Karui v The Queen [2013] NTCCA 13

PARTIES:	**KARUI, Sylvester**
	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 16 of 2013 (21136852)
DELIVERED:	12 September 2013
HEARING DATES:	4 September 2013
JUDGMENT OF:	RILEY CJ, SOUTHWOOD and HILEY JJ
APPEALED FROM:	KELLY J

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – Attempted sexual intercourse with 15-year-old-girl – Manifest excess – Appeal allowed – Appellant re-sentenced.

JUDGMENTS AND ORDERS – Power to amend sentence to correct arithmetical error – Exercise of power after leave to appeal has been granted – Inherent or implied jurisdiction of the Court – 'Slip' rule – *Sentencing Act 1995* (NT) s 112.

Criminal Code 1983 (NT) s 192; *Sentencing Act 1995* (NT) s 5, s 112

Burrell v The Queen (2008) 238 CLR 218; *Hampton v The Queen* [2008] NTCCA 5; *House v The King* (1936) 55 CLR 499; *Jovanovic v The Queen* (1999) 106 A Crim R 548; *Liddy v The Queen* [2005] NTCCA 4; *Morrow v The Queen* [2013] NTCCA 07; *R v AN (No 2)* (2006) 66 NSWLR 523; *R v Carrion* (2002) 128 A Crim R 29; *R v Melville* (1999) 9 NTLR 29; *R v Bradbury* (SCC 21106092, 21106091, 22 September 2011), referred to.

REPRESENTATION:

Counsel:

Appellant:	R Wild QC with J Hunyor
Respondent:	D Morters

Solicitors:

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

Judgment category classification:	A
Judgment ID Number:	Hil1309
Number of pages:	13

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

Karui v The Queen [2013] NTCCA 13
No. CA 16 of 2013 (21136852)

BETWEEN:

SYLVESTER KARUI
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, SOUTHWOOD and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 12 September 2013)

THE COURT:

Introduction

[1] On 19 June 2012, the appellant pleaded guilty to the offence of attempting to have sexual intercourse with a child aged 15 years without her consent and knowing about her lack of consent. The maximum penalty for the offence is imprisonment for 14 years. Investigations regarding the mental capacity of the appellant followed. On 26 March 2013, the appellant was sentenced to imprisonment for a period of eight years and 10 months with a non-parole period of six years. The sentence was backdated to 1 November 2011 on account of the fact that the appellant had been in custody since then.

[2] The sentencing judge indicated a starting point of imprisonment for nine-and-a-half years and purported to reduce that figure by 15% to reflect the plea. It is not in dispute that her Honour made an arithmetical error in calculating the reduction and the sentence should have been to imprisonment for a period of eight years and one month. The matter came back before her Honour on 19 June 2013 for the purpose of correcting the error by amending the sentence. The appellant opposed the amendment, arguing that the matter should be left to be corrected in the appeal proceedings which were then underway. Her Honour concluded that any amendment would not derogate from the rights of appeal of the appellant and purported to amend the sentence to imprisonment for eight years and one month rather than eight years and 10 months.

[3] The appellant appeals against the sentence, primarily on the ground that it was manifestly excessive.

The circumstances of the offending

[4] The offence occurred at about 4pm on 1 November 2011. The victim, who was then aged 15 years, was walking home from school. The appellant followed her for several hundred metres and she crossed the road to get away from him. He followed her and grabbed hold of her around the waist before lifting her into the air and putting her over his shoulder. She struggled and fell to the ground, landing on her back. The appellant then crouched over the top of her and held her arms down with the weight of his body. He jabbed the victim in the area of her vagina with his fingers. His

fingers made contact with the outside of her clothing. She then kicked at the appellant's groin and was yelling and screaming. Fortunately, nearby residents and motorists came to her aid. The appellant then ran away. When later interviewed by police the appellant admitted: "I was going to rape her".

[5] The victim was traumatised by the attack and could not go to school for some time because of her emotional distress. For nearly 2 months she slept with her mother. She suffered anxiety attacks and was, in general terms, distressed and anxious. The sentencing judge described the victim as "a very brave young woman".

[6] The appellant was described as an Aboriginal man of 25 years who had a traditional upbringing in Wadeye. He had a "very hard life" with parents who had alcohol problems. The investigations ordered by the sentencing judge revealed that the appellant has poor intellectual capacity with compromised reasoning and problem solving abilities. His capacity to think abstractly and appreciate complex ideas is limited. According to the psychiatrist who examined him his problems are exacerbated by his chronic alcohol abuse and his antisocial personality traits. His insight into his offending is poor. Nevertheless, at the time of the offending, he knew what he was doing and that it was wrong.

[7] The appellant has a long criminal history with offences for unlawful entry, stealing and property damage. He had a conviction in Western Australia for aggravated sexual penetration without consent which included circumstances

where he assaulted a female tourist with a broken tree branch and forced her to perform oral sex upon him. He also engaged in other indecent conduct and bit and pushed the victim. On 22 April 2008, he was sentenced to imprisonment for four years and four months backdated to 24 January 2007, when that offence was committed. The present offending occurred just under six months after his release from prison for that offence.

Sentencing remarks

[8] The sentencing judge concluded that the appellant is "a danger to the community". His prospects for rehabilitation were "very small". Her Honour stressed the need for other people in the community to be protected from this kind of conduct, and the need for a message to be sent to other men who might be tempted to behave this way that if they do, they will be punished. She added, however, that: "I do accept that your very limited intelligence means that this consideration is not as big as it might otherwise have been."

[9] Her Honour pointed out that the appellant "brazenly attacked a complete stranger, a child walking home from school, intending to have sex with her without her consent", that he used actual violence in the attempt and committed an indecent assault during the attempt, and that he may well have succeeded in his attempt to have sex with her without her consent but for the intervention of an off-duty policeman. She considered the offending to be towards the upper end of the range of seriousness for this type of offending.

[10] Her Honour expressed doubt that the appellant really is remorseful. She noted that the Crown case was strong, and that his plea of guilty cannot be said to be early. The matter had been listed for trial. She indicated that she would be reducing the sentence by about 15% on account of the guilty plea.

[11] Her Honour also noted that the appellant had been in remand for a long time in relation to this matter, and that prisoners in remand often experienced harsher conditions than do sentenced prisoners. She took that into account and placed some weight on that, "but not very much." Her Honour also referred to medical reports to the effect that whilst the appellant was fit to stand trial and would not have a defence of mental impairment, his "verbal and non-verbal reasoning ability are in the borderline impaired range."

The grounds of appeal

[12] The principal ground of appeal is that the sentence was manifestly excessive. The appellant argued that:

(a) inappropriate and inadequate weight was given to the personal circumstances of the appellant;

(b) the sentence did not appropriately recognise the long period on remand experienced by the appellant which was particularly stressful for a prisoner with impaired cognitive faculties;

(c) there was, initially, some confusion as to the maximum penalty;

(d) the offence was characterised as being towards the upper end of the range of seriousness and the sentencing judge "must have contemplated an actual head sentence close to the maximum" before making mitigatory allowances; and

(e) the sentence was manifestly excessive when compared with other sentences for similar offending.

Seriousness of the offending

[13] We agree with the trial judge's view that the appellant's conduct was towards the upper end of the range of seriousness for this type of offending. Such an attack on a 15-year-old-girl walking home from school is the kind of offending which causes considerable alarm and outrage in the community.

[14] Although it did not involve some of the elements sometimes seen in relation to this kind of offence such as planning, pre-meditation, prolonged deprivation of liberty, removal of clothing or exposure of genitalia, the offending was very serious.

[15] This offending was no less serious because it was committed by a person who was very intoxicated and who had poor intellectual capacity. His bad criminal history, particularly his previous offending of a similar kind in Western Australia which led to his lengthy imprisonment, and his chronic alcohol abuse and his antisocial personality traits, were important factors to

be taken into account particularly when considering personal deterrence, protection of the community and the expression of community disapproval.[1]

Manifest excess

[16] The principles applicable to appeals against sentence on the basis that the sentence was manifestly excessive are well established. A finding that a sentence is manifestly excessive may be made although the nature of the sentencing judge's error may not be discoverable.[2] The appellant must show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously and not just arguably excessive.[3]

[17] We recognise that there is no particular "tariff" for this kind of offending, and each matter will differ according to its own facts and circumstances. Moreover, other sentences in the Northern Territory to which we were referred involved circumstances quite different to the present. We consider that a sentence of eight years and one month is considerably above the range of sentences in similar circumstances imposed in the Northern Territory, and elsewhere in Australia, for attempted sexual assaults, including on teenage girls. There was a significant disparity between the sentence imposed and current sentencing standards for this offence.

[18] Accordingly, we consider that the sentence was manifestly excessive. We allow the appeal and will re-sentence the appellant.

---

1 Cf *Sentencing Act 1995* (NT) s 5.
2 *House v The King* (1936) 55 CLR 499.
3 *Morrow v The Queen* [2013] NTCCA 07 at [36]. See also *Liddy v The Queen* [2005] NTCCA 4 at [12] and *Hampton v The Queen* [2008] NTCCA 5 at [4].

Arithmetical error

[19] As we noted at [2] above, her Honour amended the sentence on 19 June 2013 in order to correct her arithmetical error. During the hearing of the appeal the appellant sought and was given leave to contend that her Honour erred in making that amendment, primarily on the basis that she did not have the power to do so at that time, or alternatively, that if she did have such power she should not have exercised it because the matter (including a challenge to that error) was already the subject of an appeal. This ground raised questions concerning the power of the Court to amend a sentence in circumstances where an appeal has already been brought against the sentence. This would require consideration of the Court's powers under s 112 of the *Sentencing Act*, the slip rule and the implied or inherent power of a court of superior jurisdiction to correct arithmetical errors of this kind.

[20] These questions were considered at some length by the New South Wales Court of Criminal Appeal in *R v Carrion*.[4] Other jurisdictions have provisions similar to s 112 of the *Sentencing Act* and a "slip rule" as part of their Supreme Court rules. Neither of these provisions derogate from the implied or inherent common law power of a court to correct certain kinds of errors.

[4] *R v Carrion* (2002) 128 A Crim R 29.

[21] Section 112 of the *Sentencing Act* is an express power that enables a sentencing court to correct errors of law,[5] but the power would not appear to extend to an arithmetical error. The slip rule has been held in some jurisdictions as not applying to criminal cases.[6]

[22] The implied or inherent power of a superior court of record to vary or amend a sentence which has been imposed was discussed at some length by the Full Federal Court in *Jovanovic v The Queen*[7] and also in *Carrion*. Whilst there seems no doubt that a sentencing judge may correct a sentence before it has "passed into record" there may be some uncertainty as to exactly what this means in some jurisdictions.[8]

[23] The Court of Criminal Appeal in *Carrion* observed that the Full Court in *Jovanovic* "did not question the existence of the implied or inherent power to vary an order which did not reflect the words spoken or the intent of the sentencing judge, so as to give effect to the court's true intention, or the power to intervene when the sentencing order has not been perfected."[9] Their Honours proceeded to say:

> The better view, on the authorities reviewed, is that it [ie the court] did have an inherent power to do so [ie vary a sentencing order], whether or not the order had been perfected.[10]

---

5 See, eg, *R v Melville* (1999) 9 NTLR 29 at 43 [27].
6 See, eg, *Jovanovic v The Queen* (1999) 106 A Crim R 548 at 552, referred to in *Carrion* (2002) 128 A Crim R 29 at 33–4 [24]–[26], 35 [32].
7 (1999) 106 A Crim R 548.
8 Cf *Carrion* (2002) 128 A Crim R 29 at 35 [29].
9 Ibid at 35 [32] (citation omitted).
10 Ibid at 36 [33].

[24] However, the Court did not find it necessary to finally decide that question, since in that matter the relevant orders had not been perfected.

[25] *Carrion's* case, and in particular the passage quoted above, was considered by the New South Wales Court of Criminal Appeal in *R v AN (No 2)*.[11] James J (with whom Simpson and Rothman JJ agreed) said:

> In my opinion, the cases reviewed by Wood CJ at CL in *R v Carrion* and by Hodgson JA in *R v Reardon* support the conclusion that the Court of Criminal Appeal, although a statutory court, does have power, independently of any rule of court, to correct an error in an order it has made arising from a slip or accidental omission, even after the order has been perfected.[12]

[26] In *Burrell v The Queen*, Kirby J said that the "common law rule has been held applicable to court orders although the order on appeal has been formally perfected."[13] His Honour included as authority for that observation *Carrion*[14] and *R v AN (No 2)*[15]. In *Carrion*, the court had said that the inherent jurisdiction "was seen to lie in the fact that 'the interests of justice required' the court's intervention."[16]

[27] One additional and perhaps distinguishing circumstance in this appeal is the fact that the applicant had already sought and been granted leave to appeal before the sentencing judge purported to correct the error. We do not think that makes a difference. If, for example, such an error were the sole basis

---

[11] (2006) 66 NSWLR 523.
[12] Ibid at 530 [42].
[13] *Burrell v The Queen* (2008) 238 CLR 218 at 244 [104].
[14] *Carrion* (2002) 128 A Crim R 29 at 32 [18].
[15] *R v AN (No 2)* (2006) 66 NSWLR 523 at 530 [42].
[16] (2002) 128 A Crim R 29 at 32 [18].

for an appeal we consider that the interests of justice would permit the sentencing judge to make the correction, without the need for the parties to proceed with the appeal.

[28] We consider that the sentencing judge did have the power to amend the sentence to correct her arithmetical error.

[29] In addition to submitting that the sentencing judge had no power to correct the arithmetical error, the appellant also submitted that the sentencing judge erred in exercising her discretion to do so. However, apart from suggesting that her Honour's exercise of discretion amounted to an inappropriate interference with the appellate process because it somehow weakened the appellant's grounds of appeal, the appellant did not develop this submission. In our opinion, this submission lacks merit. The exercise of her Honour's discretion did not weaken the appellant's grounds of appeal, there was no interference with the appellate process and the sentencing judge exercised her discretion correctly. Whilst we agree that her Honour purported to exercise her power under s 112 of the *Sentencing Act* rather than under the Court's inherent or implied power, there is no basis for interfering with her Honour's decision to make the correction.

Re-sentence

[30] As we have said, this offending was very serious. It involved a predatory attack on a 15-year-old school girl on a public street. The sentence to be imposed on the appellant should reflect the need for protection of the

community, punishment, specific deterrence and also reflect the fact that the community strongly disapproves of such conduct. Young girls are entitled to be safe in their community and this Court must do what it can to protect them.

[31] We recognise that, at present, conditions in remand are generally harsher than those for sentenced prisoners. This is a notorious fact that has been acknowledged by this court for at least two years since the observations in *R v Bradbury*,[17] and was also acknowledged by the sentencing judge when she likened conditions in remand to the kind of conditions experienced by prisoners held in maximum security. We have taken into account this factor, along with the various other factors noted above, and by her Honour, in the process of deciding the appropriate sentence for the appellant.

[32] We consider that the notional head sentence should have been seven years and six months. In light of the appellant's guilty plea we discount that sentence by approximately 15%. This leads to a head sentence of six years and four months. We consider that the circumstances of the offending and of the appellant are such that he should spend at least four years of his sentence in prison prior to becoming eligible for parole and we fix his non-parole period accordingly.

Orders

[33] Accordingly the orders of the Court are as follows:

[17] *R v Bradbury* (SCC 21106092, 21106091, 22 September 2011) per Mildren J.

(a) The appeal is allowed.

(b) The sentence of eight years and one month imprisonment with a non-parole period of six years is set aside.

(c) The appellant is sentenced to six years and four months imprisonment with a non-parole period of four years, from 1 November 2011.

.....