McKay v The Queen [2001] NTCCA 3

PARTIES:	PHILLIP CLIVE McKAY
	AND
	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:	CA12 OF 2000 (9815766)
DELIVERED:	20 June 2001
HEARING DATES:	11 May 2001, 14 June 2001
JUDGMENT OF:	MILDREN, BAILEY & RILEY JJ

REPRESENTATION:

Counsel:

Appellant:	J Tippett and R Coates
Respondent:	R Wild, QC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

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

McKay v The Queen [2001] NTCCA 3
No. CA12 of 2000 (9815766)

BETWEEN:

PHILLIP CLIVE McKAY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, BAILEY & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 20 June 2001)

The Court

[1] The applicant was originally charged with two counts of sexual intercourse without consent (s192(3) of the *Criminal Code*), one count of attempting to render incapable by means calculated to suffocate and with intent to commit a crime, namely sexual intercourse without consent (s175 of the *Criminal Code*), one count of deprivation of liberty (s196(1) of the *Criminal Code*) and one count of aggravated assault (s188(2)(a)(b) and (m) of the *Criminal Code)*. All charges involved the same victim and arose out of circumstances which occurred at a house at 10 Wilmot Street, The Narrows on 11 June 1999. At the suggestion of the Trial Judge, who thought that the indictment was overloaded, the Crown withdrew the deprivation of liberty and

aggravated assault counts and the trial proceeded on the remaining counts. The applicant was convicted of the two counts of sexual intercourse without consent, but acquitted of the attempt to render incapable count. He was sentenced by his Honour to an aggregate sentence of fourteen years' imprisonment and a non-parole period of ten years was fixed. The sentence and non-parole period were backdated to take into account time held on remand.

[2] An application was lodged by the applicant for leave to appeal against conviction as well as sentence, but the application for leave to appeal against conviction has now been formally abandoned. Leave is required to appeal against sentence because s410 of the *Criminal Code* does not provide for an appeal against sentence as of right. By consent of the Crown, the application for leave and the appeal were heard together.

Grounds of Appeal

[3] The grounds of appeal, as amended, are as follows:

1. that the learned Sentencing Judge erred in imposing an aggregate sentence;

2. that the learned Sentencing Judge erred in imposing a sentence that was manifestly excessive in the circumstances of the offences and the applicant;

3. that the learned Sentencing Judge erred in the application of the principles of general deterrence to the sentences imposed on the applicant;

4. that the learned Sentencing Judge erred in law by taking into account in sentencing an offence of which the applicant was not charged and a further offence of which the applicant was acquitted at trial;

5. that the learned Sentencing Judge erred in imposing a sentence that infringed the totality principle of sentencing.

The facts

[4] The basic facts and conclusions as found by the learned Sentencing Judge were as follows:

> Ms D, the victim in this matter and then aged about 28, was employed as an Outreach worker by the Northern Territory Association for Mental Health. It was her job to assist people with psychiatric disabilities, including by seeking out and providing accommodation for them. The applicant had been referred to the service and accommodation was arranged at 10 Wilmot Street, The Narrows.
>
> Ms D assisted the applicant in that regard and had helped him on other occasions. She called in to see him at that house in the course of her duties on that day. He was there alone and invited her to have a cup of tea, after which she went to another place in the house to check on the belongings of one of the other occupants who was intending to move out.
>
> Acting on a pretence, the applicant enticed Ms D into a bedroom, shut the door and barred her exit so that she could not escape. He said something about sex. She demanded to be let out. He approached her and pushed her backwards onto a bed. Despite her

screaming and physical resistance, he penetrated her vagina with his penis, having lubricated it with spittle.

When she thought he had stopped, she attempted to get up but he struck her down and she lost consciousness. When she regained her senses, she was in extreme pain and he was raping her with his penis in her anus. She screamed. He then placed a pillow over her head and continued the act of sexual intercourse.

She ceased her resistance hoping he would remove the pillow which was causing her difficulty in breathing. When he eventually got off, she was able to get away. How long this all took is not known.

She drove her car a short distance from the house where, after some time, she was located by colleagues and police in a most distressed condition. The disarrangement of her clothing which the applicant had caused during the attack upon her, was still evident. She immediately complained that he had raped her.

The evidence from a medical examination was capable of corroborating her evidence in a number of respects.

The applicant was unrepresented at trial, having refused an offer of legal representation. He cross-examined Ms D and it appears to have been directed at suggesting that she had, in some way, encouraged him to have sex with her and she consented. He suggested to the doctor who gave evidence that the injuries to Ms D that had been observed by the doctor were self-inflicted.

As was his right, the applicant declined to answer any questions from police, but he gave evidence to the effect that he had been encouraged by Ms D, that he had nicely invited her to his room; that she willingly accepted his invitation; that she consented to each of the acts of sexual intercourse. He then alleged that she had set him up.

The sexual attacks upon Ms D fall into the upper category of seriousness for this type of crime. The applicant took advantage of a woman much slighter than himself who was trying to assist him. She gave him not the slightest encouragement to think that she was in any way interested in him, other than as a client and it was her job to assist.

> The applicant took absolutely no heed of her resistance and distress and set about brutishly assaulting her in a most degrading and humiliating manner. As her resistance continued, he struck her across the face and attempted to quieten her down by placing a pillow over her head.
>
> The applicant totally lacked any remorse for what he did. Psychological and psychiatric reports were obtained, but they revealed nothing in the applicant's mental state at the time of the commission of the offences which could properly be regarded as inhibiting rational judgment about the consequences of the applicant's conduct. No causal connection was shown between his mental condition and his criminal behaviour.
>
> The victim had suffered significant and ongoing harm as a result, including physical pain, ill effects as the result of necessary medication, weight loss, psychological trauma, difficulties in resuming work and emotional upheaval.
>
> Although the applicant's behaviour was opportunistic, he had given some consideration as to how he might go about effecting his purpose in that he had concocted a reason to induce Ms D into a bedroom and then shut the door behind her.
>
> The sexual assaults were not of long duration and whilst it was not possible to say how long all this took, his Honour found that there were two separate and distinct acts of sexual intercourse without consent. Although no weapon was used, the applicant had used his superior physical strength, his hand or fist, as well as the pillow.
>
> His Honour indicated that he regarded this as having been a very bad case of its type, although certainly not in the worst category.

The application to re-open the sentence

[5] After his Honour had imposed sentence, an application was made to his Honour pursuant to s112 of the *Sentencing Act* to re-open his sentence on the ground that it was not lawful for his Honour to impose an aggregate sentence. That application was supported by counsel for the Crown. His

Honour considered s52(2) of the *Sentencing Act* but decided that that provision did not apply to those circumstances and he therefore rejected the application. His Honour's attention was not drawn to s52(3) of the *Sentencing Act*. His Honour declined to re-open his sentence.

Ground 1 – Was it open to impose an aggregate sentence?

[6] Section 52 of the *Sentencing Act* provides:

> **52. Aggregate sentences of imprisonment**
>
> (1) Where an offender is found guilty of 2 or more offences joined in the same information, complaint or indictment, the court may impose one term of imprisonment in respect of both or all of those offences but the term of imprisonment shall not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence.
>
> (2) A court shall not impose one term of imprisonment under subsection (1) where one of the offences in respect of which the term of imprisonment would be imposed is an offence against section 192(3) of the Criminal Code.
>
> (3) Subsection (1) does not apply if one of the offences in the information, complaint or indictment is a property offence, a violent offence or a sexual offence.

[7] As to s52(3), a "sexual offence" is defined by s3(1) to mean an offence specified in Schedule 3 to the *Act.* Paragraph 5 of the Schedule includes an offence against s192 of the *Criminal Code* as one of the offences so defined. Therefore, so it was submitted, as the applicant had been convicted of two counts against s192(3) of the *Code*, an aggregate sentence was precluded by both s52(2) and s52(3).

[8] It is clear that s52(1) of the *Sentencing Act* confers an unfettered discretion to impose an aggregate sentence in the circumstances provided by s52. No argument was put that the discretion was exercised wrongly.

[9] The learned Sentencing Judge was of the view that s52(2) was enacted so that it would be possible to establish just what sentence had been imposed for an offence under s192(3) when there were other offences which fell for sentencing on the same indictment which were not offences against s192(3). It was submitted by Mr Wild QC, for the respondent, that his Honour's construction was correct and that the same construction should be given to s52(3). In support of that submission, Mr Wild QC submitted that when the legislature seeks to achieve the interpretation urged by the applicant, it uses the phrase "one or more" to achieve that purpose: see for example s53(2A).

[10] The main argument of Mr Tippett, for the applicant, rested upon s52(3) rather than s52(2). He submitted that the history of the legislation showed that s52(3) was designed to ensure that, in those circumstances where a mandatory minimum term of imprisonment is required, the court is required to impose separate sentences so that it can be seen that the legislative requirements have been complied with.

[11] When the *Sentencing Act* was passed in its original form in 1995, there was no subsection (3) to s52. Sub-sections 52(1) and (2) are still in their original form. At that time, there were no provisions requiring mandatory terms of imprisonment. However, s55(1) required the fixing of a minimum

non-parole period of 70% of the head sentence where there was a sentence of imprisonment for an offence against s192(3) which was not suspended in whole or in part. In all other cases, where a sentence of twelve months imprisonment or more is imposed which is not suspended, s54(1) required the fixing of a non-parole period of at least 50% of the head sentence. Where a court imposed sentences of imprisonment in respect of more than one offence, s53(2) required the non-parole period to be fixed in respect of the aggregate period to be served. Thus, if an offender was convicted of an offence against s192(3) and some other kind of offence joined on the same indictment, and an aggregate sentence was imposed, it might be impossible to know whether the sentencer had complied with s55(1) or not. The purpose of s52(2) seems to have been to ensure that there was a patent compliance by the sentencer with the requirements of s55(1). However, that problem does not arise if, for example, both of the offences are against s192(3), because the sentencer can apply s53(2) to the aggregate sentence and still patently comply with s55(1). On the other hand if, as might easily have happened in this case, there had been convictions for two offences against s192(3) as well as for another type of offence, the problem would re-emerge. It is difficult to suppose that the intention of the legislature in those circumstances would be promoted by leaving it open to impose an aggregate sentence and Mr Wild QC, conceded in argument that in such a case an aggregate sentence could not be imposed. Yet, to reach that conclusion, it is necessary to give to s52(2) the meaning contended for by

the applicant, viz., to interpret "one of the sentences" to mean "one or more of the sentences". This suggests that the *prima facie* rule of construction that words in the singular include words in the plural (*Interpretation Act*, s24) was meant to apply in this case; in other words, the word "one" is to be read as meaning "one or more", or "at least one".

[12] The position with s52(3) is slightly different. That subsection was first enacted by the *Sentencing Amendment Act 1998* (Act No 14 of 1998), but it is necessary first to recall that the *Sentencing Act* was amended by the *Sentencing Amendment Act (No 2) 1996* (Act No 65 of 1996) which introduced mandatory minimum terms of imprisonment for property offences for the first time: see especially s78A. Initially there was some controversy as to whether or not, if there was more than one property offence in respect of which the Court was required to impose a sentence of imprisonment, one sentence of imprisonment was to be imposed with the relevant minimum term, and there were differing opinions of single judges on the point: see *Schluter* (1997) 6 NTLR 194; 94 A Crim R 581 and *D v Gokel* (1998) 123 NTR 1. Subsequently, further amendments were made to the Act by the *Sentencing Act Amendment Act 1998* which introduced s52(3) which provided at that time as follows:

> (3) Subject to section 78A, a court must not impose one term of imprisonment under subsection (1) where one of the offences in respect of which the term of imprisonment would be imposed is a property offence.

[13] At the same time, the *Sentencing Act Amendment Act 1998* amended s78A to introduce ss(3A) which provided:

> (3A) Despite sections 50 and 51, the mandatory period of a term of imprisonment imposed in pursuance of subsection (1), (2) or (3) is not to be served concurrently with the term of imprisonment for another offence (whether that other offence is a property offence or not).

[14] These amendments gave rise to further litigation as to whether or not, if a person was found guilty of more than one property offence, an aggregate sentence could be imposed. In *Hallam* (1998) 102 A Crim R 546, Mildren J concluded that an aggregate sentence was open and suggested (at p552) that perhaps an aggregate sentence must be imposed. In *Trenerry v Dowell* (1998) 8 NTLR 80, decided only eleven days later, Olney J concluded that in those circumstances only one finding of guilt and only one sentence can be imposed because of s78A(4) and that there was therefore no question that an aggregate sentence was being imposed. The end result was that if a single sentence with a single minimum term was imposed for a series of property offences, s52(3) did not apply in the circumstances envisaged by s78A, especially s78A(4) and (5), except where offences other than property offences were also preferred.

[15] In 1999 the *Sentencing Act Amendment Act (No 2) 1999* further amended s52 by deleting s52(3) and substituting therefore the following:

> (3) Subsection (1) does not apply if one of the offences in the information, complaint or indictment is a property offence, a violent offence or a sexual offence.

[16] By the same amending Act, ss78A(1) to (6) (inclusive) were replaced with new provisions, s78A(1) to (6F) (inclusive) and ss78A(8) and (9) were added. The new provisions made it clear that, if an offender was dealt with on the same day for one or more property offences, a single sentence of imprisonment of not less than the minimum term must be imposed in respect of all the offences. The same Act, by new sections 78BA and 78BB required a court, in the case of a sexual offence and in the case of certain "violent offences" to impose an actual custodial sentence which could not be wholly suspended. The definition of "violent offence" included a whole range of offences, mostly offences which could be loosely characterised as offences against the person.

[17] The common element between property offences, certain violent offences and sexual offences is that they each carry mandatory terms of imprisonment. In the case of property offences, there are also mandatory minimum terms which can be fourteen days, ninety days or one year depending on whether it is treated as a first, second or third or subsequent offence. Section 78(6A) precludes the mandatory minimum term being served concurrently with either another term imposed for a property offence imposed on a different day, or any term of imprisonment for another offence regardless of when it is imposed. Therefore, if an offender is convicted of a property offence as well as a sexual offence, there must be an actual sentence of imprisonment for both and the sentence for the sexual offence must not be made concurrent with the mandatory minimum term for the

property offence or offences. The same does not necessarily apply in the case of a violent offence, because a mandatory sentence of actual imprisonment applies only if there has been a previous conviction for a violent offence. On the other hand, there is no restriction on imposing concurrent sentences where the offence is a violent offence or a sexual offence.

[18] No explanation is evident from the Act as to why s52(2) was left to remain in the Act, given that "sexual offence" includes an offence against s192(3).

[19] Section 52 applies only where the relevant offences are all joined in the same information, complaint or indictment. S309(1) of the *Criminal Code* provides that more than one charge may be joined in the same indictment only where "the charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.". Similar, *albeit* more restrictive provisions, apply to complaints (*Justices Act*, s51(1)) and informations (*Justices Act* s101A).

[20] The conclusion to be arrived at by an analysis of these provisions is that the legislative intent is that where separate offences are joined on the same indictment which include at least one sexual offence, property offence or violent offence, there must not be an aggregate sentence imposed. The purpose of this seems to be to ensure that any mandatory terms required to be imposed are not only imposed but are seen to be imposed; and that the

requirements of the Act relating to minimum terms of actual imprisonment and the cumulation of mandatory minimum sentences for property offences where required, are not only met, but are seen to be met and separately identifiable. It would lead to absurdity if s52(3) were to be interpreted to apply only where one of the offences was a violent offence, sexual offence or property offence. It is not difficult to envisage a situation where an offender was charged on one indictment and found guilty of burglary, rape and causing grievous harm, all arising out of the same incident, i.e. a property offence, a sexual offence and a violent offence. It would make no sense at all to permit an aggregate sentence in those circumstances, but not where there was say, a single violent offence together with other offences not of the property/violent/sexual classification. If that be so, it can only be because the expression "if one of the offences" in s52(3) is interpreted to mean "if at least one of the offences", or "if one or more of the offences". Once that conclusion is reached, it follows that where there are two or more offences in the indictment, etc. which are sexual offences, there can be no aggregate sentence. The application for leave to appeal must therefore be granted on ground 1, and the appeal allowed and the applicant must be resentenced by this Court, but before doing so it is necessary to comment on the other grounds of appeal.

Ground 3 – General deterrence

[21] The nub of this submission as argued was that the learned Sentencing Judge gave too much weight to general deterrence when the appellant had a mental

abnormality which made him an inappropriate medium for making him an example to others. Reliance was placed upon *R v Anderson* [1981] VR 155 at 160 where the Victorian Full Court applied a passage from a previously unreported Full Court decision in *R v Mooney* where it was said that:

> General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or an abnormality because such an offender is not an appropriate medium for making an example to others.

[22] In *Waye v R* [2000] NTCCA 5, this Court referred to the case of *R v Tsiaras* [1996] 1 VR 398 at 400 where the Victorian Court of Appeal set out a number of propositions as to the significance of finding that an offender is suffering from a serious psychiatric illness. The third such proposition is:

> ...a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, *whether or not the illness played a part in the commission of the offence.* (emphasis added).

[23] The Court of Criminal Appeal expressed reservations about adopting the entirety of this proposition, and in particular the words emphasised above. The Court observed at paragraphs [19] to [21] of their joint judgment:

> [19] It seems to us that in each of the cases referred to by their Honours (*R v Anderson* [1981] VR 155 and *R v Man* (1990) 50 A Crim R 79) the offender committed the offence whilst under the influence of the mental illness (see also: *Thiele* (1986) 19 A Crim R 105 and *Payne* (1984) 12 A Crim R 226). Further, in the later case of *R v Yaldiz* (1998) 2 VR 376, the Victorian Court of Appeal would seem to have withdrawn from the absolute terms of the third proposition in *Tsiaras, supra.* In that case, Batt JA held at p381:

> ...general deterrence is not eliminated but still operates, sensibly moderated, in the case of an offender suffering from a mental disorder or severe intellectual handicap.

[20] His Honour also emphasised the absence of any evidence or submissions in the case before him 'to the effect that the illness contributed to the offence or that the offence was committed under its influence' (p380). Winneke ACJ (with whom Hampel AJA agreed) held at p383:

> Whether in the particular case a psychiatric condition should reduce or eliminate general deterrence as an appropriate purpose of punishment will depend upon the nature and severity of its symptoms and its effect upon the mental capacity of the accused.

[21] It is clear from the context of these remarks that His Honour was referring to the effect of an accused's mental capacity at the time of the offending in the sense of whether the accused's psychiatric condition had obscured the mental intent to commit the crime with which he had been charged.

[24] There was no evidence that the appellant was, at the time of the offending or at any subsequent time, suffering from a mental disorder, but it was put that he suffered from a mental abnormality. The medical and other reports tendered at the sentencing hearing demonstrated that the appellant did not suffer from any psychiatric illness, was cognitively intact and of normal intelligence, but had a significant personality problem. This does not amount to a mental abnormality of the kind warranting a more lenient sentence. There was no evidence that his personality problem reduced his moral culpability for the offending. There was no reason why the appellant's personality problems should be viewed as inappropriate media for deterrent sentences. Further, as the learned Sentencing Judge rightly

observed, there was no evidence that the appellant's personality disorder was causally connected to the offending.

[25] Mr Tippett submitted that at the least some discount was warranted because the appellant's personality disorder was likely to make prison harder for him than for others, because he is likely to come to the attention of prison officers and other prisoners. However the report of Dr Walton says:

> Despite his odd behaviour at times, it seems that Mr McKay does not present any major management problem for prison authorities.

The appellant had been held on remand at the time of sentencing for a little over twelve months. No submission was made to the learned Sentencing Judge that his personality problems had caused any difficulties for him during this period. In fact, all that was put was that, because he had been held in remand for so long, it had been a "bit difficult for him on remand for that period", which was presumably a reference to the fact that remand prisoners do not get some of the opportunities that are available to sentenced prisoners. There is no substance to this ground of appeal which must be rejected.

Ground 4 – Did the Trial Judge improperly take into account other offences?

[26] As previously stated, the appellant had originally been charged with aggravated assault in relation to the victim and that charge was withdrawn at the suggestion of the Trial Judge. The appellant now complains that his Honour took into account the fact that the appellant struck the victim in the

face as a result of which she lost consciousness, at the time of sentencing. It is clear that his Honour did take that matter into account in arriving at his sentence. It was put that his Honour was wrong to have done so because it is fundamental that no one should be punished for an offence of which he has not been convicted.

[27] It has long been the practice of the courts, not only in this Territory but elsewhere, to impose heavy sentences for rape, where the rape is accompanied by the use of violence: see *Fox and Frieberg, Sentencing State and Federal Law in Victoria* 2nd Edn., para 12.409. In Victoria until 1992, the law of that State provided for rape with circumstances of aggravation which increased the maximum penalty from ten years to twenty years' imprisonment. The single offence of rape in that State has since then carried a maximum term of twenty-five years. *Fox and Frieberg* observe, *op.cit* p916 (footnote 287):

> The factors which statutorily aggravated rape were that the offender inflicted serious personal violence upon the victim or another person; that the offender had with him an offensive weapon; that the offender committed an act which was 'likely seriously and substantially to degrade or humiliate the victim' and that the offender was aided and abetted by another person. The abolition of the distinction between the two offences has created some problems for sentencers. In *O'Rourke* [1997] 1 VR 246, 252-3 the Court of Appeal observed that whereas prior to the abolition of the distinction, the prosecution was able to allege and prove the 'aggravating circumstances' if it wished to demonstrate that the case deserved a higher punishment, following the abolition, it faced a dilemma. If it charged the offence of rape alone, the court may find it difficult to take into account aggravating circumstances if they amounted to discrete offences and were uncharged, see *De Simoni* (1981) 147 CLR 383. On the other hand, if the aggravating conduct is charged separately, a court may be tempted to impose concurrent sentences if the offences amounted to a

> single course of conduct, thus undervaluing the weight which should be accorded to those actions. In *Sessions* (1997) 95 A Crim R 151 the Court of Appeal held that *Sentencing Act 1991* (Vic), s. 5(2) (db) requires a judge to have regard to any injury loss or damage arising directly from an offence and it is not necessary to charge the infliction of harm as a separate offence in order for an appropriately severe sentence to be imposed.

[28] It is convenient to start with *The Queen v De Simoni* (1980-81) 147 CLR 383. In that case, the defendant had been charged with robbery, contrary to s391 of the *Criminal Code* (WA). It was not alleged that he had wounded the victim. That was a circumstance of aggravation under the *Code* which increased the maximum penalty from fourteen years to life. Gibbs CJ, who delivered the leading judgment of the Court, held that a circumstance of aggravation not alleged in the indictment could not be taken into account for the purposes of increasing the sentence beyond that which the facts related to the actual charge warranted. It is to be observed that this is not the case here. The offence of sexual intercourse without consent contrary to s192(3) of the *Code* carries a maximum of imprisonment for life. There is no circumstance of aggravation attached to s192(3) which imposes a greater maximum penalty, as was the case in Victoria prior to 1992. At page 392, his Honour said that the sentencer:

> ...may, of course have regard to facts which might ordinarily be described as circumstances of aggravation, but which do not fall within the definition of that expression in the Code, because they do not render the offender liable to greater punishment.

However, in the course of discussing the relevant principles, Gibbs CJ referred to the general principle that no one should be punished for an

offence for which he has not been convicted. It is this principle which has sometimes caused difficulty where the acts alleged by the Crown in support of a charge show the commission of some other offence. In this case, it was submitted by counsel for the applicant that the striking of the victim in the face was a separate and discrete offence. Reliance was placed upon an observation by Hayne JA in *R v Session* [1998] 2 VR 304 at 308:

> The present case may be contrasted with a case in which the offender rapes the victim and, strikes and injures the victim. If the Crown contends, in the latter case, that the offender is to be punished for the rape and for the assault, separate charges should be preferred: see e.g. *R v O'Rourke* [1997] 1 VR 246 esp. at 252-3.

[29] Section 192(2)(a) of the *Criminal Code* provides that, where a person submits to sexual intercourse because of force, there is no free agreement and therefore there is no consent: see also s192(1). The facts in this case show that the Crown relied upon the slap across the face and the subsequent loss of consciousness to show that there was no consent by the victim in relation to the second count: see also s192(2)(b). This was therefore, an integral part of the single act which amounted in the circumstances to the second count of sexual intercourse without consent. The case is wholly unlike *R v Newman and Turnbull* [1997] 1 VR 146 or other cases where there were distinctly separate offences. Nevertheless in that case, Winneke P said, at 152:

> It has frequently been said that, for the purposes of sentencing, it is not always easy to determine where the permissible consideration of circumstances surrounding the commission of an offence ends and punishment for an offence not charged begins. Indeed counsel before

us agreed that it was a "matter of degree" which depended upon the facts of the particular case. Such a view was expressed by Cox J (of the South Australian Court of Criminal Appeal) in the recent case of *R v Teremoana* (1990) 54 SASR 30. Having referred to a passage in the reasons of King CJ in the case of *R v Austin* (1985) 121 LSJS 181 at 183, his Honour said that:

> Applying these principles to the facts of a particular case has sometimes caused difficulty. Plainly if the defendant has already been acquitted by the jury on one particular count the judge may not have regard to allegations distinctive to that count when sentencing the defendant on other counts on which he has been found guilty. The situation will be essentially the same where he pleads guilty to one count and the Crown decides not to press a related charge of a serious offence on the same information, or indeed where a related charge could have been laid but in fact was not...However, it is certainly not a universal rule that the judge, when sentencing for the offence specifically charged in the information, may never have regard to relevant actions of the defendant that, strictly speaking, constituted separate offences. If they were offences of lesser gravity than the offence of which the defendant has been convicted, then it will be a matter of degree and fairness whether they may properly be taken into account as a part of the circumstances surrounding the offence charged.

This passage was endorsed by the Court of Criminal Appeal in this State in *Medcraft* (1992) 60 A Crim R 181 at 187-8.

[30] We consider that there was no unfairness to the appellant in taking this matter into account. Indeed, as Hayne JA pointed out in *R v Sessions*, *supra,* the relevant provisions of the *Sentencing Act* (Vic) require a judge to have regard to the injury done to the victim and that is the case also in this jurisdiction: *Sentencing Act* s5(2)(d). Moreover, the jury must have been satisfied with the facts alleged in order to have arrived at a conviction given that the applicant's case was that sexual intercourse was consensual.

[31] The applicant also complains that the learned Sentencing Judge took into account a matter of which he had been acquitted. It is true that his Honour found that when the victim regained her senses, the appellant placed a pillow over her head and continued in the act of sexual intercourse. His Honour found that the victim ceased her resistance hoping that the appellant would remove the pillow which was causing her difficulty in breathing and that the appellant had used the pillow in an attempt to quieten the victim down.

[32] The offence of which the appellant had been acquitted was that "by means calculated to suffocate and with intent to facilitate the commission of a crime, namely sexual intercourse without consent, attempted to render [the victim] incapable of resistance.". The facts relied upon to support this charge was the incident relating to the use of the pillow.

[33] At the sentencing hearing (which took place some seven months after the jury's verdict) the prosecutor suggested to his Honour that the jury might not have been satisfied "as to the intent for which he used the pillow". His Honour indicated that his view was, subject to submissions, that:

> ...the jury could have been satisfied as to the evidence about it, but not satisfied as to the commission of the offence as alleged...They did come back and ask for further directions on the law in respect of that matter, and I must say it troubled me somewhat...I think – there were some difficulties with the law...but given the jury accepted all the other facts, it seemed to me doubtful that they would've rejected the evidence about that incident, but not that it amounted to a criminal offence standing alone. So I would accept it, subject to what [counsel for the accused] may have to say of course, that the event occurred.

Counsel for the accused made no submissions to his Honour about that matter.

[34] An examination of the trial transcript shows that the matter about which the jury sought further direction was what was meant by the expression "calculated to suffocate" rather than the intent question and in particular, whether or not "suffocate" was to be looked at "in the context of death or the process of suffocation". His Honour directed the jury that "suffocate" meant to deprive somebody of the ability to breathe by chopping off their air supply and that "calculated" meant "likely to" and that there need be no intent to kill by way of suffocation, the only intent necessary being the intent to facilitate the commission of the crime. The inference is that his Honour, consistent with the jury's verdict, found that the pillow was used in a manner not calculated to suffocate, even though it caused difficulty in breathing and was used in order to quieten the victim down. We think that it was open to his Honour to so find in that there may be difficulty in breathing caused without the means used going so far as being calculated to suffocate.

[35] It is a well-established principle that a sentencing court cannot take into account offences of which an accused has been acquitted. On the other hand, a sentencer must form his or her own view of the facts once a jury has made a finding of guilt, but the judge must not form a view of the facts which is inconsistent with the jury's verdict: see *R v Webb* [1971] VR 147 at 152-3. The sentencer may, in forming his or her view of the facts, rely on

anything which has fallen from the jury: see *Skillin* (1991) 53 A Crim R 311 at 313. The findings by the learned Sentencing Judge in this case concerning the use of the pillow are not inconsistent with the jury's verdict in the circumstances of this case. It was submitted by counsel for the appellant that his Honour could only use that finding if it was established beyond reasonable doubt, but there is no reason to suppose that his Honour did not so regard it. This ground of appeal must therefore be rejected.

Resentencing

[36] In the course of this exercise, regard will be had to the matters referred to by counsel for the applicant on the question of whether the original sentence imposed was manifestly excessive, as well as the further submissions of Mr Coates of counsel for the applicant on 14 June 2001. These rapes were very serious offences, *albeit* not at the top of the range. The features which indicate this are these. The applicant tricked the victim into going into the room and then locked the door. The first attack was conducted after pushing her backwards onto the bed and despite her screaming and physical resistance. Although no weapon was used or threatened to be used, the victim was much slighter than the applicant who used his superior physical strength to force his will upon her, and in relation to the second count, struck her using a hand or fist causing her to lose consciousness and as well, used the pillow to quieten her down which had the effect of causing her difficulty in breathing. The attacks persisted despite the victim's struggling, screaming and obvious distress. The victim had done nothing to encourage

the appellant and was vulnerable because of her position as a care worker carrying out the duties of her employment. The second offence caused the victim severe pain when using the toilet for the first two days and pain when sitting or using the toilet for the next ten days. The victim had to undergo post exposure HIV medication which made her ill and she lost four weeks work initially. She also underwent intensive testing for HIV, STDs and for pregnancy. She had internal bleeding for six weeks and lost a lot of weight. She developed phobias and needed twice weekly sessions with a psychologist. She also sought psychiatric assistance. This damaged her relationship with her husband for a time, but things had since improved although the relationship had not returned to what it was at the time of the victim impact statement. Six months after returning to work, the victim was still not coping and took four months' leave. She has since returned to work part time, but is in a different job which she does not enjoy. She had problems sleeping which had improved somewhat before the trial, but she still suffered flashbacks and nightmares at the time of the victim impact statement. She had also difficulty getting physically close to her children due to her phobia and had been suffering mood swings, including tearful episodes.

[37] We have received, by consent, a report by Mr Ian Joblin, a forensic psychologist, dated 2 September 2000 which was not available to the learned Sentencing Judge. Mr Joblin, who interviewed the applicant on 1 September 2000, has concluded that at the time of his interview the

applicant had a significant paranoid delusional state. He considered that the applicant had very limited insight about his own wrong-doing and in his opinion the applicant:

> ...is encapsulated in his own psychological state and issues in the jail or in society generally are interpreted only within that particular mental framework. Thus there is a distortion of reality and he will not consider issues outside his reality. This is not inconsistent with his own world inhabited by his fears and fantasies.
>
> At the time of my interview with this man I considered that had he been attending court on that day there would certainly have been an issue with regard to fitness.

Mr Joblin also comments that from reading the transcript at the time of sentencing and noting the applicant's behaviour then, "perhaps the issue of fitness has been present for some time". After referring to the reports of Dr Summers and Dr Walton, he observes that "it may be that Mr McKay's psychological state has deteriorated markedly since Dr Walton's interview with him". Mr Joblin offers no opinion as to the applicant's mental state as at the time of the offending nearly two years ago. Having regard to the approach adopted by this Court in *Waye v R, supra,* this material is of no assistance to the applicant.

[38] The conclusion that we have reached is that there are no mitigating circumstances; there is no remorse and no reduction of sentence because of a guilty plea or for previous good character. The appellant has a very long history of prior offending, *albeit* none for sexual offences, but he does have prior convictions for violent offences.

[39] In relation to the first count, we consider that an appropriate sentence is imprisonment for eight years and in relation to the second count, we consider that an appropriate sentence is imprisonment for ten years. We would order that six years of the sentence on the second count be ordered to be served cumulatively bearing in mind that these were quite separate offences, but that some of the matters going to the seriousness of the offending (such as some of the consequences to the victim) apply to both counts and the totality principle calls for some concurrence. That is a total sentence of fourteen years. We would fix a non-parole period of ten years.

[40] Accordingly leave to appeal is granted, the appeal is allowed on the first ground of appeal and the sentence imposed set aside. In lieu thereof the sentences indicated are imposed, the sentence of eight years and the non-parole period to be deemed to have commenced from 29 February 1999. Otherwise the appeal is dismissed.
