The Queen v Goodwin [2003] NTCCA 9

PARTIES:	THE QUEEN
	v
	NOELIE GOODWIN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 8 of 2003 (20219616)
DELIVERED:	12 NOVEMBER 2003
HEARING DATES:	29 OCTOBER 2003
JUDGMENT OF:	ANGEL ACJ, MILDREN J and PRIESTLEY AJ

REPRESENTATION:

Counsel:

Appellant:	R Wild QC
Respondent:	M O'Reilly

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	CAALAS

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

The Queen v Goodwin [2003] NTCCA 9

No. CA 8 of 2003

BETWEEN:

THE QUEEN

Appellant

AND:

NOELIE GOODWIN

Respondent

CORAM: ANGEL ACJ, MILDREN J and PRIESTLEY AJ

REASONS FOR JUDGMENT

(Delivered 12 November 2003)

THE COURT:

[1] This is a Crown Appeal as of right pursuant to s 414(1)(c) Criminal Code NT against a sentence of three years and four months imprisonment suspended after 12 months on conditions for sexual intercourse without consent.

[2] On 21 March 2003 the respondent pleaded guilty before the Supreme Court to a charge that on 26 December 2002 at Yulara he had sexual intercourse with the victim without her consent contrary to s 192(3) Criminal Code NT for which the maximum penalty is life imprisonment.

[3] The admitted Crown facts in support of the charge as found by the learned sentencing Judge are as follows:

> "The victim in the matter is a 25 year old international student. She attends university in Melbourne. She decided to travel within Australia, and on 23 December 2002, arrived in Alice Springs as part of a tour. Plans were made to travel to Uluru and on 26 December 2002, she arrived at Yulara.
>
> The victim was part of a tour group. They went to Ayers Rock where the victim decided to do a full walk around the base of the rock. The offender in the matter at this time was taking his 3 year old nephew for a swim in one of the waterholes near the base of the rock.
>
> The offender approached the victim and they struck up a conversation. The offender offered to show the victim waterholes in the area. As he was with the 3 year old, she did not fear for her safety. They walked to a waterhole and were there only for a short while.
>
> She at this time was feeling a little uneasy as she had been told not to stray from the walking tracks. The offender led her to a second waterhole where he decided to swim. He posed for the victim who took a photograph of him and the 3 year old using her digital camera.
>
> The victim was not up to swimming, and decided to rejoin the tour group. She started walking off and the offender emerged out of the water and chased her. With both hands across her shoulders, the offender turned her round to face him and tried to kiss her. She had told him: 'Don't do it'. She again began to run and he chased her by grabbing both her arms from behind.
>
> She tried to get away and yelled out, 'Help, help'. He used his hand to cover her mouth and pushed her to the ground. She tried to hit the offender and continued to yell out, 'Help'. While she was on the ground for approximately five minutes trying to hit him, he placed one of his hands around her throat which affected her breathing.
>
> She kicked out and he lost his grip of her legs which enabled her to again run away. However after about three steps he tripped her and she landed on her left elbow which caused pain.
>
> He put both his hands on her chest, pushed her flat to the ground and placed his legs over her legs, immobilising her. She then decided to stop resisting because she was terrified and thought he would hurt her.

> Terrified she kept still and the offender used his fingers and slipped them into her shorts. He inserted a finger into her vagina. He used his finger in an in and out motion for about one minute, at the same time looking around to see if anybody was coming.
>
> The victim was saying, "Don't, don't'. He was rough and the motion was hurting the victim. The offender pulled his shorts exposing his penis. The victim fearing for the worse and not wanting to be vaginally penetrated told the offender that she would perform oral sex upon him. The victim thought that by doing this the offender would then let her go without having intercourse with her.
>
> She began to perform fellatio to which the offender said, 'No'. He said to her, 'Just let me do it, I will go'. She said, 'No, no, I don't want it'. She told him, 'This is an offence, how can you do it, it's an offence to your people'. He just kept saying to her, 'Just let me do it, let me do it'.
>
> He then began to pull the shorts and underpants of the victim exposing her. He lay on top of her and had forcible sexual intercourse with her. This lasted for at least a minute. He then started to look around. It is believed that he ejaculated as DNA material from the offender was identified in a SARK subsequently taken from the victim.
>
> The victim heard voices and footsteps. The offender got off her and ran away with the 3 year old."

[4] We notice the evidence discloses that the offence took place in the presence of the three year old boy, an aggravating feature that was not adverted to by the learned sentencing Judge.

[5] The appellant complains that the sentence imposed upon the respondent was manifestly inadequate.

[6] The respondent, a first offender, was a juvenile aged 17 at the time of the offence. He turned 18 years of age the day following sentence. The learned sentencing Judge's concluding remarks were as follows:

"Mr Goodwin has agreed to comply with conditions of a supervised court order. I consider it is very important that Noelie Goodwin be encouraged to undergo traditional ceremonies. He is very fortunate to have a grandfather prepared to undertake that responsibility.

He is also fortunate and it is an obvious factor in his rehabilitation that he has a supportive wife and family who are concerned for his future welfare.

The fact he has no prior convictions is also a positive indication of his future prospects for rehabilitation.

My concern however must also be with the very serious nature of the offence. The aspect of general and specific deterrence are factors that must also be included in the sentencing process for this offence and for this offender, as must the protection of the community.

Noelie Goodwin has demonstrated little if any insight into the consequences of his offending upon his victim. He does not appear to have accepted that he must take responsibility for his actions and that he cannot continue to blame some outside cause.

I do not consider it appropriate to release him at this time. I am aware that he turns 18 years of age tomorrow. He has served something less than five months detention for what I consider to be a very serious offence.

For these reasons the order I make is that he be convicted and sentenced to 4 years' imprisonment allowing for the reduction of 15% for the plea of guilty I impose a head sentence of 3 years and 4 months imprisonment.

Pursuant to section 40(1) and (2) of the Sentencing Act, the offender is to be released after he has served 12 months detention or imprisonment on condition that he be of good behaviour and accept the supervision of the Director of Correctional Services or his delegate and obey the reasonable direction of the Director or his delegate as to his place of residence, employment and/or training, attending for counselling and/or treatment as the Director or his delegate considers appropriate, attendance at appropriate traditional Aboriginal ceremonies and Aboriginal business and reporting to the Director or his delegate.

I would further recommend that appropriate counselling be made available to Noelie Goodwin whilst he is in gaol. Pursuant to the provisions of section 40(6) of the Sentencing Act, I specify the period of 2 years and 4 months from the date of his release on a suspended sentence, during which the offender is not to commit

> another offence punishable by imprisonment, if the offender is to avoid being dealt with under section 43 of the Sentencing Act.
>
> I am aware he has been in custody since 26 December 2002 with respect to this offence. For that reason, I backdate this sentence to commence on 26 December 2002."

[7] At the conclusion of his submissions in reply on sentence the prosecutor said

> "Obviously, had Mr Goodwin been an adult then a head sentence (inaudible) somewhere around the five – year mark. I do not propose to put any particular tariffs to Your Honour. Obviously Your Honour is dealing with a juvenile and I appreciate that some reduction needs to be made in relation to his age".

The learned sentencing Judge passed sentence shortly after that submission. The conclusion, we think, is inescapable, that Her Honour was influenced by the submission and thereby led into error, for we are firmly of the view that the sentence passed is manifestly inadequate and in error.

[8] This Court on appeal does not interfere with a sentence merely because it is of the view that the sentence is insufficient. It interferes only if error is demonstrated. The Court of Criminal Appeal only interferes once it is demonstrated that the sentencing Judge erred in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence or if the sentence itself is so excessive or inadequate as to manifest error, i.e. that in some unspecified way the exercise of the discretion has miscarried: *Tate & Bartley* (1979) 46 FLR 386 at 388; *Raggett & Ors* (1990) 50 A Crim R 41 at 46, 47.

[9] On a Crown appeal against sentence, the Crown is not debarred from taking a stance different on appeal from that adopted at first instance. An inappropriate concession by prosecuting counsel at first instance will not necessarily be fatal to an appeal by the Director of Public Prosecutions. Ultimately it is a matter for this Court's discretion what weight is to be accorded the position taken by the Crown at first instance; see *Waack* (2002) 3 VR 194 at 207; *Hales v Jamilmira* (2003) 142 NTR 1 at 11; *Alpass* (1993) 72 A Crim R 561 at 566; *Zhen Qi* (1998) 102 A Crim R 172; *Morton* (2001) 11 NTLR 97 at 101, 102.

[10] The present offending was, as was acknowledged by the learned sentencing Judge, very serious. The sentencing exercise involved the obvious tension between the young age of the offender and the seriousness of the offence.

[11] There is a well established line of authority to the effect that in the case of serious offending the youth of the offender is not the prevailing consideration in sentencing. A number of the cases are collected in the judgment of this Court in *Serra* (1996)92 A Crim R 511; see also *Bloomfield*]1999] NTCCA 137 at paras 21 and 34. It is well established that if a young offender commits a criminal offence like an adult then that justifies sentencing him or her in a fashion more akin to an adult. Where crimes of considerable gravity are committed the protective function of the criminal court would cease to operate unless denunciation, general deterrence and retribution are significant sentencing considerations even in respect of juveniles: *Pham & Lee* (1991) 55 A Crim R 128 at 135; *Nichols* (1991) 57

A Crim R 391 at 395; *Hawkins* (1993) 67 A Crim R 64 at 66*; Gordon* (1994) 71 A Crim R 459 at 465; *AEM, KEM and MM* [2002] NSWCCA 58 paras 95–102. As the Director of Public Prosecutions submitted in the present case, the offence in this case is by its nature an adult crime. It must be denounced by the Courts by the imposition of appropriate penalties.

[12] In the present case the respondent sought sexual intercourse outside his marriage because, he said, "My wife don't give me any sex, that's why". The respondent persisted with his intentions over the clear objections of the victim until he secured his object. These were the actions and justifications of an adult rather than a child. Although under 18 at the time the respondent was nearly an adult legally, was living in an adult married relationship and was about to be a father. Any mitigation given on account of his age needs reflect not only the respondent's circumstances but the adult nature and gravity of the offence. In the present case it is apparent that insufficient consideration was given to these matters.

[13] Section 40(1) Sentencing Act NT provides that only a head sentence of five years or less can be suspended, either wholly or in part. In virtue of s 55(1) Sentencing Act NT any non–parole period fixed in respect of a head sentence in the present case necessarily must be 70% of the head sentence.

[14] We turn to resentence the respondent. The serious nature of the present offence is obvious. The serious nature of the present offence calls for strong denunciation and the prosecutor's conduct of the case below ought

not bar this Court passing a sentence that properly reflects the gravity of the offending. We have already noted that the offence occurred in the presence of the respondent's three year old nephew. As the learned sentencing Judge found the respondent has shown little remorse for the victim and has not accepted responsibility for the offence. Instead he has placed blame on his cannabis use. The respondent is at risk of re–offending so there is a need for personal deterrence. We see no reason to allow more than the 15% discount allowed by the learned sentencing Judge for the respondent's plea of guilty. Being a Crown appeal we have regard to the double jeopardy principle which requires this Court to exercise restraint in resentencing the respondent and justifies the imposition of a sentence no more than the minimum sentence which ought to have been imposed at first instance.

[15] We allow the appeal, quash the sentence below and impose a head sentence of 6 years imprisonment and fix a non–parole period of 4 years and 3 months. That sentence and non–parole period will be backdated to 26 December 2002 the date he first went into detention.

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