CITATION:	*Sundarjit v Heath* [2018] NTSC 14
PARTIES:	SUNDARJIT, David Harivansh v HEATH, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 11 of 2017 (21609495)
DELIVERED:	9 March 2018
HEARING DATES:	9 March 2018
JUDGMENT OF:	RILEY AJ
APPEAL FROM:	Local Court Alice Springs

REPRESENTATION:

Counsel:

Appellant:	C Steirn SC with D Shridar
Respondent:	G Dooley

Solicitors:

Appellant:	Hemant Prakash and Associates
Respondent:	Office of the Director of Public Prosecutions
Judgment category classification:	C
Judgment ID Number:	Ril1801
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sundarjit v Heath [2018] NTSC 14
No. LCA 11 of 2017 (21609495)

BETWEEN:

DAVID HARIVANSH SUNDARJIT
Appellant

AND:

ANDREW HEATH
Respondent

CORAM: RILEY AJ

Ex Tempore
REASONS FOR JUDGMENT

(Delivered 9 March 2018)

[1] On 6 March 2017, in the Local Court at Alice Springs, the appellant was convicted of one count of indecent dealing with his stepdaughter, SD, a child under the age of 16 years. He was found not guilty of a second count for a similar offence against SD. On 5 May 2017 the appellant was convicted and sentenced to imprisonment for nine months suspended after three months. The appellant appealed against the conviction and, on the morning of the hearing, added an appeal against sentence.

[2] The grounds of appeal are (1) that the verdict was unreasonable and could not be supported having regard to the evidence; (2) the two verdicts were inconsistent with each other; and (3) that the learned trial Judge failed to

provide adequate reasons in determining the guilt of the appellant. The appeal against sentence alleges it was manifestly excessive.

[3] The Local Court Judge accepted the evidence of SD that, after a swimming lesson in the family home town of Yuendumu, the appellant was drying her hair when he put his hand under her school shirt and bra and squeezed her breast. She pushed the appellant away and he left the room.

[4] His Honour found the appellant not guilty of the second count which his Honour noted the complainant described as occurring when, at night, she woke from sleep and "it felt like someone was touching her breasts like before". His Honour recorded that SD said she saw a shadow which she identified as the appellant. Upon her moving as she woke the appellant left the room and she went back to sleep.

Ground 1 – Whether the complainant wore a bra?

[5] In support of the contention that the verdict was unreasonable and not supported having regard to the evidence, the appellant first complained that the Local Court Judge failed to resolve two "irreconcilable" pieces of evidence. His Honour found as a fact that the appellant, whilst drying the complainant's hair, "put his hand under her school shirt and bra and touched her breasts". It was submitted his Honour also accepted the evidence of the complainant's mother which included an observation by his Honour "that SD didn't wear a bra at this time under her school uniform".

[6] It was argued that it was not possible to reconcile these apparently conflicting pieces of evidence. Reference to the evidence of the mother reveals that in cross-examination she was taken to the topic of the clothing worn by her daughter in 2015 and, in listing that clothing, there was no mention of a bra. The cross-examiner suggested some items of clothing to her, for example socks, shoes and underpants, but did not ask any specific question of the mother directed to whether her daughter wore a bra. Rather, a list of items of clothing worn by SD was agreed which did not make mention of a bra. This is quite different from a positive statement that "SD didn't wear a bra at this time". By way of contrast, the cross-examiner asked quite detailed questions of the complainant on this issue and in her responses she gave a description of the bra including that it did not clip at the back and it was not loose-fitting. None of this was put to the mother. The evidence of the complainant was clear and firm and accepted by his Honour. Notwithstanding the observation of the trial Judge it is not readily apparent that there was necessarily a conflict in the evidence given the specific item of clothing was not squarely raised with the mother.

[7] In any event, as a fair reading of the reasons for decision reveals, his Honour did not express acceptance of the evidence of the mother in this regard but simply noted her evidence whilst going on to accept the clear and firm evidence of SD. A review of the evidence on this topic makes this conclusion unsurprising. This complaint is not made out.

Ground 1 –the reason and timing of the complaint.

[8] SD did not make any immediate complaint regarding the conduct of the appellant. She says that was because the appellant told her he would take her mother away if she did so. Complaint was first made in December 2015 to aunties of SD when the family was in Fiji. The circumstances were described by his Honour as follows:

> In December 2015, the family went to Fiji for Christmas holidays. While there, the defendant complained to Mr Sundarjit's family about SD. Amongst other things, she wasn't talking to him and he was concerned for her welfare and that she had a boyfriend in Yuendumu and he was worried SD might become pregnant.
>
> The evidence before me is that Abraham, the boy of concern for the defendant, was two years younger than SD and was probably nine years of age at the time. SD said she didn't have a boyfriend in Yuendumu and felt the defendant was lying to her family about her. Because of this, she spoke to her aunties, Sangita and Yogita about the defendant being mean and nasty to her. In the child forensic interview, SD explain this by saying the defendant says, "I do bad things and I don't talk to him", but in fact it was the defendant who didn't speak to her.

[9] Although no immediate complaint was made, his Honour accepted the evidence of various witnesses (including the appellant) that from earlier in 2015 SD became "very distant" towards the appellant and that "she had little or nothing to do with him". His Honour concluded:

> This change in behaviour is significant, in my view and would *only* come about due to some event occurring between them. This change in relationship between SD and the defendant is clearly supported by (the mother) and the defendant himself. It is independent of the evidence given by SD about it. In considering it, it is important to weigh up the other circumstances in play, namely, the boyfriend issue, the change of name issue, the complaint – the complaint made

> by the defendant to the family about SD and her reaction to it by telling her aunties about the touching.
>
> I am not satisfied there was any arrangement, agreement or even discussion between SD and her mother about pushing the defendant away from them now (the mother) has permanent residency. The evidence does not support such an inference. In my view, this change in the relationship supports and strengthens SD's evidence that she was touched on the breast by the defendant and I am satisfied it is corroborative of her evidence as there is no other reasonable explanation to explain her conduct on the evidence before me.

[10] The appellant submits that error occurred in using the word "only" and that SD's change of behaviour towards the appellant was equally consistent with being because the appellant had raised with the mother and her aunts issues regarding SD having a boyfriend. However, the evidence of the mother was that the first time she heard that the appellant had accused SD of having a boyfriend was in Fiji (ie in December), long after the change of behaviour commenced.

[11] Similarly SD denied being accused by the appellant of having a boyfriend and said the "lies" that he told about her related to her not working for the appellant, not talking to the appellant and not wanting to be around the appellant. It is apparent that the trial Judge did not accept that the appellant had raised issues concerning sexualised behaviour by SD earlier in the year and therefore this could not be the cause of the change of behaviour. There was a clear evidentiary basis for concluding that the change in the nature of the relationship between SD and the appellant arose out of the conduct of the appellant earlier in 2015.

[12] This complaint is not made out.

[13] In the course of submissions Counsel for the appellant presented a fresh argument not foreshadowed in the grounds of appeal. It was contended that the reason for the complaint made by SD was a response to the appellant having disclosed to the mother and to the aunties that SD had a boyfriend. This submission had been put to the trial Judge and rejected. No argument was presented to this Court as to any error on the part of the Judge in reaching the conclusion. I see no error on the part of his Honour in this regard.

[14] Further, Counsel put another submission not obviously connected to any ground of appeal. This was as to the reliability of SD, suggesting inconsistency between the version of events provided by her to the police officer who conducted the child forensic interview and the version provided to Ms Gray and Mr Nesbitt who were child protection officers. With respect, reference to the relevant transcripts does not support the suggestion and, indeed, demonstrates consistency.

Ground 2 – Inconsistent verdicts.

[15] The submission of the appellant is that the two counts turned solely upon the complainant's evidence and that, in dismissing count 2, the trial Judge must have found the evidence of SD to be inherently unreliable. The submission continued that, having entertained reasonable doubt concerning the truthfulness or reliability of her evidence, this doubt should have been taken

into account in assessing the truthfulness and reliability of her evidence in relation to count 1.

[16] Reference to the reasons for decision makes it plain that his Honour accepted SD as a truthful witness but, in all the circumstances, was left in reasonable doubt as to the circumstances of the incident upon which count 2 was based. It is open to a finder of fact to accept the evidence of a witness in relation to one matter while retaining a reasonable doubt about the commission of events about which the same witness is the only substantive witness.[1] In this case his Honour noted that the prosecution conceded that the evidence was inherently weaker in relation to count 2 and that the evidence was "extremely vague, putting it at its highest". The incident was not referred to in the complaints made to the FACS officers and it may not have been mentioned to the aunties in Fiji. His Honour concluded:

> Taking the evidence at its highest, I have a doubt as to the circumstances of this incident. The defendant is entitled to that doubt. Accordingly, I am not satisfied to the relevant standard that the charges been made out and count 2 is dismissed.

[17] The summary of the evidence led in support of this count as set out above reveals the paucity and vagueness of the evidence and makes it clear that his Honour was correct to dismiss the charge for those reasons. The verdicts were not inconsistent in the manner described by the appellant. This ground of appeal has not been made out.

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1 *R v Markuleski* [2001] NSWCCA 290 at [31].

Ground 3 – Inadequate reasons

[18] It is, of course, part of the judicial function to provide reasons for decision.[2] The appellant complains that, in this case, the trial Judge failed to provide adequate reasons in determining the guilt of the appellant. The focus of the complaint relates to the matters discussed above in relation to ground 1. For the reasons I have expressed in relation to that ground I do not accept that there has been any relevant failure on the part of the Judge.

[19] This ground of appeal has not been made out.

Appeal against sentence

[20] The appellant complains that the sentence was manifestly excessive. The appellant was convicted and sentenced to imprisonment for nine months suspended after three months.

[21] The principles applicable to an appeal against sentence are well known. The exercise of the sentencing discretion will not be disturbed on appeal unless error in that exercise is shown. There is a presumption that there has been no error. The appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence was insufficient or excessive. It interferes only if it can 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 sentence may be so excessive as to manifest error. The onus rests upon the appellant to

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[2] *Wainohu v New South Wales* 243 CLR 181 at [54] - [58].

demonstrate the sentencing discretion was improperly exercised. In order to establish that the sentence was manifestly excessive the appellant may show that the sentence was out of all proportion to any view of the seriousness of the offence which could reasonably be taken. The sentence must not just be excessive, it must be manifestly so.

[22] In sentencing the Local Court Judge described the offending in terms consistent with the evidence of the complainant and the reasons for decision. His Honour referred to the threat to the child that if she said anything the appellant would take her mother away and described this as an effort to "buy her silence".

[23] The Judge noted that the maximum penalty for the offence was imprisonment for 10 years and that, while the appellant was entitled to defend the proceedings, he was not to be accorded the discount which is afforded those who plead guilty. His Honour made reference to the requirements of the *Sentencing Act* that the Court must record a conviction and order a term of actual imprisonment that may be partly suspended, but not wholly suspended.[3]

[24] His Honour described the offending as "spontaneous and without explanation" and accepted there was no evidence that the appellant was grooming the child for sexual contact. The incident was described as "isolated and momentary in its execution". The appellant was said to be a

[3] *Sentencing Act* s 78F.

man of otherwise “excellent character” but could not be given credit for any expression of remorse or contrition. The appellant was not a person with a propensity for sexual offending and it was unlikely there would be further offending.

[25] In determining sentence the Judge made reference to the serious breach of trust involved in the actions of the appellant, the impact upon the child and the fact that there had been no acceptance of responsibility for his conduct and no remorse shown.

[26] In the course of submissions in this Court a number of fresh issues were raised with the Court. At the time of sentencing the thrust of each of those submissions was known to his Honour, save for one.

[27] The first of the fresh submissions was that any sentence imposed upon the appellant would have to be served in Alice Springs. Of course, the offending occurred in the Northern Territory and, at that time, the appellant was living in the Northern Territory. The sentence he will be obliged to serve was for a relatively short period of three months.

[28] Mention was also made of the obligation on the appellant to enrol as a reportable offender under the relevant legislation and it was submitted this was an onerous obligation. Of course, as is well known, that is an obligation imposed by statute and is one that applies to every offender who commits an offence against the relevant legislation.

[29] The next item mentioned was that the appellant had been on bail since February 2016 and obliged to report three times per week during the intervening period. It was suggested that this was an onerous reporting condition. In the absence of further information regarding any special impact of such reporting upon the appellant I do not accept that suggestion. In any event it was information known to his Honour at the time of sentencing.

[30] Finally, it was put that the trial was delayed by some months due to a failure on the part of the Local Court to proceed when the matter was originally set for trial. It was not suggested that this was information not known to his Honour. In the absence of information as to any additional special hardship caused to the appellant, and not already known, this was not a matter that would have a significant impact upon sentence in any event.

[31] In my opinion the head sentence was within the range of appropriate sentences. The actual period to be served could be correctly described as stern but, in my opinion, could not be described as manifestly excessive as that term is understood.

[32] The appeal is dismissed.