PARTIES:	MELVILLE, Robert Todd
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL
JURISDICTION:	DARWIN
FILE NO:	CA 7 OF 1994
DELIVERED:	MONDAY 27 MARCH 1995
HEARING DATE:	17 MARCH 1995
JUDGMENT OF:	MARTIN CJ, THOMAS J & GRAY AJ

CATCHWORDS:

Appeal - Criminal Law - Right of Appeal - Application for extension of time within which to apply for leave to appeal against sentence - Considerations relevant to the exercise of discretion to extend time -

Criminal Code (NT), s417.

Criminal Law & Procedure - Appeal against sentence - Manifestly excessive - sexual assault - Plea not guilty - Relevant considerations - Prosecutrix obliged to give evidence five times - effect on victim" - Matters personal to appellant - Weight -

R v Henry (unreported Ct of Criminal Appeal, 11 April 1991), approved.
R v Webb [1971] VR 147, applied.
R v P (1992) 64 A Crim R 381, considered.
Skinner v The King (1913) 16 CLR 336, followed.

REPRESENTATION:

Counsel:

Appellant: Ms S Cox
Respondent: Mr T Wakefield

Solicitors:

Appellant: Ms S Cox
Respondent: Mr T Wakefield

Judgment category classification: B
Judgment ID Number: tho95
Number of pages: 10

DISTRIBUTION:LOCAL

(tho95)

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

No. CA7 of 1994

BETWEEN:

ROBERT TODD MELVILLE

Appellant

AND:

THE QUEEN

Respondent

CORAM: Martin CJ, Thomas J and Gray AJ

REASONS FOR DECISION

(Delivered 27 March 1995)

MARTIN CJ

I have had the benefit of the draft reasons of Gray AJ and agree with them. I would grant leave to appeal and dismiss the appeal.

THOMAS J

I have read the reasons for decision of Gray AJ. I agree with his reasons and with his conclusion. I would grant leave to appeal and dismiss the appeal.

GRAY AJ

On 12 November 1993, the appellant was found guilty on one count of aggravated sexual assault contrary to Section 192(1) and (4) of the Criminal Code. This crime is the

statutory equivalent of common law rape. The crime was committed on 12 March 1991 at Darwin.

The appellant stood trial on three occasions. Each of the first two trials miscarried, but not before the prosecutrix, one Margaret Bangay, had given evidence. She had also given evidence at the committal proceedings.

After hearing submissions, Mildren J sentenced the appellant to twelve years imprisonment with a non-parole period of six years. The maximum penalty provided is life imprisonment.

On 19 September 1994, the appellant filed a notice of application for leave to appeal against conviction and sentence. He also filed an application for an order extending the time within which to appeal. Section 417 of the Code requires that notice of application to appeal or seek leave to appeal must be given within 28 days of the date of conviction or sentence.

The appeal being over ten months out of time, the first question is whether the extension sought should be granted. The reason for the delay is unexplained in the appellant's affidavit. However, the Court was informed by counsel that the problem had arisen because of difficulties and uncertainties concerning legal aid. Initially, the appellant was refused legal aid for an appeal. Some months passed before he became aware of his right to have such refusal reviewed. He eventually put this process in train. The result was that he

was allowed legal aid for an appeal against sentence only.

When the appeal was called on for hearing on 17 March 1995, each counsel was prepared to present argument in relation to the appeal against sentence, the appeal against conviction having been abandoned on 14 February 1995. In these circumstances the Court agreed to hear the arguments on the appeal and to reserve the question of the extension of time. At the conclusion of the argument, the Court reserved its decision on both questions.

In the result, I am prepared to allow the extension of time and to treat the appeal as properly before the Court. Although the explanation for the delay was not very convincing and was not the subject of any evidence, I think that enough material was provided from the bar table to justify the grant of relief, particularly as the appellant was unrepresented during the relevant period. The Crown did not oppose the application.

Accordingly, I turn to a consideration of the appeal itself. The facts of the case are conveniently set out in the sentencing remarks of the learned trial judge in the following terms:

> " I find that on 12 March 1991 Ms Bangay went to sleep in the flat provided to her, by her employer, at Stuart Park at about 12.30 am that morning. At some time during the night and before approximately a quarter to 4 in the morning, you entered her flat. You gained entry through a window, which may well have been left open, by removing a flyscreen. Having entered the flat you found your victim's wallet which was probably left in some part of the flat other than the bedroom.

I find that you left the flat probably through a door and that you went out onto a balcony where you looked through your victim's wallet. You found the victim's driver's licence, you saw her photo and you read her name and her age. Whether you had seen her naked on the bed before this I do not know, but, if not, you could see from her photo that she was attractive and young.

You then re-entered the flat. After this you entered her bedroom where you found her asleep, naked, on the bed. There was a light on in the bathroom adjacent to the bedroom which provided good light into the bedroom. You were dressed in dark clothing and you had something over your head, probably a T-shirt, to disguise your face which made you victim think you were wearing a balaclava.

You placed a pillow over you victim's head. Your victim tried to push the pillow away. You placed an object, which I find to have been a knife, which you had with you to gain entry to the flat if necessary, and you placed it on your victim's stomach. Whether it was in fact a knife or not does really matter. What matters is that you intended you victim to believe it was a knife and I find that she did believe that it was a knife and that that was a reasonable belief for her to have held.

You threatened her. You said: 'Don't move, don't try to look at me and don't make a noise or I'll kill you', or words to that effect. Your victim froze. You removed the pressure from off the pillow, but leaving it still in place, and you got onto the bed and you started to lick her vagina. You licked her vagina, you fondled her breasts and you also bit her breasts.

This went on for some time, perhaps five minutes. You then got off the bed and you put on a condom and you penetrated her vagina with your penis. You had sexual intercourse with your victim for a period of time, perhaps five minutes, and then withdrew and removed the condom. You then penetrated your victim again with your penis, at the same time removing the pillow and covering her eyes with a towel.

You asked your victim to kiss you. She kept her teeth together and you tried to kiss her. You pushed her legs very hard up to her shoulders to have sexual intercourse. You asked your victim if she wanted you to ejaculate inside of her. She said no, and you ejaculated on her hip. But as the medical evidence also showed, you also ejaculated inside of her. You told her to go to the bathroom and have a shower. You shone a torch into her eyes to ensure that she couldn't see you. You turned the light in the bathroom off and you stayed there with her until she showered and was towelling herself off before you left the flat.

You were wearing gloves at some stage and you put on an accent to disguise your voice. Immediately you left, your victim rang her girlfriend, Mrs Corry, but was spoken to instead by Mrs Corry's husband and she told him that she'd been raped and didn't want to be alone. She also rang another person, Mr Rogers, who was told much the same thing - possibly by a message on his answering machine.

She then rang the police who arrived some time after 4 am. At the time your victim spoke to Mr Corry, she was in obvious distress and remained in obvious distress until after the police had arrived. Police inquiries as to the identity of Ms Bangay's attacker proved fruitless until 2 March 1992 when Shayne Carter, your former wife, told the police what she knew.

This ultimately led to other witnesses being found who gave evidence against you at your trial. You were arrested on 3 March 1992 and charged with this offence. You denied being the rapist, to the police. You were committed for trial at a committal hearing in November 1992. Your victim gave evidence at the committal. Your first trial was in July of 1993 but that was aborted through no fault of your own. Your victim gave evidence at that trial.

Your second trial was in August of 1993 and your victim gave evidence at that trial as well. You also gave evidence and you denied on your oath that you were Ms Bangay's assailant. There was a hung jury on that occasion. You were tried again before me, this time commencing on 1 November 1993. This trial lasted two weeks. Your victim again gave evidence and, having given her evidence, was not released immediately and even after she was released several days later, had to be recalled for further cross-examination.

I formed the view that the trial was a significant ordeal for your victim. She was visibly distressed on number of occasions. I thought her distress was entirely genuine and was caused by having to recall the events of that night. In my view, she did not attempt to gild the lily and did her best to cope with having to give evidence, and she seemed to me to be a forthright, honest and courageous witness."

His Honour went on to observe that the case was in the upper level of gravity. He accepted that the crime was opportunistic rather than premeditated, because the appellant entered the flat to burgle rather than commit rape.

As against that, His Honour emphasised the following aggravating circumstances:

(i) the victim's life was threatened and a knife was used to reinforce the threat.

(ii) the victim was penetrated twice and was subjected to other humiliating procedures.

(iii) that as a consequence of the appellant's plea of not guilty, the victim was obliged to give evidence on five separate occasions.

(iv) the absence of any evidence of contrition.

(v) the fact that the victim has suffered and will continue to suffer from severe psychological symptoms which affect her self esteem and her ability to form normal relationships, particularly with men.

(vi) the particular gravity of the rape of a woman in her own house, at night, by an assailant unknown to her.

(vii) the fact that the appellant had significant prior convictions which disqualified him from any discount for previous good character.

The learned trial judge accepted that the appellant, who was aged 25 at the time of the offence, had reasonably good prospects of rehabilitation but stated, on the authority of *R v*

Henry (unreported judgment of Court of Criminal Appeal delivered 11 April 1991), that matters personal to the appellant could be given only limited weight in circumstances such as the present. Beyond that, His Honour found that there were no significant circumstances pointing towards leniency and said that condign punishment was called for.

Ms Cox, who appeared for the appellant, first submitted that the sentence was, on its face, excessive. She tendered a useful summary of all, or nearly all, sentences imposed for rape in Darwin since 1991. She referred to the summary in some detail with a view to demonstrating that the instances in which sentences of this magnitude had been imposed involved repeat offenders or contained grossly aggravating factors which were not present here. This exercise was, to my mind, inconclusive. There is always great difficulty in making sensible comparisons because of the inevitable points of distinction between cases, some pointing one way and some the other.

The learned trial judge was taken to a number of allegedly comparable cases but stated that he had received little guidance from the exercise, except for *R v Henry* which he thought provided some points of similarity. In that case, the Court of Criminal Appeal upheld a sentence for rape of ten years in circumstances where the accused had pleaded guilty. However, there were some aggravating factors not present here and, once again, no very helpful comparison can be made.

In my opinion, the present sentence has not been shown to be manifestly excessive. It was indeed a very serious instance of this class of crime. The learned trial judge rightly emphasised the hideous violation of the victim's rights which is involved in the entry into a private dwelling at night by an armed stranger followed by repeated acts of rape. It is conduct which can be fairly described as monstrous. The sentence passed was, in my view, stern but within the proper ambit of His Honour's sentencing discretion.

An alternative argument put forward by Ms Cox was that the learned trial judge had made a specific error in giving weight to the fact that the prosecutrix had been obliged to give evidence five times and linking that fact to the appellant's plea of not guilty. Ms Cox submitted that His Honour had, in effect, treated the appellant's decision to plead not guilty as amounting to an aggravating circumstance.

In view of this submission it is desirable to set out what His Honour said on this subject. The transcript reads:

> " Your victim has had to give evidence now on five separate occasions. I say five because she was recalled for further cross-examination at the trial in November, and I have mentioned that this has caused her considerable visible distress. I accept that it was not your fault that the first trial aborted, but you could have saved your victim from this distress at any time by pleading guilty. Had you pleaded guilty I could've given you some discount, on the sentence I'm about to give you, for having saved your victim the suffering of having to give evidence."

I read that passage as doing no more than identifying one of the aspects of the distress caused to the prosecutrix by the commission of the offence and the subsequent legal proceedings. His Honour merely pointed out that this particular aspect of distress was occasioned by the appellant's decision to plead not guilty. His Honour cannot be understood as treating the mere fact of the not guilty plea as an aggravating circumstance. The aggravating circumstance was the distress occasioned by the prosecutrix giving evidence. This was one of the consequences of the crime and the ensuing trial.

In *R v Webb* [1971] VR 147 at p 151, the Court of Criminal Appeal said that a sentencing judge "is equally entitled, in our view, to have regard to any detrimental, prejudicial, or deleterious effect that may have been produced on the victim by the commission of the crime." See also *R v P* (1992) 64 A Crim R 381 at pp 384-5.

In my opinion, the learned trial judge was entitled to regard the distress suffered by the prosecutrix in giving evidence, part of which he had personally observed, as an important aggravating factor. In this regard Mr Wakefield, who appeared for the Crown, referred the Court to *Skinner v The King* (1913) 16 CLR 336 at pp 339-49 where Barton ACJ emphasises the advantages possessed by a judge who passes sentence following a trial:

> " There remain the two points upon which the appellant declares that he relies, the one being misdirection at the trial, and the other that the sentence is excessive and should have been reduced.
> As to the second of those two points, of course the

> sentence is arrived at by the Judge at the trial under circumstances, many of which cannot be reproduced before the tribunal of appeal. He hears the witnesses giving their evidence, and also observes them while it is being given, and tested by cross-examination. He sees every change in their demeanour and conduct, and there are often circumstances of that kind that cannot very well appear in any mere report of the evidence. It follows that a Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. ....."

In my view, the views expressed by Barton ACJ have application to this appeal and, in particular, to the point raised by Ms Cox in her alternative submission.

For the reasons I have endeavoured to express I, would dismiss the appeal against sentence and confirm the orders made by the learned trial judge.