Gilligan v The Queen [2007] NTCCA 08

PARTIES:	GILLIGAN, DAVID MATTHEW
	v
	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:	CA 18 of 2006 (20602743)
DELIVERED:	18 JUNE 2007
HEARING DATES:	6 JUNE 2007
JUDGMENT OF:	MILDREN, RILEY & SOUTHWOOD JJ
APPEAL FROM:	DECISION OF SUPREME COURT APPLICATION 1 DECEMBER 2006

CATCHWORDS:

CRIMINAL LAW – sentencing appeal – change of plea after complainant gave evidence in chief – agreed facts – whether trial judge could take into account facts beyond the agreed facts – whether lack of procedural fairness – whether some other sentence should be imposed – appeal dismissed

Statutes:
Criminal Code (NT), s 192(3), s 411(4), s 429(2)

Citations:

Applied:
R v Ireland (1987) 49 NTR 10
Waye v R [2000] NTCCA 5

Referred to:
Altham v The Queen (1992) 62 A Crim R 126
Chow v Director of Public Prosecutions (1992) 28 NSWLR 593
FV v The Queen [2006] NSWCCA 237
GAS v The Queen (2004) 217 CLR 198
Malvaso v The Queen (1989) 168 CLR 227
Mielicki, Whitman and Poniewaz v The Queen (1994) 73 A Crim R 72
Pettingill v The Queen (1985) 21 A Crim R 130
R v Olbrich (1999) 199 CLR 270
R v Riley [1896] 1 QB 309 at 318
R v Visconti [1982] 2 NSWLR 104
Siganto (No 1) (1997) 97 A Crim R 60
Siganto (No 2) (1999) 106 A Crim R 30
The Queen v Perre (1986) 41 SASR 105
The Queen v Uzabeaga (2000) 119 A Crim R 452

Followed:
Damaso (2002) 130 A Crim R 206
Kelly v The Queen (2000) 10 NTLR 39

REPRESENTATION:

Counsel:

Applicant:	P Elliott
Respondent:	J Karczewski QC

Solicitors:

Applicant:	
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID number:	mil07406
Number of pages:	19

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

Gilligan v The Queen [2007] NTCCA 08
No. CA 18 of 2006 (20602743)

BETWEEN:

DAVID MATTHEW GILLIGAN
Applicant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, RILEY & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 18 June 2007)

Mildren J:

[1] I have had the opportunity of reading a draft of the reasons prepared by Riley J. I agree with orders proposed by Riley J, but I have arrived at my conclusions by a slightly different route.

Grounds 2, 3 and 4

[2] In my opinion a discount of one year on the head sentence was entirely appropriate in the circumstances of this case having regard to the lateness of the plea, the fact that the complainant had already completed her evidence in chief and the trial had already commenced.

[3] It was submitted that a discount of 10 per cent of the head sentence inadequately reflected the applicant's remorse and the utilitarian value of the plea. Mr Elliott's submission concentrated on the percentage of the discount as an indication of error by the trial Judge. I do not agree.

[4] In *Kelly v The Queen* (2000) 10 NTLR 39 this Court said, at 49 [27]:

> "In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances."

[5] There is nothing in *Kelly v The Queen* to suggest that the discount must be expressed in percentage terms, although in practice that is often done. What is important, in a case like this where the discount is reflected solely by a reduction of the head sentence, is the extent to which the head sentence has been reduced.

[6] In my opinion a reduction of one year from the nominal head sentence discloses no error by the sentencing judge, but was entirely appropriate in the circumstances of this case.

Grounds 5 and 6

[7] The agreed facts which were relied upon by the parties as the basis for the sentencing hearing did not include an allegation that the applicant had attempted to have anal intercourse with the complainant. They alleged only that the complainant believed that this was what he was trying to do.

[8] In my opinion the learned sentencing Judge should not have found as an aggravating circumstance, a matter which was not relied upon in the agreed facts. It is not to the point that the learned Judge had heard the complainant's evidence in chief during which her evidence went further than this, unless the prosecution made it clear that it relied upon this evidence. Whilst it is true that the agreed facts contained words quoted from the complainant's evidence at trial and for which transcript references were given that only indicated the source of the words relied upon. In the course of submissions, neither counsel indicated to the learned sentencing Judge that the parties relied upon the complainant's evidence beyond what was reproduced in the agreed facts. In particular, the prosecutor at no time suggested that the accused in fact attempted anal intercourse with the complainant. That matter was not raised by the Judge and was not discussed by counsel. This ground of appeal if therefore made out.

[9] As to the matter of the scissors causing lacerations in the area of the right ear, it was not in contest that the lacerations were caused by the applicant during the course of the violence perpetrated on the complainant. It was a reasonable inference that somehow or other the scissors came into contact with the ear during the course of the struggle. No finding was made by the learned sentencing Judge that the applicant deliberately used the scissors to cause that laceration. There is no substance to this submission.

Manifestly excessive

[10] I agree with Riley J for the reasons that he gives that this ground is not made out.

Determination of the Appeal

[11] Section 411(4) of the Criminal Code provides:

> "On an appeal against a sentence the Court, if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefore and in any other case shall dismiss the appeal."

[12] The fact that error has been disclosed does not automatically have the consequence that "some other sentence… is warranted in law": see *Damaso* (2002) 130 A Crim R 206 at 217 [53]. I accept the submission of Mr Elliott, the applicant's counsel, that if error is disclosed, the Court must consider for itself what is the appropriate sentence and if the Court forms a positive opinion that some other lesser sentence is warranted, the Court must impose it.

[13] In my opinion, this offending warranted total head sentences of imprisonment of nine years to be served concurrently, taking into account all of the relevant factors, both mitigatory and aggravating. So far as concerns the matter of the complainant's belief that the applicant was attempting to have anal intercourse with her, the complainant experienced the fear and humiliation in her mind concerning this and this was caused by

the applicant's behaviour towards her. I am satisfied in all of the circumstances that no other sentences than those imposed are warranted.

RILEY J:

[14] This is an application for an extension of time within which to make application for leave to appeal against sentence. The application came before a Judge of the Court and, on 1 December 2006, was refused. The applicant brings the matter before the Court pursuant to the provisions of s 429(2) of the Criminal Code.

[15] On 4 September 2006 the applicant pleaded not guilty to three counts contained in an indictment dated 17 August 2006, being an offence of aggravated assault and two counts of sexual intercourse without consent. The victim in each case was the same person. The trial commenced and then, on 6 September 2006, after the victim had completed her evidence in chief, the applicant entered pleas of guilty to the two offences of sexual intercourse without consent. The prosecutor filed a nolle prosequi in respect of the remaining count.

[16] The matter thereafter proceeded by way of a sentencing hearing. The parties placed a set of agreed facts before the learned sentencing Judge and submissions were made. The applicant was sentenced to concurrent terms of imprisonment for nine years in respect of each of the offences. A non-parole period of six years and six months was set.

[17] The reasons for the delay in making the application for leave to appeal were explained in an affidavit filed by counsel for the applicant. The affidavit revealed that counsel had been instructed to seek leave to appeal on the day the sentence was imposed but delay occurred as a result of applications for funding being pursued with the Northern Territory Legal Aid Commission. The application for an extension of time was opposed on the basis that leave to appeal would not, in any event, be granted. The respondent advised that if the court was minded to grant leave to appeal against severity of sentence the application for an extension of time would not be opposed. The issue was, therefore, whether leave to appeal should be granted.

[18] In written submissions the applicant identified six grounds of appeal upon which he proposed to rely in the event that leave was granted. The grounds were addressed in three groups:

(a) Ground 1 – the learned sentencing judge erred in imposing a sentence that is manifestly excessive;

(b) Grounds 2, 3 and 4:

Ground 2 – the learned sentencing judge erred by placing excessive weight on the factor of deterrence in sentencing the applicant and in particular general deterrence after making a finding that personal deterrence was not a weighty factor in sentencing the applicant;

Ground 3 – the learned sentencing judge erred in giving insufficient weight to the applicant's remorse;

Ground 4 – the learned sentencing judge erred in giving insufficient weight to the applicant's plea of guilty;

(c) Grounds 5 and 6:

> Ground 5 – the learned sentencing judge erred in making a finding that the applicant attempted to penetrate the victim anally;
>
> Ground 6 – the learned sentencing judge erred in making a finding that the victim had lacerations consistent with scissors in the area of her right ear, the learned sentencing judge must have concluded that the applicant cut the victim with a pair of scissors when there is no evidence that this occurred.

[19] It is convenient to deal with grounds 2 to 6 before addressing the issue of manifest excess.

Grounds 2, 3 and 4

[20] The applicant submitted that these grounds overlap and should be considered together.

[21] The applicant pleaded guilty after the complainant had completed her evidence in chief. It could not be said to have been an early plea and, given that the trial was underway, the utilitarian benefits that flowed from the plea were limited. The learned sentencing Judge observed that the witnesses had been assembled and were ready to give their evidence. The change of plea probably saved three to four days of hearing and were, to that extent, of benefit.

[22] The most significant aspect of the change of plea was that it reflected a realisation on the part of the applicant of the gravity of his actions and a recognition of the harm he had caused. The plea demonstrated remorse on

the part of the applicant and the learned sentencing Judge accepted that to be so. His Honour observed:

> "Your instructions to counsel not to say anything which might cause further grief to the victim or members of her family and friends who were present in the court, also indicated to me that you were genuinely sorry for what you had done. It took a long time, caused the victim further unnecessary distress and anxiety along the way, but you are entitled to some credit for that."

[23] Although the change of plea resulted in the complainant not being cross-examined it had still been necessary for her to give her evidence in chief in the presence of a jury and others in the court. Her ordeal extended over a period of two days. It is clear from the sentencing remarks that the process caused the complainant significant distress and that, in part, led to the applicant's change of plea.

[24] The submission made on behalf of the applicant was that the learned sentencing Judge gave little and insufficient weight to the fact that the applicant had gained real and genuine insight into what he had done and into his criminality. It was then submitted that his Honour must have either placed too much weight on general deterrence or too little weight on the applicant's plea and remorse in order to arrive at the sentence he imposed. In fact his Honour acknowledged that the applicant had recognised the wrong he had done, specifically observing that the plea demonstrated a recognition of the gravity of his actions and the harm that flowed from his actions. I regard the discount provided by his Honour for the plea of guilty

which was in the order of 10 percent, as being at the low end of the available range but nevertheless within the range.

[25] It was further submitted that the learned sentencing Judge placed too much weight on deterrence, and in particular general deterrence, in light of his finding that personal deterrence was not a weighty factor in the sentencing process. The sentencing remarks of his Honour included the following:

> "I regard your prospects of rehabilitation as being fair, but plainly only if you can overcome your problems with alcohol and drug abuse and your time and attempts at rehabilitation in prison should help with that. You must be punished for what you did and I consider that an element of personal deterrence is not a weighty factor. The need for the court to do what it can to protect women in society from attack and abuse leads to a sentence, which hopefully will demonstrate to others who may be minded to behave in this way, that they may well find themselves a subject of a significant punishment by way of a lengthy prison term."

[26] It is clear from that passage that his Honour was weighing the competing considerations of deterrence and retribution on the one hand and a consideration of subjective mitigating features on the other. As was observed in *Waye v R* [2000] NTCCA 5 at [29]:

> "In cases of armed robbery, armed home invasions, rape of a stranger involving violence with offensive weapons and other crimes of similar gravity, subjective mitigating factors must take a back seat to the need to deter, punish and make it entirely clear that the community does not approve such conduct. Those who engage in offences such as the present must be left in no doubt that regardless of their youth and prospects for future rehabilitation, they will forfeit their liberty for a very considerable period."

[27] The approach adopted by the learned sentencing Judge and the sentence imposed by him accords with those observations. In my view no error has been demonstrated.

[28] In the course of submissions it was contended that his Honour erred in observing that it was "beyond me" why the applicant thought he had a chance of acquittal. It was submitted that his Honour could only have reached that view based upon the evidence in chief of the victim without the benefit of cross-examination. It was further submitted that his Honour may have fallen into error in assessing the change of plea as being an acceptance of the inevitable rather than an expression of remorse and the realisation of the gravity of the conduct of the applicant. Reference to the sentencing remarks makes it clear that his Honour did not adopt such an approach. His Honour said:

> "Although you did not co-operate with police, it seems that at the time of committal you were prepared to admit your guilt and that intention was conveyed to the prosecutor, but you later changed your mind. That was said to be because of a disagreement between you and your then counsel and because you thought you had a chance of acquittal. Why you should have thought that is beyond me, given the weight of the evidence against you, *but of course, any person charged with a crime is entitled to put the Crown to proof and is not punished for doing so*."

[29] It is plain from the emphasised words that his Honour excluded from consideration the applicant's conduct of the case.

Grounds 5 and 6

[30] The applicant complained that the learned sentencing Judge made findings that the applicant "attempted anal intercourse" with the victim and, further, that the victim suffered "lacerations consistent with scissors in the area of her right ear". It was submitted that there was no evidence in the Crown facts to support such findings. It was submitted that those findings, and in particular the reference to attempted anal intercourse, amounted to aggravating factors in relation to the offending and could only be relied upon if proven beyond reasonable doubt: *R v Olbrich* (1999) 199 CLR 270 at 281.

[31] As can be seen from the agreed Crown facts placed before the learned sentencing Judge those Crown facts were a summary of the evidence in chief of the victim and, indeed, reference was made to the specific pages of the transcript of the complainant's evidence in the course of the document. The Crown facts include the following:

> "The prisoner removed his penis from the complainant's vagina and attempted to roll her onto her stomach. The complainant believed, from the words used by the prisoner and what she physically felt, that he was 'trying to go up my bottom' (T86). However he did not anally penetrate her."

[32] By including references to the pages of the transcript his Honour was being referred to what was said by the complainant at that point to provide the context. The transcript at the page referred to in the Crown facts reveals evidence from the complainant that the applicant said, as he was trying to

roll her over: "He was going to do me anally". She went on to say that his intentions were quite clear as to what he was going to do and: "No way I was going to let him do that to me". Her evidence was that: "He was trying to go up my bottom", and when asked whether he penetrated her anally she said: "No. I fought as hard as I could. I wasn't going to let him touch my bottom".

[33] In the particular circumstances of this matter the reference in the agreed Crown facts to the subject of anal penetration must be seen in the context of that evidence, there being no suggestion to the Court that it was in dispute. Whilst a sentencing judge would normally be confined to the agreed facts, in this case the references to the transcript of the evidence of the complainant expanded the scope of the agreed facts. In those circumstances there was an evidentiary basis upon which the learned sentencing Judge could find that the applicant had attempted anal intercourse with his victim.

[34] If I be wrong in so concluding and his Honour should not have had reference to the evidence, the fact remains that the victim was clearly of the view that the applicant was attempting anal intercourse and there were words spoken by the applicant and physical conduct undertaken by him that led to her belief. However the finding of his Honour that there was an actual attempt went beyond her expression of belief and should not have been made. Notwithstanding that error may have occurred in that regard I am of the view that no other sentence should have been imposed (s 411(4) Criminal Code NT) and I would not interfere.

[35] In relation to the injuries suffered by the victim there is no dispute that there was a laceration below her right ear with a small abrasion below that laceration. The complaint of the applicant is his Honour's observation that those lacerations were consistent with the application of scissors in the area of the right ear. There is also no dispute that the applicant did wield a pair of scissors and the Crown facts include the following:

> "The prisoner then grabbed a pair of scissors and held them at the complainant's throat. The complainant told the prisoner that she had a pacemaker in an attempt to convince him to stop the assault. The prisoner put the scissors to the complainant's chest. She told him that she had two boys again in an attempt to get him to desist. He appeared to go into a rage, dropped the scissors and picked up a framed photograph which he then threw at the complainant."

[36] The gravamen of the reference to the scissors is not that some minor injury was caused to the complainant but is, rather, the fact that they were used to threaten the victim and to force her into submission. There is no dispute that the lacerations to which reference was made occurred during the course of the attack upon the victim and whether they were made by the scissors or in some other way is not to the point. There was no finding by his Honour that the applicant intended to cause the identified injuries with the scissors. His finding was limited to the conclusion that the injury was consistent with the use of scissors. She was threatened with the scissors and she also suffered the injuries to which reference was made. It was all part of what his Honour described as "the violence, humiliation and fear which (the applicant) inflicted upon the victim".

[37] I see no merit in these grounds of appeal.

Manifest excess

[38] The principles applicable to an appeal alleging that a sentence was manifestly excessive in all the circumstances are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.

[39] In *Siganto (No 1)* (1997) 97 A Crim R 60 the Court of Criminal Appeal dealt with an appeal against sentence where the prisoner had been sentenced to nine years imprisonment for the offence of rape. In that case the Court observed (at 68):

> "General and personal deterrence undoubtedly play the most significant part in fixing an appropriate sentence for crimes of this type. After all, the maximum penalty is imprisonment for life. The

> Parliament intends that the offence be seen at the top end of the scale of gravity of criminal conduct. The head sentence of nine years imprisonment is not excessive. It is within the range of sentences imposed in this Court in recent years for offences of rape where the accused is convicted after trial, and the assault is accompanied by violence and degradation beyond the minimum which might be expected. It is a sentence warranted by the objective facts measured against the maximum."

[40] *Siganto* was the subject of further appeal and, as a consequence, the appellant was re-sentenced: *Siganto (No 2)* (1999) 106 A Crim R 30. However the observations to which I have referred were not challenged.

[41] In the course of argument counsel for the applicant referred to the range of sentences imposed for offences against s 192(3) of the Criminal Code since 2003. In considering the schedule of information provided it is necessary to bear in mind the observations of Street CJ appearing in *R v Visconti* [1982] 2 NSWLR 104 and adopted by this Court in *R v Ireland* (1987) 49 NTR 10 at 18:

> "The second initial consideration is the ascertainment of the existence of the general pattern of sentencing by criminal courts for offences such as those under consideration. The task of the sentencing judge, no less than the task of an appellate court, is to pursue the ideal of evenhandedness in the matter of sentencing. Full weight is to be given to the collective wisdom of other sentencing judges in interpreting and carrying into effect the policy of the legislature. That collective wisdom is manifested in the general pattern of sentences currently being passed in cases which can be recognised judicially as relevant to the case in hand. This is not to suggest that sentences are to be arbitrarily dictated by mathematical application of statistics. There is an enormous difference between recognising and giving weight to the general pattern as a manifestation of the collective wisdom of the sentencing judges on the one hand and, on the other hand, forcing sentencing into a straightjacket of computerisation. There is, moreover, always a danger, as is recognised on the civil side in the assessment of

damages, of seeking to use a factual assessment in one case as a legal precedent or authority to govern the decision in another."

[42] Reference to the range of sentences provided to the court by counsel for the applicant confirms me in the view that the sentence imposed in the present case was an appropriate sentence in all the circumstances.

[43] There is nothing unusual about the sentence in this matter. It was a serious offence of its kind involving circumstances which were humiliating for the victim and the offending was accompanied by violence. A weapon was used to obtain the co-operation of the victim and the assault only came to an end when other people heard the victim's cries for assistance and came to her rescue. The sentence was, in my view, comfortably within the range of sentences which would be expected in all the circumstances.

[44] In the circumstances I would grant the extension of time, allow leave to appeal but dismiss the appeal.

Southwood J:

Introduction

[45] I too have had the opportunity of reading a draft of the Reasons for Decision prepared by Riley J. I agree with his Honour's Reasons for Decision in relation to the grounds of appeal numbered one, two, three, four and six.

[46] In my opinion ground of appeal number five is made out. The learned sentencing Judge should not have found that the applicant attempted to have anal intercourse with the complainant without giving counsel for the

applicant an opportunity to address that specific factual issue and without giving the applicant an opportunity to call evidence in rebuttal. The applicant only admitted that he attempted to roll the complainant onto her stomach and that the complainant believed that the applicant was "was trying to go up [her] bottom". The Crown Facts that were admitted by the applicant did not include the fact that the applicant had attempted to have anal intercourse with the complainant and neither the Crown prosecutor nor counsel for the applicant told the learned sentencing Judge that the parties relied upon the complainant's sworn testimony beyond what was reproduced in the Crown Facts. At no stage during the sentencing process did the Crown prosecutor suggest to the learned sentencing Judge that the applicant in fact attempted anal intercourse with the complainant. The parties proceeded on the basis of the Crown Facts which were admitted by the applicant. A fair inference from the Crown Facts was that when the applicant agreed to plead guilty the Crown abandoned any allegation that the applicant had attempted anal intercourse with the complainant. By pleading guilty to the two counts of sexual intercourse without consent the applicant did not admit the truth of all of the facts about which the complainant gave evidence: *R v Riley* [1896] 1 QB 309 at 318.

[47] The learned sentencing Judge was not bound by the Crown Facts and his Honour was not precluded from having regard to the whole of the sworn testimony of the complainant: *GAS v The Queen* (2004) 217 CLR 198 the Court at 210 - 211 [27] - [32]; *Malvaso v The Queen* (1989) 168 CLR 227 at

233; *FV v The Queen* [2006] NSWCCA 237 per Kirby J at [30] - [46]; *Altham v The Queen* (1992) 62 A Crim R 126 per Hunt CJ at 127; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 per Kirby J at 604 to 608 particularly at 606E and 608C; *Mielicki, Whitman and Poniewaz v The Queen* (1994) 73 A Crim R 72 the Court at 77 and 79; *The Queen v Perre* (1986) 41 SASR 105 per King CJ at 106; *Pettingill v The Queen* (1985) 21 A Crim R 130 per Cox J at 132 - 133. The learned sentencing Judge had a right in law to go beyond the Crown Facts when sentencing the applicant. However, given the basis on which the plea was conducted by the parties, procedural fairness required the learned sentencing Judge to alert the applicant to any proposed reliance by his Honour on the sworn testimony of the complainant that went beyond the ambit of the Crown Facts which were admitted by the applicant: *The Queen v Uzabeaga* (2000) 119 A Crim R 452 per Bell J at 459 [38]; *The Queen v Perre* (supra) per King CJ at 106 and *Mielicki, Whitman and Poniewaz v The Queen* (supra) the Court at 79.

[48] The learned sentencing Judge erred in failing to inform the applicant that he was minded to sentence him on the basis of the complainant's sworn testimony that the applicant had attempted anal intercourse with the complainant and in failing to give the applicant an opportunity to address the factual issue by calling evidence or otherwise.

[49] Nonetheless I am of the opinion that no sentences other than the sentences of imprisonment imposed by the learned sentencing Judge are warranted in this case. The crimes committed by the applicant were serious crimes. As a

result of her belief that the applicant was attempting to have anal intercourse with her the complainant suffered great anxiety and humiliation.

[50] I would make the following orders:

1. The applicant is granted an extension of time in which to make the application for leave to appeal.

2. The applicant is granted leave to appeal.

3. The appeal is dismissed.