(3) Criminal Code (NT): see generally, *Visconti* [1982] 2 NSWLR 104 and *Jabaltjari* (1989) 64 NTR 1 at 32. See also the general discussion by Nader J in *Ireland* (1987) 49 NTR 10 at 17–19 where the difference between recognising and giving weight to a

general pattern of sentencing on the one hand and comparing the facts of individual cases on the other was discussed. The former approach is acceptable, the latter not.

[25] As to the third ground of appeal, having regard to the gravity of the offending and the circumstances of the appellant, the sentence, although substantial, is not outside the proper range of the sentencing discretion. It is not excessive.
