

MUNAR v R

Court of Criminal Appeal of the Northern Territory

Nader, Martin JJ and Gray A/J

14 March and 9 April at Darwin.

Delivered 11 April 1991

CRIMINAL LAW - Sentence - appeal against - Aboriginal - 4 counts - Assault with intent to have carnal knowledge - unlawful entry - unlawful assault - 17 years - 6 years minimum term - whether manifestly excessive - substitution of lesser "aggregate" term - Criminal Code ss.192, 212 and 213 Parole of Prisoner's Act - S4

CRIMINAL LAW - Sentence - individual sentences for unrelated matters - wholly cumulative - general rule of law - displaced where aggregate term too high - viewed in all the circumstances

CRIMINAL LAW - Sentence - Aboriginal - assault - relevant factor in exercise of discretion - protection of law for community workers in remote areas.

Counsel for Appellant:

S. Cox

Solicitor for Appellant:

NAALAS

Counsel for Respondent:

T. Pauling QC with
J.Karczewski

Solicitor for Respondent:

Director of Public
Prosecutions

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

No CA 10 of 1990

BETWEEN:

JONOTHAN MUNAR

Applicant

AND

THE QUEEN

Respondent

CORAM: NADER, MARTIN JJ and GRAY AJ

REASONS FOR JUDGMENT

(Delivered 11 April 1991)

This is an application for leave to appeal against sentences imposed upon Jonathan Munar (the applicant) on 17 August 1990. The applicant had pleaded guilty on 5 April 1990 to a number of counts in two indictments. All offences were committed at Port Keats. He was sentenced to a term of imprisonment on each count.

INDICTMENT 1:

COUNT 1: On 30 September 1988 assaulted Sandra Hegert with intent to steal a motor vehicle, with the circumstance of aggravation that Jonathan Munar

was armed with an offensive weapon, namely, a
barbecue fork.

Section 212(1) and (2) of the Criminal Code.

Maximum sentence: 14 years.

Sentence imposed: 4 years.

COUNT 2: On 30 September 1988 assaulted Sandra Hegert
with intent to have carnal knowledge of her,
with the circumstances of aggravation that
Jonathan Munar thereby caused bodily harm to
Sandra Hegert, and that Jonathan Munar thereby
committed an act of gross indecency.

Section 192(1) and (3) of the Criminal Code.

Maximum sentence: 14 years.

Sentence imposed: 8 years.

INDICTMENT 2:

COUNT 1: On 9 September 1989 unlawfully entered a
building, namely, Nurse's Flat, with intent
therein of committing an offence, with the
circumstances of aggravation that Jonathan
Munar did so with intent to commit a crime,
namely, stealing, that the said offence was
committed at night-time, that Jonathan Munar
was armed with an offensive weapon, namely, a
knife, and that the said building was a
dwelling house.

Section 213(1),(4),(5) and (6) of the Criminal

Code.

Maximum sentence: Life.

Sentence imposed: 9 years.

5 COUNT 2: On 9 September 1989 unlawfully assaulted Ann
Marie Hoschke, with the circumstances of
aggravation that Ann Marie Hoschke thereby
suffered bodily harm, and that Ann Marie
Hoschke was a female and Jonathan Munar a male.
10 Section 188(1), and (2)(a) and (b) of the
Criminal Code.

Maximum sentence: 5 years.

Sentence imposed: 3 years.

15 COUNT 3: On 9 September 1989 unlawfully assaulted
Wilhelmina Maria Bulters, with the
circumstances of aggravation that Wilhelmina
Maria Bulters thereby suffered bodily harm, and
that Wilhelmina Maria Bulters was a female and
20 Jonathan Munar a male.
Section 188(1) and (2)(a) and (b) of the
Criminal Code.

Maximum sentence: 5 years.

Sentence imposed: 1 year.

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His Honour ordered the sentences for the offences in
each indictment to be served concurrently, but those in
respect of the second indictment to be served cumulatively

upon those in respect of the first. This produced an aggregate sentence of 17 years imprisonment. A minimum term of imprisonment of 6 years was fixed under the Parole of Prisoners Act.

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In respect of the first count of the first indictment, on 30 September 1988 the applicant, then aged 20 years, went to the social club at Port Keats in the late afternoon where he drank a quantity of alcohol. He noticed a motor vehicle being driven past the club. The vehicle belonged to the victim of the offences charged in the first indictment, Sandra Hegert, a school teacher employed at Port Keats. She drove the vehicle to the school which is not far from the club. The applicant decided to steal the vehicle. He left the club and walked to the school. When he arrived there, Miss Hegert had locked the vehicle and gone into the school building. The applicant tried but failed to gain entry to the vehicle. He hid behind a tree and waited for the return of Miss Hegert. Some minutes later she returned. In the meantime the applicant had armed himself with a barbecue fork. Miss Hegert went to her vehicle door and was in the process of opening it when the applicant came out from behind the tree and approached her from behind. The applicant grabbed the right side of her throat and pressed a sharp object, which she assumed to be a knife but which was the fork referred to, against her throat. The grip on her throat troubled her breathing. She soon realised from the feel of the fork that it was not a knife although she could not work

out what it was. The applicant said to her: "Give me your
fucking keys; I want to take your truck. Your know me, I'm
Jonathan Munar. I want to steal this truck. Don't fuck with
me. I want to steal your truck." As his school teacher a
5 year or two before, Miss Hegert knew the applicant but did not
recognise him until he spoke. She motioned to give the
applicant the keys to the vehicle. He said: "No. You get in
and start it up." She said: "Let me go so I can get in and
start it for you." She was then being held so tightly that
10 she could not move. The hold was loosened enough for her to
reach into the car and put the key in the ignition switch.
She then told him he could take the car. While Miss Hegert
was putting the key in the ignition switch the applicant said
2 or 3 times: "Don't fucking scream. I'm not frightened to
15 kill you." When the keys were in the ignition the applicant
said he would not let her go and ordered her to drive him to
the dump. Miss Hegert got into the driver's seat and he
climbed over her into the passenger seat. At no time did he
let her out of his grasp. It was during this manoeuvre that
20 she saw the object that had been held at her throat all the
time to be a barbecue fork. For a short time thereafter they
sat together in the vehicle with the applicant speaking very
quickly in broken English, some of which Miss Hegert was
unable to understand. However, he became calmer and she was
25 able to make out the gist of what he was saying, namely, that
he was a Mad Warrior, and that he had to steal the vehicle to
outdo somebody else. The Mad Warriors were one of a number of
gangs at Port Keats. Miss Hegert tried to persuade him that

he did not want to go to gaol and to think about what his parents would say about what he was doing. The applicant replied: "I'm not frightened of killing you and I'll rape you." This was the first indication that the applicant had any sexual intention. He repeated his threat to rape Miss Hegert and said that, far from being afraid to go to gaol, that was exactly what he wanted. The two of them sat in the car for quite some time. Miss Hegert's estimate is about 15 minutes. The fork was at her throat throughout this time. Eventually the conversation was brought back to one of the applicant's early propositions, namely, that Miss Hegert drive him to the dump where he would let her go free. She refused because she feared that if she drove him to the dump he would rape her. These fears were aggravated by a change in his mood. After a period of calm he had become agitated. Miss Hegert told him he could drive himself to the dump. Probably fearing a ruse on her part, the applicant said: "This is a trick car." Miss Hegert showed him the key, which was still in the ignition switch and visible from the dashboard. The applicant became even more agitated. He then said to her in pidgin or an Aboriginal language: "We'll go to the staff room." Miss Hegert understood the language and understood him to mean that he intended to lock her in the staff room at the school. If that were so, she knew that she could escape from there and her hopes concerning the outcome of the incident began to rise.

The next series of facts relate to count 2 of the

first indictment. The applicant led Miss Hegert as far as the verandah of the school building, a few paces from where the car was. There he said to her: "I'm going to rape you." He then began to grasp at her body with one hand, holding the fork to her throat with the other. He gripped her vagina from outside her dress and when he did that Miss Hegert began to scream. The screams seemed momentarily to shock the applicant who fell away from her when she pushed his arm from her body. She continued to scream for help and grabbed the fork which he was still holding. Then a struggle took place. Miss Hegert fell to the ground still clutching the fork. When she fell, the applicant lost his grip on it. He stood over her as she lay on the ground. She lashed out at him with the fork striking him somewhere. She was able to get back onto her feet and back to the vicinity of the car door. She hurled the fork as far away as she could with intention of running to the safety of some nearby houses. The applicant caught her and threw her to the ground again near the car door. He picked up a rock and threw it at her but, whenever he approached her, she lashed out at him with hands and feet from her position on the ground. While she was on the ground, he hit her about the face and legs with one of her shoes which had come off in the struggle. He also kicked her in the ribs a number of times. She was constantly screaming for help while this was going on and he was saying from time to time: "Don't you fucking scream", or words to that effect. The applicant finally ran off when two men came to Miss Hegert's assistance. The assault had occasioned a number of minor injuries: grazes to

the left side of her neck, a cut lip, several cuts to the face and bruised ribs. The applicant fled to the bush where he hid for a day or two. Police located him on 3 October 1989, by which time he had returned to Port Keats. He agreed to return with them to the police station where he agreed to be interrogated. The applicant admitted the facts of the offences described above. A typewritten record of the interrogation was made.

The events constituting the offences charged in the second indictment took place almost a year after the first group. The committal proceedings in respect of the earlier offences had not yet been commenced.

In respect of the second indictment, the facts are that the applicant was drinking alcohol on the night of 8 and 9 September 1989. The applicant later told police that he had had 4 cans of beer and some moselle. He claimed to have been "full drunk", a claim that is borne out by the statements of most of the witnesses who saw him at the relevant time between 3.30 and 4 am on the 9th. All of the witnesses either smelt liquor on him or saw him swaying and staggering somewhat. At about 3.15 am the applicant went to the convent at Port Keats and woke Lee Davidson, a nun and nursing sister, by calling out: "Sister, sister!" She saw him on the porch of the convent and he pointed towards the church. She gained the impression that he was trying to obtain help for someone who was hurt. She told him to go to the healthworker on call.

The applicant made no reply to that but, as he turned, he dropped a knife onto the concrete of the porch. He bent down to pick it up, saying "Sorry, Sister. Sorry Sister". He then said, "I have to do it". He picked up the knife and left. It is not known why he went to the convent at that time. After leaving the convent, he went to the Nurses' Quarters. Two nurses were in residence at the time, both of them asleep. One of the nurses, Ann Marie Hoschke, thought that she had locked her door before retiring for the night but was not sure that she had done so. The applicant entered her flat through the door. He still carried the knife and he was also carrying a cigarette lighter which he lit in order to be able to see around the flat. His reason for entering the flat was to steal liquor.

Miss Hoschke awoke and saw the applicant through her bedroom door which was open. He was then standing in the loungeroom of the flat. She asked him who he was and what he wanted. In response to her question, the applicant looked in her direction, put out the lighter and went into her room. Miss Hoschke felt him touch the bed near her feet. She got out of the bed on the side away from the door. This left her in an awkward position as the bed was placed at an angle in the room and the area she stood in after getting out of bed was a small confined triangle between the bed, a wall and a cupboard, with only a narrow access around the foot of the bed towards the door. While she was standing there, Miss Hoschke asked the applicant what he wanted. He said, "I want a drink"

as well as some other unintelligible remark. She tried to get past him to leave the room but he moved down towards the foot of the bed so as to block off the exit from the small triangle of floor space. He grabbed her by the arm and pushed her against the cupboard. She told him to get out or she would scream. He did not leave. Miss Hoschke screamed and woke Miss Bulters in the next flat. Miss Bulters got up and unsuccessfully attempted to activate the alarm bell in her flat. She sent to see what was happening. The applicant responded to Miss Hoschke's screams by putting his hand over her mouth. She continued to struggle and scream for help. Miss Bulters arrived and tried to activate Miss Hoschke's alarm but that also failed to work. Miss Bulters then ran back to her flat and succeeded in activating her own alarm bell. At about the moment the alarm bell started ringing, the applicant began to punch Miss Hoschke. She felt some punches to her chest and what she thought was a very hard punch on her left side. In fact, she had been stabbed there. She had no idea that the applicant was carrying a knife. She was also aware of what she thought was another hard punch but which was in fact a stab wound to her left thigh. Soon afterwards she fell down, unaware that she was bleeding or that she had been stabbed. The applicant dropped the knife and left.

On the verandah outside, the applicant met Miss Bulters on her way back from sounding the alarm to see what she could do to help. He approached her very fast and swung out a hand to grab or punch her. She grabbed his hand and

wrapped his arm around a verandah pole which prevented him from grabbing her, if that was indeed his intention. The applicant hit her with his free hand and she fell to the ground. He then kicked her about four times, once to the head and three times to the body. Miss Bulters was dazed for a short time. By the time she recovered, Mr Glen Higgie, the mechanic at Port Keats, arrived to help. While Miss Bulters was telling him what had happened she saw the applicant standing some 15 metres away in the darkness. She pointed him out to Higgie who gave chase, but the applicant got away.

Miss Bulters then went to Miss Hoschke's room and found her lying on her bed distressed and unwell. Miss Bulters noticed blood on Miss Hoschke and informed the latter that she had been stabbed. The injuries to Miss Hoschke were a stab wound to the left chest and one to the left thigh. Neither was very deep. There were also some bruises around the chest. Miss Bulters had her nose broken and also some bruising.

The applicant, having run away from Higgie, went to a house occupied by some women who included his aunt, Concepta Narjic. He asked for a cigarette; she gave him one and told him to go home. He just paced around the house there and Mrs Narjic could tell that he was scared of something. Eventually he said to Mrs Narjic: "I stabbed one of those nurses." She asked why. He said: "We had an argument at the disco." The applicant was located by police about 9 am the same day and

arrested. In due course the applicant admitted the offences.

The Crown Prosecutor informed the sentencing court on 25 July 1990 that the applicant had been arrested in respect of the first indictment offences on 3 October 1988 and that he was released on bail on 5 October 1988. According to the Crown Prosecutor, the applicant was arrested on 6 October 1988 for offences of which he was convicted in the Darwin Court of Summary Jurisdiction on 17 October 1988. In respect of those matters, the applicant was remanded in custody and eventually sentenced to a total of three months' imprisonment. He was released from custody on 9 December 1988. He was next taken into custody on 9 August 1989 upon a warrant issued on 4 July 1989 for failure to answer bail at the committal proceedings for the offences of 30 September 1988. He was again allowed bail and was released on 4 September 1989. He had then been in custody for a total of 28 days in respect of the offences of 30 September 1988. Some 5 days later he committed the offences of 9 September 1989. In respect of those latter charges the applicant remained in custody continuously from 9 September 1989 until the time of sentencing, 17 August 1990: according to the Crown Prosecutor, a period of 10 months and 16 days.

It was submitted to the learned sentencing judge on the applicant's behalf by Miss Cox of counsel that the crux of the applicant's problem was alcohol. When sober he is quiet, polite and "a loner", but when under the influence of alcohol

his personality transforms dramatically. Miss Cox carefully elaborated her submissions to his Honour, relying on the report of Mr Peter Curwen-Walker, a Probation Officer whose knowledge and understanding of Port Keats and the people who live there is well known to this court. Miss Cox also relied upon the report of a psychologist, Mr Re Acacio, which diagnosed the applicant as suffering from Alcohol Idiosyncratic Intoxication when he is drinking.

In his remarks on sentence the learned sentencing judge alluded to the unusual reaction of the applicant to alcohol, even in the milieu of Port Keats where alcohol abuse is prevalent. His Honour observed that, under the influence of alcohol, the applicant displays an almost complete reversal of character. He also took into account the applicant's age (then 21), his pleas of guilty and cooperation with police. The applicant's shame for what he had done was taken into account. He took into account the report of Mr Curwen-Walker, referring specifically to some of the adverse matters referred to in Mr Curwen-Walker's report, for example, that the applicant was badly thought of by the Port Keats Community Government Council. His Honour treated the Council's opinion not as an aggravating factor but as shedding light on the character of the applicant. He referred also to the serious concerns of other groups in the Port Keats community. There was evidence to which his Honour alluded that suggested that alcohol was not the sole basis of the applicant's anti-social behaviour.

The first submission on behalf of the applicant was that the aggregate sentence of 17 years was manifestly excessive. It was also described in the Notice of Appeal as "crushing". The individual sentences comprising that aggregate are set forth above.

We should say at the outset that no overt error of principle is to be found in the learned sentencing judge's remarks on sentence. His Honour did not take into account impermissible matter nor did he fail to take into account any matter proper to be considered. Nor do we regard any of the individual sentences, although somewhat heavy, as in themselves manifestly excessive. That is, given an appreciation of the relevant facts, they are not excessive on their face. People, such as nurses and teachers, who venture to live in remote areas for the benefit of the people who live there are entitled to demand a full measure of protection from the law, especially from brutal attacks by members of the very communities they are dedicated to serving. Accordingly, it was not inappropriate that the individual sentences should be severe. It was significant too that the offences of 9 September 1989 were committed very shortly after release on bail and whilst on bail.

The generally observed rule that sentences for unrelated matters should be made wholly cumulative also pointed, prima facie, to the appropriateness of the sentences

for the offences committed on 9 September 1989 being made cumulative upon those for the offences committed on 30 September 1988. However, having said that, standing back and looking at the aggregate sentence of 17 years thus arrived at, in all the circumstances referred to, we consider it to be manifestly excessive: too severe and crushing on the face of it. The applicant is still young and there is yet some hope for rehabilitation.

Therefore we grant the application for leave to appeal and allow the appeal.

In all the circumstances, we consider an appropriate aggregate sentence to be 12 years. We effect that sentence in the following way. We order that the imprisonment upon the sentences for the offences of 30 September 1988 be regarded as having commenced on 14 August 1989, and we direct that imprisonment upon the sentences for the offences of 9 September 1989 be ordered to take effect on 14 August 1992. These orders may be made under section 405(2) and (3) of the Criminal Code. Under section 4 of the Parole of Prisoners Act we specify a lesser period during which the applicant would not be eligible to be released on parole of 5½ years.