Green v The Queen [2004] NTSC 65

PARTIES:	HARRISON GREEN
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	9721574
DELIVERED:	14 December 2004
HEARING DATES:	6 December 2004
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Crown:	N Rogers
Mr Green:	M O'Reilly

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Mr Green:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Green v The Queen [2004] NTSC 65
No. 9721574

BETWEEN:

HARRISON GREEN

AND:

THE QUEEN

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 14 December 2004)

[1] The application to this Court is for a review of an indefinite sentence pursuant to s 72(1)(a) of the Sentencing Act.

[2] On 21 October 1998, I made an order pursuant to s 65(2) of the Sentencing Act sentencing the offender, Harrison Green, to an indefinite term of imprisonment.

[3] Harrison Green had entered a plea of guilty to a charge that on 25 September 1997 at Ali Curung in the Northern Territory of Australia did have sexual intercourse with Zachary Holmes without the consent of Zachary Holmes contrary to s192(3) of the Criminal Code. This is an offence which carries a maximum penalty of life imprisonment. The facts found to prove this offence are as follows:

" the victim in the matter is a young Aboriginal boy named Zachary Holmes. At the time of the offence he was 8 years old. At about midday on Thursday, 26 September 1997 the accused went to the Wycliff Well Hotel with his brother and friends. There the accused consumed about nine Victorian Bitter beer cans until about 4 pm when the group returned to Ali Curung. The accused, on his return to Ali Curung, went to the sideshow which was being held in a park.

There he spoke with his nephew and the victim. The accused said to the victim: 'Come over here, I fuck you.' The victim tried to run away but the accused picked him up and placed him under his arm. The accused took the victim to the rear of an old school building. The accused then sat down on the ground and the victim's clothes were removed. The accused then removed his clothes and laid on top of the victim inserting his penis into the boy's anus and proceeded to have anal intercourse with him. The victim told police he began to cry, although in the record of interview, the accused told police the boy wasn't crying.

A short time later the accused removed his penis. The victim then punched the accused in the testicles and swore at the accused. The accused told police in the record of interview he then said to the victim, 'Don't swear or I'll fuck you some more.' Zachary then put his pants back on and ran home. He changed his tracksuit pants from his green ones to his red ones. He went to the toilet and wiped his bottom and told police, 'I see white like cheese with blood.' The forensic examination was conducted of the victim's clothing by Mrs Kuhl, forensic biologist. The green tracksuit pants had a small blood stain on the back buttock area consistent with being blood from Zachary Holmes.

At about 2 am on Friday, 26 September 1997 the accused was arrested at Ali Curung after attending at the police station of his own accord. He was lodged in the cells and later conveyed to Tennant Creek. At about 6.17 pm on 26 September the accused took part in a videotape record of interview. During the interview the accused made admissions to have anal intercourse with the victim. When asked his reasons for committing the offence the accused replied, 'I don't know, I was drunk eh?'"

[4] At the time of sentence for this offence the applicant had a history of criminal violence. A summary of his convictions for violence at that time was prepared by Bailey J in the course of his reasons for judgment on a subsequent review of the indefinite sentence delivered 12 January 2001.

[5] I have extracted this summary as a convenient method of setting out the applicant's criminal history, as follows:

"(i)	September 1978	Assault x 2, unlawful use of a motor vehicle and malicious damage. Sentence: 5 months imprisonment.
(ii)	February 1979	Aggravated assault. Assault of a female teacher – intoxicated. Sentence: 6 months imprisonment, suspended after 2 months on 2 year good behaviour bond.
(iii)	October 1980	Assault with intent to rape – intoxicated. Victim 12 year old girl. Victim covered by a blanket and struck several times about the face. Sentence: 3 years, non-parole period 12 months. Concerns about the suitability of his plans on release delayed grant of parole and eventually he was refused parole after indicating he wanted to return to Ali Curung. Served full sentence. While doing so, he received an additional three months for assault of a Prison Officer.
(iv)	June 1984	Convicted of an assault involving one of his brothers and two juveniles. Sentence: 6 months imprisonment.
(v)	December 1985	Convicted of three counts of assault against females and one count of assault against a male. His mother was the victim in two counts. The other victims were his father and his sister-in-law. Sentence: 13 months, suspended after 2 months on 12 month good behaviour bond including a condition not to travel to, stay or reside at Ali Curung or Wycliffe Well.
(vi)	February 1986	Breached bond by going to Ali Curung. Convicted and ordered to serve the outstanding balance of 11 months imprisonment from the 12/85 sentence. A non-parole period of 3 months was fixed, but he served the full sentence because parole was refused on account of concerns of the Ali Curung Community and previous breaches of court orders.

(vii)	August 1989	Convicted of assaulting Police and sentenced to one month imprisonment. Cumulative upon sentences (6 months) for other offences.
(viii)	November 1990	Convicted of common assault x 2, aggravated assault (male/female) and aggravated assault (aged and disabled person).
(ix)	December 1990	Convicted of assault with intent to have carnal knowledge causing bodily harm. Victim was an 8 year old girl. Sentenced to 4 years imprisonment, non-parole period of 2 years. Initially refused to apply for parole – later changed his mind. Parole was refused and he served his full term.
(x)	March 1994	Convicted of aggravated sexual assault. Victim was a 10 year old girl. Sentenced to 2 ½ years' imprisonment with a non-parole period of 18 months. In sentencing, Martin CJ expressly warned the prisoner that further offending of a similar nature might lead to an indeterminate sentence. He refused to co-operate with a psychiatrist and declined to apply for parole. Served full sentence and was released on 8.8.95.
(xi)		Matter dealt with by Thomas J – committed offence on 25.9.97 – raped an 8 year old boy after carrying him to the rear of an old school building. On 21.10.98 Thomas J imposed an indefinite sentence and pursuant to s 65(3) of the *Sentencing Act*, a nominal sentence of 6 years imprisonment.

[6] This decision to impose an indefinite sentence upon Mr Green was the subject of an appeal to the Court of Criminal Appeal. The Court of Criminal Appeal granted leave to appeal but dismissed the appeal: see *Green v R* (2000) 133 NTR 1. At para [33] Angel J noted the following matters were not in dispute and continued at para [34]:

> "The applicant is an intelligent, articulate full blood Aboriginal man. Gaol apart, he has lived almost his whole life in Ali-Curung. He is married. He is 38 years of age. He is alcohol dependent. Under the influence of alcohol he is violent and aggressive and unable to

control his sexual instincts. Since 1980 he has committed four serious sexual offences, the last three on young children. In addition he has 12 convictions for assault and aggravated assault since 1978 for which sentences of imprisonment were imposed. Very significantly for present purposes imprisonment in the past has proved no deterrent. There is no discernible trend of psychological maturation despite his age. In the past he has refused parole on a number of occasions because he will not accept "vigilant supervision". He has never completed available alcohol abuse rehabilitation programmes in the past. There is nothing in his history to indicate he has the capacity or the will to change his ways. The Ali-Curung community do not want him to return to the community and there is no post release plan for him. Prior to the present offences he had received strong comments from various sentencing judges and magistrates about his offending. In March 1994 he was specifically warned by the Chief Justice that if he did not mend his ways, any further offending may well result in the imposition of an indefinite sentence of imprisonment. Her Honour found that the applicant is a serious danger to the community and that there was a risk of serious physical harm to young children if an indefinite sentence was not imposed. Implicit in this finding was a rejection of a fixed term sentence as a suitable alternative. Such a finding was in my view justified given, inter alia, that imprisonment in the past had proved no deterrent, that the applicant had neither the capacity nor the will to change his ways and that he had deliberately refused rehabilitative efforts in the past. At all events, it has not been shown to be wrong.

[7] Mildren J at par [72] observed:

"The findings her Honour made, so far as s 65(9) are concerned, included findings that the nature of the offence was exceptional; that imprisonment in the past has not acted as a deterrent; that, under the influence of alcohol, the appellant is violent and aggressive and loses control of his sexual restraints; that in the past the appellant has refused parole because he would not accept vigilant supervision; the appellant has failed to take previous opportunities available to him to redress his alcoholism; there is nothing in the appellant's history to show the will to change his behaviour; the appellant is a serious danger to the community; that there exists a risk of serious physical harm to young children if an indefinite sentence is not imposed, and a need to protect the community, particularly young and vulnerable children. There are no countervailing findings, except that her Honour did not completely rule out the appellant's prospects of

> rehabilitation, but, as she pointed out, there was nothing to indicate any capacity or will to change his ways.".

[8] These paragraphs are referred to in the reasons for judgment delivered by Bailey J on 12 January 2001 following a review of the indefinite sentence pursuant to s 72(1)(a) of the Sentencing Act.

[9] Bailey J stated that the passages quoted from the judgments of Angel and Mildren JJ provide the essential background to the review he was undertaking pursuant to s 71(2) of the Sentencing Act.

[10] Bailey J gave detailed reasons for why he refused to make an order discharging Mr Green from his indefinite sentence. At pars [42] and [43] of this reasons for judgment, Bailey J stated:

> "[42] The present review is not, of course, concerned directly with the offender's post-release plans. However, I consider the offender's thoughts in this regard are relevant in assessing whether the offender is demonstrating signs of a late psychological maturity and a genuine desire for rehabilitation.
>
> [43] On all the materials before me, I consider that there are some positive signs for the offender's future rehabilitation, but I am also satisfied to a high degree of probability that he is still a serious danger to the community. In short while the offender has made some progress, he needs to advance his rehabilitation considerably further before the Court orders the discharge of his indefinite sentence.

[11] The indefinite sentence again came for review before Bailey J who delivered reasons for his decision on 3 December 2002. I have read a transcript of these reasons. Bailey J referred in some detail to the evidence that had been presented by the Crown. His Honour stated in conclusion:

"On the available materials I am satisfied to a high degree of probability that Harrison Green is still a serious damage to the community. Accordingly I decline to order that his indefinite sentence is to be discharged."

[12] The matter is now before the Court again for periodic review pursuant to s 72 of the Sentencing Act which provides as follows:

"(1) Where the Supreme Court imposes an indefinite sentence, it –

(a) shall for the first time review the indefinite sentence not later than 6 months after an offender has served –

(i) 50% of the offender's nominal sentence; or

(ii) if the offender's nominal sentence is imprisonment for life, 13 years of the nominal sentence; and

(b) shall review the indefinite sentence at subsequent intervals of not more than 2 years from when the last review was made.

(2) Subject to section 73, the Director of Public Prosecutions shall make the application that is required to be made to cause the reviews referred to in subsection (1) to be carried out."

[13] The application for review is made by Dr Rogers on behalf of the Crown in accordance with the obligations placed upon the Crown under s 72(2) of the Sentencing Act.

[14] Under cover of a letter signed by Dr Rogers, the Crown have provided the following reports:

1. Report dated 23 August 2004 from Dr Ho (Exhibit P1).

2. Report dated 27 September 2004 from Ms Uren (welfare officer) (Exhibit P2).

3. NT Correctional Services Security Assessment Review – review date July 2004 (Exhibit P3).

[15] At the outset of the application to review the indefinite sentence, Dr Rogers on behalf of the Crown stated that the Crown could not satisfy the Court to a high degree of probability that the offender is still a serious danger to the community.

[16] Accordingly, it is the Crown position that this Court should now proceed to sentence the offender for the offence pursuant to s 74(1)(b) of the Sentencing Act. Section 74 provides as follows:

> "(1) Unless it is satisfied to a high degree of probability that the offender is still a serious danger to the community when a review is made under section 72 or 73, the Supreme Court shall –
>
> (a) order that the indefinite sentence is discharged; and
>
> (b) sentence the offender under this Act for the violent offence for which the indefinite sentence was imposed.
>
> (2) Where the Supreme Court does not make an order under subsection (1)(a), the indefinite sentence continues in force.
>
> (3) A sentence imposed under subsection (1)(b) –
>
> (a) is taken to have started on the day the indefinite sentence was originally imposed;
>
> (b) takes the place of the indefinite sentence; and
>
> (c) shall be not less than the nominal sentence."

[17] I have now had an opportunity to read the reports that have been tendered on the present application. The report dated 23 August 2004 from Dr Charlotte Ho, Behavioural Therapist, is based on a clinical interview with Mr Green on 24 August 2004. The other sources of information for the report include:

- Perusal of the relevant files with Department of Correctional Services.

- Perusal of psychiatric reports prepared by Dr Lester Walton (dated 25 May 1998) and Dr Marcus Tabart (dated 6 November 2002).

- Rehabilitation programs summary prepared by Mr Geoff Manu (dated 29 September 2000), Ms Vanessa Sutah (dated 2 September 2002) and Ms Tracy Quinney (dated 31 July 2002).

- Administration of a battery of psychometric testimony STATIC-99, Coping Scale for Adults, State-Trait Anger Inventory -11 (STAXI-11).

[18] Dr Ho stated that no psychological or psychiatric disturbance was noted in respect of Mr Green.

[19] In her report, Dr Ho states as follows on p 5 of her report under the heading of "Risk Assessment":

> "To determine Mr Green's risk of recidivism, the STATIC-99 was administered. The STATIC-99 is a brief actuarial instrument designed to estimate the probability of sexual and violent recidivism based on static factors amongst adult males, who have already been convicted of at least one sexual offence against a child or non-consenting adult. Mr Green's STATIC-99 score indicates that he is at Medium-High risk of re-offending. Furthermore, a number of dynamic factors have been identified, which might increase Mr Green's risk of re-offending. The following is a list of the identified dynamic factors.
>
> - Sexual deviation – pattern of sexual arousal to inappropriate stimuli that causes distress, harm to others or social dysfunction.
> - Substance abuse – previous excess consumption of alcohol.
> - Lack of positive influences/social supports – absence of those likely to be available to render positive influences or social

supports. Do not consider contact with professionals as the sole form of positive influences.

- Other family problems/domestic violence – history of domestic violence and family criminality.
- Environment supports sexual offences – evidence that the offender's environment supports, condones or excuses sexual offences.
- Supervision failure – previous evidence indicating failure to adhere to rules and requirements of community-based dispositions or parole that led to a breach of the order."

[20] Dr Ho also set out the offence related intervention programs attended by Mr Green during his current episode of incarceration at Alice Springs Correctional Centre.

[21] Since this matter last came before the Court for review, Mr Green has successfully completed further behaviour programs most importantly "An Introduction to Alcohol Awareness Program" and "Alcohol Treatment Program". The latter program stretched over a period of approximately two months in May to July 2004. It would appear that Mr Green has also completed an educational program on sexually transmitted diseases and an HIV program.

[22] Dr Ho did recommend that Mr Green participate in either a prison based or community based sexual offender program. Such program should be delivered in accordance with appropriate standards. The report states that Mr Green is willing to participate in recommended offence related and offence specific treatment.

[23] The Northern Territory Correctional Services Security Assessment Review (Exhibit P3) states that Mr Green is a full time student at Education and is employed as a store cleaner in J Block. This report indicates there has been an improvement in his behaviour and conduct since the last review conducted in July 2002. The report does mention some areas where Mr Green still requires supervision and that he can be manipulative and cause trouble when he does not get his own way. However, the review panel appear to be in agreement that Mr Green is making a concerted effort in trying to improve his behaviour and conduct.

[24] Mr O'Reilly, on behalf of Mr Green, has stated that his client is prepared to accept supervision on parole. Mr O'Reilly submitted that Mr Green accepts that he has to cut all ties with Ali Curung and has no plans to return there. Mr Green has family in Darwin and it is part of his own post release plans to reside in Darwin.

[25] Unlike the previous two reviews the Crown are not in a position, with respect to the present application, to present evidence to satisfy the Court to a high degree of probability that the offender is still a serious danger to the community.

[26] I accept that it is appropriate I should order that the indefinite sentence is discharged and then proceed to sentence Mr Green for the violent offence for which the indefinite sentence was imposed.

[27] On 21 October 1998 when I imposed the indefinite sentence, I imposed a nominal sentence of six years imprisonment pursuant to s 65(5). The fixing of a nominal sentence sets in place a timetable for review of the indefinite sentence as required by s 72(1) of the Sentencing Act. At the time of imposing the nominal sentence the transcript of proceedings on 21 October 1998 indicates I said as follows (tp 91):

> "Under the provisions of s 65(5) I am required to specify in the order in imposing an indefinite sentence a nominal sentence of a period equal to the period that I would have fixed had I not imposed an indefinite sentence. In arriving at that nominal sentence I do have regard to the principles established in *R v Singh* (1984) 55 ALR 692 and I quote from the decision of Foster J at p 695:
>
> > '… For some time, however, it has been recognised that when a court makes a declaration that an offender is an habitual criminal, it should impose a light determinant sentence (*R v Roberts* [1961] SR NSW 681.
> >
> > When an offender is declared to be an habitual criminal consideration should be given to imposing as the sentence for the offence of which he is convicted a somewhat lighter sentence than would otherwise have been imposed so that the commencement of the period of detention as an habitual criminal will not be unduly delayed (*R v Baldry*, a decision of the High Court, 24 June 1982, unreported).'
>
> Accepting that principle I will in fact impose a lighter nominal sentence than I would have imposed had I not made an order for indeterminant sentence and the order that I make under s 65(5) is that the offender be sentenced to six years' imprisonment."

[28] In imposing sentence, I must take into account the very serious nature of the offence. Mr Green does not benefit from any leniency that would normally be extended to a first offender or person with few or minor prior convictions. He has a horrifying list of prior convictions. He is entitled to have it taken into account that he pleaded guilty to the offence and to this

extent assisted in the administration of justice. I do not consider the plea of guilty was accompanied by remorse or an insight at that time into the seriousness of his offending. It was essentially an acceptance of the inevitable. For this reason the discount for the plea of guilty would be in the order of 10 – 15 per cent.

[29] The offence having been committed in September 1997, the provisions of s 55A and s 78BB of the Sentencing Act do not apply to Mr Green. I am aware Mr Green has been in custody now on the indefinite sentence for a little over seven years.

[30] During the seven years he has been in prison, Mr Green has undertaken courses in Education and Music. He has completed a range of courses designed to address those aspects of his behaviour which have led him to be a frequent offender. In particular, he has in recent months undertaken programs to address his problems with alcohol. He has indicated that he would be prepared to participate in recommended offence related and offence specific treatment.

[31] I note that when I sentenced Mr Green on 21 October 1998, I recommended Mr Green be encouraged to attend the Sex Offender Treatment Program. I am informed there is currently no such program within the gaol. It may be a matter the Parole Board would want to consider if there is a decision made that parole is appropriate.

[32] I do not think it necessary to repeat all the matters that were addressed in the sentencing process when sentence was imposed on 21 October 1998.

[33] From the reports received it would appear Mr Green has made some progress in addressing his behavioural problems, however, there does appear to be an ongoing need for supervision. Whilst I acknowledge the improvements he has made, Mr Green is still in the medium-high risk of re-offending as assessed by Dr Ho. I consider that supervision under parole would still be necessary. To his credit he has attended the various programs relating to his behavioural problems and which have been made available to him in gaol. He has also undertaken other courses designed to develop his own skills and education. These are very positive steps towards rehabilitation. He has accepted that it would not be appropriate to return to Ali Curung, being the community which has expressed a strong view that he should not return there. Upon his release Mr Green plans to move to Darwin where he does have family members.

[34] The order I make is that:

1) The indefinite sentence is discharged.

2) On the offence of sexual intercourse with Zachary Holmes without the consent of Zachary Holmes, I impose a sentence of 14 years imprisonment. I fix a non parole period of 10 years.

[35] The sentence and non parole period are to date from 26 September 1997 to take account of time already spent in custody and was the date fixed for the commencement of his indefinite sentence.

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