R v RSP [2004] NTSC 14

PARTIES:	THE QUEEN v RSP
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AS 20313235
DELIVERED:	1 April 2004
HEARING DATES:	8 December 2003 12, 23, 25 and 31 March 2004
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Prosecution:	R. Noble
Defence:	D. Bamber

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Defence:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	B
Judgment ID Number:	ril0405
Number of pages:	9

ril0405

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v RSP [2004] NTSC 14
No AS 20313235

BETWEEN:

THE QUEEN

AND:

RSP

CORAM: RILEY J

REASONS FOR JUDGMENT
(Delivered 1 April 2004)

[1] On 18 December 2003 the defendant pleaded guilty to having maintained an unlawful relationship of a sexual nature with a child, S, who was under the age of 16 years. That offence is contrary to s 131A(2) and (4) of the Criminal Code. The maximum penalty for the offence is imprisonment for 14 years.

[2] A set of agreed facts was presented to the court. Those facts describe a relationship of a sexual nature between the defendant and his daughter from the time she was approximately 8 years of age until she was approximately 13 years of age. The agreed facts detailed sexual acts that involved touching, but did not extend to penetration of the victim.

[3] At the request of counsel for the defendant I ordered a pre-sentence report including a psychological assessment. The matter was then adjourned for a period to enable the reports to be obtained.

[4] When the matter came back before the court on 12 March 2004 the reports were to hand. There were two reports, being the report of a psychologist who is a behavioural therapist and that of a Probation and Parole officer.

[5] The reports were detailed and arose out of separate interviews with the defendant. In the report of the psychologist it was recorded that the defendant described his sexual relationship with his daughter as including penile-vaginal sexual intercourse on a regular basis. This information, if accepted, is at odds with the agreed facts which did not assert any penetration of the victim of any kind. For the moment I concern myself only with that alleged admission and I do not refer to other information provided to any reporting officer that may (arguably) amount to admissions of more serious offences.

[6] Counsel for the defendant objects to the identified material being received and submits that the proceedings should be continued before another Judge of this Court who should not have access to the information to which I have just referred. He relied upon *Rose* (1978) Qd R 61. That case involved a consideration by the Queensland Court of Criminal Appeal of a pre-sentence report that included information in relation to previous charges against the

offender that had never been brought to trial. The case does not seem to me to be on point.

[7] The obtaining of a pre-sentence report is provided for in Division 2 of the Sentencing Act. Section 104 of the Act provides that a court "may, before passing sentence on an offender, receive such information as it thinks fit to enable it to impose the proper sentence". Section 105 provides that the court may order a pre-sentence report in respect of the offender and adjourn the proceedings to enable the report to be prepared. Section 106 sets out matters which may be covered in the report. The section does not limit the matters upon which a report can be obtained to those set out in s 106.

[8] It is to be noted that in the present case the additional information to which I have referred, if accepted, does not take the criminal conduct of the defendant beyond the scope of s 131A of the Criminal Code. The additional information falls within the circumstance of aggravation to which he has pleaded guilty; namely that he maintained an unlawful relationship of a sexual nature with S and "that in the course of the relationship (he) has committed an offence of a sexual nature for which he is liable to imprisonment for 5 years or more or 14 years or less".

[9] Had the additional information been alleged by the Crown, it would have been by way of particulars of the offence and would not have involved any alteration to the charge preferred or to the circumstance of aggravation. This is a different situation from that which applied in the matter of *Rose*

(supra) where the pre-sentence report referred to the defendant having been "the subject of extensive criminal investigations" and which thereby raised previous charges that had never been brought to trial. It is also different from the circumstances addressed in *De Simoni* (1981) 147 CLR 383.

[10] The situation in the present matter is that, in the course of obtaining information to enable the court to impose a proper sentence, information has been disclosed by the defendant that sheds a different light upon the offence to which the defendant has pleaded guilty. If accepted, that information makes the conduct of the defendant a more serious example of the offence than was suggested by the agreed facts. The additional information does not suggest a different offence or a circumstance of aggravation that has not been charged and made the subject of the plea.

[11] It is clear from the submissions made on his behalf that, for present purposes, the defendant does not admit the additional information. If he did so, then the information (limited in the manner I have described) would be receivable and able to be considered in the sentencing process. It is information that the court is able to receive under s 104 of the Sentencing Act and does not go beyond the offence charged or the circumstance of aggravation alleged.

[12] Where (as here) the defendant denies or does not admit the additional information, different considerations arise. Where material in a pre-sentence report is the subject of dispute then, if a finding adverse to the

defendant in relation to those facts is likely to expose him or her to punishment of a different kind or of a greater severity than otherwise would be appropriate, the onus rests upon the prosecution to establish those matters beyond reasonable doubt: *Storey* (1998) 1 VR 359. If the Crown fails to establish the disputed circumstances beyond reasonable doubt then the offender must be sentenced on the basis that those circumstances have not been shown to exist: *Anderson* (1993) 177 CLR 520 at 536.

[13] It was originally submitted on behalf of the defendant that he should be permitted to withdraw his plea. It was contended that otherwise he would be dealt with for a circumstance of aggravation which should have been charged in the indictment. It was submitted that the changed circumstances would result in him being dealt with for an offence more properly charged under s 134 of the Criminal Code, being incest by a male upon his daughter. I do not accept this submission. The maximum penalty for an offence under s 134 of the Code is imprisonment for 14 years. The maximum is exactly the same as that applicable under s 131A of the Criminal Code. Indeed, s 131A of the Criminal Code expressly contemplates an offence of the kind addressed in s 134 being dealt with under s 131A. An offence against s 134 is an "offence of a sexual nature" for the purposes of s 131A.

[14] As the hearing proceeded, the application to withdraw the plea made on behalf of the defendant was not pursued. Rather it was submitted that the plea should remain and any reference to the additional information should be excluded from consideration by the Court.

[15] Following receipt of the reports to which I have referred, the Crown further investigated the matter and gathered information which it says is consistent with the additional information in the reports. The Crown provided the results of its further inquiry to counsel for the defendant. It is not disputed that this information goes beyond the additional information to which I have referred and which is contained in the report. It is agreed between the parties that the fresh information, which was not previously available to the Crown, provides a basis for the Crown asserting against the defendant more serious offending than that identified in the indictment to which he has pleaded. Both parties referred to the existence of an evidentiary basis for a Crown case alleging offences against s 192 of the Criminal Code. The maximum penalty for such an offence is imprisonment for life.

[16] In the circumstances the Crown does not seek to pursue its original contention that the matter proceed as a contested plea. In light of the further information now to hand it submits that it should be granted leave to withdraw its acceptance of the plea because it is in the interests of justice that it be permitted to do so.

[17] Prior to sentence, the prosecution is entitled to withdraw its acceptance of a plea of guilty subject to obtaining the leave of the court: *Maxwell* (1996) 184 CLR 501. Leave of the court is necessary because, in reliance upon the acceptance by the prosecution of his plea, an accused person may have taken a course which would prejudice him. *Maxwell* (supra) was considered in *BWM* (1997) 91 A Crim R 260. In that case (at 263) Hunt CJ at CL said:

> "In the High Court, the basis upon which leave may be granted to the Crown to withdraw an acceptance of a plea was expressed as being where it is in the interests of justice that the Crown be permitted to do so. It was made clear that different interests were involved in that question, a proposition which was ultimately accepted by the applicant. The interests of justice include the legitimate interests of the Crown, which prosecutes on behalf of the community, as well as the legitimate interests of the accused. The High Court gave examples of situations which would fall within the interests of justice. The legitimate interests of the accused include the prejudice to him by any admissions made – these would include any admissions implicit in the plea itself – which would not have been made if the matter were to go to trial, or the unavailability of his witnesses at the time when the trial would proceed. The legitimate interests of the Crown include the situation which arises when the facts tendered on the sentencing demonstrate to the Judge that the accused was guilty of the more serious offence originally charged."

And further at page 267:

> "It would not be acceptable to the community on behalf of which the Crown prosecutes that a person charged with murder should be sentenced only for the substantially less serious offence of manslaughter where there remains outstanding the disputed but unresolved issues of fact which bear directly upon his guilt or otherwise of the more serious crime."

See also *Beeby* (1999) 104 A Crim R 142; *R v Filimoehala* (2003) NSWCCA 37.

[18] In this case the Crown says that it is in the interests of justice for the leave to be granted. A plea was entered to a particular offence based upon the state of knowledge of the Crown at the time. Following the plea and in the course of the sentencing process the defendant made what the Crown submits are admissions to more serious offending. This led to further inquiries being made and, as a consequence, to the Crown wishing to pursue

more serious charges based upon the new information. The matters with which the Court is concerned are clearly serious. They involve allegations of misconduct of a sexual nature between a father and his young daughter. The conduct which was the subject of the agreed facts presented to the Court now appears to have been a sanitised version of events. Information that is said to have come from the defendant suggests the circumstances of the offending may have been considerably more serious than was understood by the Crown at the time the plea was accepted.

[19] In response to the application by the Crown, the defendant submits that to grant leave will cause prejudice to him. It is submitted that the plea was entered into by him on the basis of the agreed facts and not the additional information that is now available. It is further submitted that the additional information came to light in the sentencing process and whilst the defendant was being interviewed for a pre-sentence report directed to be obtained by the Court. In my view, any prejudice suffered by the defendant in those circumstances can be met by the Crown providing an undertaking to the Court that it will not, at any future trial, use any admission implicit or explicit arising out of the plea and the sentencing process, against the defendant.

[20] As the argument developed the position of the parties shifted. At the conclusion of the hearing counsel for the defence argued that the matter should proceed upon the limited basis of the plea already entered and the agreed facts presented to the Court. The Crown argued that it should be

granted leave to withdraw its acceptance of the plea entered by the defendant. In my view, to allow the matter to proceed on the basis of a set of facts which, although originally agreed, are now in dispute and which the Crown submits do not reflect the very serious nature of the offending as it is now understood by the Crown, is to bring the system of justice into disrepute. It is not acceptable for the serious allegations now raised to be left unresolved because of the plea entered on 18 December 2003. It is appropriate that any disputed issues be resolved by a jury.

[21] Subject to the Crown giving the undertaking suggested it seems to me that justice requires that the Crown be permitted to withdraw its acceptance of the plea entered by the defendant and I give leave to do so.

———————————————