

*GD v The Queen* [2010] NTCCA 07

PARTIES: GD  
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: CCA 4 of 2010 (20726630)

DELIVERED: 10 June 2010

HEARING DATES: 10 June 2010

JUDGMENT OF: MARTIN (BR) CJ, RILEY AND KELLY JJ

APPEAL FROM: MILDREN J

**CATCHWORDS:**

CRIMINAL LAW – APPEAL – APPLICATION TO EXTEND TIME  
Convictions for sexual intercourse without consent – whether sentences  
manifestly excessive – sentences within range of sentencing discretion –  
application refused.

**REPRESENTATION:**

*Counsel:*

Appellant: I Read  
Respondent: E Armitage

*Solicitors:*

Appellant: Northern Territory Legal Aid Commission  
Respondent: Office of the Director of Public Prosecution

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

*GD v The Queen* [2010] NTCCA 07  
No. CCA 4 of 2010 (20726630)

BETWEEN:

**GD**  
Appellant

AND:

**THE QUEEN**  
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND KELLY JJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* 10 June 2010)

**The Court:**

**Introduction**

- [1] This is an application for leave to extend the time within which to appeal against sentence.
- [2] The applicant was convicted by a jury of four crimes of sexual intercourse without consent. Each of the offences was committed late in the evening of 2 October 2007. The victim was the estranged wife of the applicant. Acts of anal, vaginal and oral intercourse were involved and the sentences for the individual offences were as follows:

Count 1 (anal intercourse)	10 years
Count 2 (vaginal intercourse)	8 years
Count 3 (anal intercourse)	11 years
Count 4 (oral intercourse)	7 years

- [3] The learned sentencing Judge directed that the sentences be served concurrently resulting in a total sentence of 11 years in respect of which his Honour fixed a non-parole period of seven years and 11 months.
- [4] Sentence was imposed on 25 June 2008. The application for leave to appeal was not filed until 11 February 2010. Counsel for the applicant has conceded that it cannot be said that there are exceptional circumstances which explain the delay and accepted that the application for an extension of time within which to seek leave to appeal cannot succeed unless the Court is satisfied either that the proposed appeal “would probably succeed or alternatively there would be a manifest miscarriage of justice if the extension were not granted”.
- [5] For the reasons that follow, in our opinion an appeal would not succeed and the application for extension of time is refused.

### **Facts**

- [6] The victim and the applicant had been in a relationship since late 1985. They were married in March 1991. Together with the children of their

relationship, they moved to Darwin in June 2002 and purchased a property on which they built a residence and operated an okra farm.

- [7] The sentencing Judge found that the relationship between the victim and the appellant was volatile and there were periods of separation. Following a separation in April 2007, the applicant moved out of the matrimonial home in July 2007 leaving the victim and the children living in the home. At trial there was a dispute as to whether sexual intercourse occurred between the victim and the applicant on 1 July 2007, but the trial Judge found it was not necessary to reach any finding about that conflict.
- [8] Both the victim and the applicant obtained new employment and in October 2007 the applicant was residing in a motel provided by his employer. The applicant retained possession of a key to the former matrimonial home and he attended at the home every Friday night to look after the children while the victim was at work. The applicant had other periods of access to his children and joint decisions were made concerning their upbringing.
- [9] The applicant was of the view that there was no good reason for the separation in the first place which had come about because the victim believed that the applicant was having an affair with another woman, which he denied. In September 2007 the victim started seeing someone else and this became the subject of argument between the victim and the applicant.

[10] As to the facts of the offending, based on the evidence given by the victim at trial which was, in its essential respects, accepted by the jury, the sentencing Judge summarised the facts as follows:

“On the evening of 2 October your wife was entertaining guests at home. X [one of the children of the relationship] had been allowed by your wife to have a sleepover at a friend’s place nearby. You had attended at the Humpty Doo Post Office and received in the mail an assessment report concerning X. You rang your wife at home and asked to speak to X because you say you wanted to speak to her about the school results. However, X was not at home. You demanded that your wife go and get X and bring her home which she declined to do. You then demanded that she get rid of her guests because you were going to come around and speak to her about why X had been allowed out when she was supposed to be grounded. Subsequently the guests left and your victim remained in the house with your son and your younger daughter, who both went to bed. At the time of the phone calls you were at Humpty Doo, you finished your shopping and then on the way back to Marrakai you decided, notwithstanding the lateness of the hour, that you would call in at the house. By the time you arrived at the house, your victim had gone to bed. The lights of the house were off. It seems likely that you tried to get into the house using your key, but was unable to do so because your wife had left her key in the lock. You then banged on the door demanding to be let in and threatened to put the tractor through the doors if your wife did not open them. By this time you were angry and aggressive. You no doubt thought that you had been locked out. You had been told by your wife during one of the phone calls earlier in the evening that she had consulted her solicitor, again a matter which you did not consider to be necessary.

Your wife was awoken and she went and answered the door and let you in. The children were also awoken. When you came into the house you demanded to know “Why are you doing this?” Your body language was very aggressive towards your victim who did not understand what you were talking about and said, “Doing what?” You kept repeatedly asking “Why are you doing this?” and got no answer. You moved into your wife’s personal space and forced her backwards towards her bedroom and into the bedroom. You then grabbed her by the arms and pushed her down onto the bed saying things like, “Just who do you think you are?” and “Why are you doing this?” You then left the bedroom to attend to your younger daughter who had need to access her ventilator, and then returned to

the bedroom. You shut the bedroom door and said, "I don't know why you're doing this, but this is what's going to happen to you". You forced your victim onto the bed and ripped her underwear off. Your wife was telling you to stop and not to do it, but you said, "I will do this" and you said, "I'm going to fuck you over like you're fucking me over". You told your wife to roll onto her stomach and she said, "No, no, no". You said, "Either I knock you out or you do it". Your wife was petrified and rolled over as requested. You told her to get onto her knees and she refused. You put your hand in the back of her head and assisted her to get up onto her knees and inserted your penis into her anus. From time to time your wife said words to the effect that she was concerned that the children would hear what was going on and it is apparent that the proximity of the children to the events added to her distress. The insertion of the penis into the anus was extremely painful. After a short period of time you then inserted your penis into her vagina. Following that you inserted your penis into her anus again and finally you demanded that she perform fellatio on you. There was no hygiene exercised between the acts of anal intercourse, vaginal intercourse and fellatio. The sequence of acts was degrading, offensive and humiliating. When you forced your penis into your victim's mouth you said to her, "Make it clean, you made it dirty". The acts of intercourse were accompanied by threats and some physical violence. On one occasion your victim was thrown backwards onto the bed. On another occasion you raised your fist to the victim's face and said, "Get back around here". The incident resulted in the victim receiving bruising to her arms, upper thighs and face. The initial act of anal intercourse caused her to experience significant pain. Your victim said that she were [sic] sobbing and crying and telling you to stop. Concerning the second act of anal intercourse she said that, "That shot me across the bed because the pain was just incredible". She said the anal intercourse continued for about two minutes and it was "excruciating, like broken glass had been put in me". A medical examination of your victim subsequently revealed that the anus was swollen, lumpy, bruised and purple. There was an abrasion half a centimetre long at the five o'clock position, it was extremely painful and prevented further examination. The anal swelling resulted in the loss of anal seal and the victim experienced faecal/mucosal leakage from the bowel as a result of her injuries.

When you had your victim perform fellatio on you, you grabbed her by the back of the head and forced your penis into her mouth and she was gagging.

When you stopped you picked up the torn underpants and put them in your pocket. Your victim said, “What are you doing?” and you said, “I don’t trust you” and that you were going to get rid of them. You also said, “Get rid of the solicitor or else I’ll come back and do this every single night and you won’t be telling anyone about it”. You said, “I want half of everything and you won’t see me and the kids again”. You said, “If you tell anyone about this I will deny it and say that you invited me in here”. Subsequently there was some discussion about seeing X on Friday night and your wife said that she would be there. You then left the premises and disposed of the torn underpants. Your victim was extremely distressed. Her son found her sobbing in her room and was so concerned that he contacted a family friend. Your victim was in considerable distress when the friend came to the house and on the following morning when X returned to the house. Your victim made immediate arrangements the next morning to leave the house and find alternative accommodation.”

[11] As to the impact of the offending on the victim and the children, the sentencing Judge made the following findings:

“As is to be expected, your wife has suffered significant emotional damage which has affected not only herself, but the children as well and she found it hard to form a relationship of trust with her new partner. She and the children have all had counselling. She has been forced to leave the family home and rent for a time which placed a financial burden upon her. The circumstances have also had a traumatic affect upon the children. I note that she is now living with her new partner and that neither she nor the children wish to live in the former matrimonial home.”

[12] The sentencing Judge found that the appellant decided to punish the victim by sexually violating her. This was an aggravating circumstance of significance.

[13] The applicant’s criminal conduct was accurately described by the sentencing Judge as “very serious” and “demanding of condign punishment”. As his Honour said, the sequence of criminal acts was “degrading, offensive and

humiliating”. Threats and physical violence were involved. The initial act of anal intercourse caused significant pain and the second act of anal intercourse caused excruciating pain. Injury was caused to the anus. The offending was followed by the threat of repetition.

[14] The applicant’s conduct was a serious example of criminal conduct of this type. It caused significant harm and the applicant has not disclosed any remorse whatsoever.

[15] At the time of sentencing the applicant was 46 years of age. He had a good record of employment and volunteer work. He had taken his family responsibilities seriously and had been very supportive of his children. The applicant had prior convictions, including two prior convictions for assault, but the sentencing Judge noted that the prior convictions were not recent and the assaults were only minor as they resulted in fines. His Honour considered that the prior convictions were not relevant for sentencing purposes.

[16] Ordinarily, such a history might lead to a conclusion that the applicant was unlikely to re-offend, but the sentencing Judge found that he was unable to be confident in that regard because, in his Honour’s view, the applicant was a “person who does not like to be challenged in matters where [his] authority and lifestyle has been questioned”. Neither this nor any other finding of fact was challenged.



## **Conclusion**

- [17] Ultimately, when regard is had to the totality of the criminal conduct and the personal circumstances of the applicant, there was very little to be said by way of mitigation, particularly in the absence of remorse. In addition, the applicant was not entitled to a reduction in sentence that is normally given following a plea of guilty.
- [18] The solitary proposed ground of appeal is that the sentences of 10 and 11 years on counts 1 and 3 for the acts of anal intercourse are individually manifestly excessive and have resulted in a total sentence which is manifestly excessive. We do not agree. Bearing in mind the absence of a plea of guilty and remorse, and having regard to the aggravating circumstances to which we have referred, in our opinion the individual sentences and the total of 11 years were well within the range of the sentencing discretion.
- [19] For these reasons, in our view the proposed appeal would fail and the application for an extension of time within which to seek leave to appeal is refused.
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