The Queen v Bara [2006] NTCCA 17

PARTIES:	THE QUEEN
	v
	BARA, Raymor
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 31 of 2005 (20424770)
DELIVERED:	18 AUGUST 2006
HEARING DATES:	13 JULY 2006
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ
APPEAL FROM:	NTSC, 20424770, 2 December 2005

CATCHWORDS:

CRIMINAL LAW
Appeal – Crown appeal against sentence – unlawfully causing grievous harm – sentence manifestly inadequate – appeal allowed – re-sentenced.

R v Barbara (NSWCCA, unreported judgment, 24 February 1997); *R v Hicks* (1987) 45 SASR 270; *R v Osenkowski* (1982) 30 SASR 212, applied.
Massie v The Queen [2006] NTCCA 15; *R v Davy* (1980) 2 A Crim R 254, followed.

NT Criminal Code s 181

REPRESENTATION:

Counsel:

Appellant:	R Coates, D Lewis & M Heffernan
Respondent:	S Cox QC & G Smith

Solicitors:

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

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

The Queen v Bara [2006] NTCCA 17
No. CA 31 of 2005 (20424770)

BETWEEN:

THE QUEEN
Appellant

AND:

BARA, Raymor
Respondent

CORAM: MARTIN (BR) CJ, ANGEL AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 18 August 2006)

THE COURT:

Introduction

[1] The respondent pleaded guilty to unlawfully causing grievous harm. The learned sentencing Judge imposed a sentence of 18 months imprisonment which was suspended immediately upon conditions including supervision by the Director of Correctional Services. The Crown appealed against the sentence on the basis that the sentence was so manifestly inadequate as to demonstrate error of principle.

[2] At the conclusion of submissions on the appeal, the Court allowed the appeal and set aside the sentence. In connection with re-sentencing the

respondent, the Court noted that the respondent had now been living in the community for nearly two years since he committed the offence. For a considerable portion of that time, he had been living with the victim as husband and wife. In addition, it was over seven months since the respondent had been sentenced. In those circumstances the Court sought the assistance of a pre-sentence report with respect to the respondent and his current circumstances.

Facts of offending

[3] At the time of the offending in October 2004 the respondent was aged 19 years. The victim was aged 16 and had been in a boyfriend/girlfriend relationship with the respondent for approximately one year.

[4] The respondent lived with his mother in the Angurugu community. In mid October 2004, at the request of the respondent, the victim agreed to stay with him at his mother's house. After about a week the victim expressed a desire to go home and visit her family, but the respondent told her she was not permitted to go. He did not give a reason.

[5] On 29 October 2004 two female friends of the victim arrived at the offender's house in a motor vehicle. The victim approached the car where her friends asked if she wanted to go for a drive. The victim turned to the respondent who had followed her to the car and asked if she could go home and visit her family. He replied "No, you're not allowed." The victim opened the rear door and began to enter the motor vehicle.

[6] The respondent had a knife in his back pocket. When the victim attempted to enter the motor vehicle, the respondent stood at the rear door leaning into the vehicle and took the knife in his right hand with an underhanded grip. He then attacked the victim with the knife. The respondent used the knife in a slashing motion and slashed at the victim's chest, shoulder, back and arm. The victim screamed and put her arms up in an endeavour to protect herself. One of her friends yelled at the respondent to stop. That friend managed to lean across the victim and close the rear door enabling the driver to move the vehicle away from the respondent.

[7] The victim sustained significant injuries. They were described in the Crown facts in the following terms:

> "(1) a 6.5 centimetre laceration in her left upper chest on the back that was 1 centimetre, (2) a 2.5 centimetre long and 2 centimetre deep laceration on her right upper chest wall, (3) a 2 centimetre long and 2 centimetre deep laceration on her right upper chest wall, (4) a 3 centimetre long and 2.5 centimetre deep laceration to her right upper arm, (5) a 4 centimetre V shaped cut to her right lower foreman (sic) in which a cut tendon could be seen. She had lost sensation to her right fifth finger and could not fully extend or flex the fingers on her right hand.
>
> The lacerations to her chest and right upper arm were sutured and she was then medevac'd to Gove District Hospital because of the need for surgery to repair a lacerated right ulna nerve and two tendons. She was finally transferred to Royal Darwin Hospital. She was operated on at Royal Darwin Hospital on 30 October 2004. It was found that the ulnar nerve had been cut and it was repaired. The tendon of flexor carpi alnaris was completely divided and the flexor digitorum profundus was partly divided. They were both repaired and her wrist was put in a splint."

[8] In her victim impact statement, the victim said that she "felt sad" when she was struck with the knife and that she cried because she was scared of the respondent. She said the injuries were very painful and she now has a scar on her wrist. The victim also said that she remains the girlfriend of the respondent and wishes to be his girlfriend. The statement concluded:

> "I do not want Ramor to go to jail."

[9] The respondent was born in Darwin and raised in Angurugu on Groote Eylandt. He went to school until aged about 14 and has not undertaken any particular employment since leaving school. Significantly, the respondent had not previously been convicted of any offence and the sentencing Judge accepted that he was a responsible young person whose actions were out of character. His Honour also accepted that the offending occurred because the respondent was jealous as a consequence of something that had been said to him the night before and repeated on the day of the offence. That jealousy, coupled with the victim's defiance when the respondent told her she could not leave, led to what the sentencing Judge described as a "quite immature" response.

[10] The respondent was on bail prior to sentencing for in excess of a year. When the victim returned to Angurugu the respondent immediately sought her out and apologised. The respondent used his time on bail to mend his relationship with the victim and no further violence had occurred prior to sentence being imposed on 2 December 2005. The sentencing Judge

accepted that at the time of sentencing the respondent and victim were living together as husband and wife at the home of the respondent's mother.

[11] At the time of sentencing the respondent was about to undertake manhood ceremonies which would require a period of isolation in a male only environment. The Judge was informed that during the period of isolation the elders of the community would discuss with the respondent matters of "men's business", including the respondent's conduct toward the victim.

[12] There is no error apparent in the approach or reasoning of the sentencing Judge. His Honour expressly acknowledged that the wishes of the victim were not determinative of sentence and referred to the principles and observations relevant to sentencing in connection with violence in Aboriginal communities as discussed by this Court *R v Wurramara* (1999) 105 A Crim R 512. The critical question is whether the sentence is so manifestly inadequate as to demonstrate that in some unspecified manner his Honour must have fallen into error.

Principles

[13] The principles governing Crown appeals are well established. They were discussed in *R v Riley* [2006] NTCCA 10 and it is unnecessary to repeat that discussion. It is sufficient to note that, as explained by Hunt CJ at CL in *R v Barbara* (NSW Court of Criminal Appeal, unreported judgment number 60638 delivered 24 February 1997):

> "Sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards, constitute error in point of principle which the Crown is entitled to have this Court correct."

Competing considerations

[14] In substance the Crown highlighted the gravity of the criminal offending which was unprovoked and caused serious injuries. The Crown submitted that the motivation of jealousy is not an unusual motivation in domestic circumstances within Aboriginal communities and could not be regarded as a feature of mitigation. The Crown emphasised the dangerous nature of the weapon used, being a 20 – 30 centimetre hunting knife, and the fact that the attack was sustained in the face of the victim's screams and the call by her friend that he cease. While the Crown did not challenge the assessment of the sentencing Judge that the appellant has good prospects of rehabilitation, nevertheless the Crown urged that the sentence conveys the wrong message to perpetrators of violence, including violence in domestic circumstances, and general deterrence requires the imposition of a significantly longer sentence.

[15] Counsel for the respondent acknowledged the gravity of the respondent's conduct, but emphasised the respondent's youth, lack of maturity, plea of guilty and remorse. In particular, counsel emphasised that the respondent is a young person who, to his considerable credit and contrary to the experience of many in his community, reached the age of 19 years without getting into trouble. In addition, the respondent has remained out of trouble

since the commission of the offence and is now reconciled with the victim. The respondent continues to live with the victim at the home of her mother.

Manifestly inadequate

[16] The objective circumstances of the respondent's crime were particularly serious. He repeatedly attacked a defenceless woman with a knife. He was not distracted by the victim's screams or the call from her friend for him to stop. The attack came to an end only because the victim's friends were able to shut the door of the car and drive away.

[17] General deterrence was of particular importance in the exercise of the sentencing discretion. Offences of the type committed by the respondent continue to be prevalent in Aboriginal communities. Many such attacks occur in domestic situations. Jealousy, often coupled with a desire to exercise and maintain control over a female partner, is a common motivation for such attacks. Regret is frequently expressed after the attacks, but the combination of jealousy and a desire for or belief in dominance, usually coupled with intoxication, continues to motivate serious attacks upon women partners in Aboriginal communities. It is noteworthy that the respondent was not affected by alcohol or any other drug.

[18] Women and children in Aboriginal communities are particularly vulnerable to attacks by men in domestic situations. Such victims lack the support mechanisms that are available in many other sections of our community. These vulnerable victims are entitled to the protection of the law. This

Court has repeatedly emphasised over many years that men in Aboriginal communities must recognise that attacks of this nature upon the more vulnerable members of the communities, particularly when dangerous weapons are used, will not be tolerated and will be met with severe punishment.

[19] It is also important that men in Aboriginal communities understand that the consequence of severe punishment will follow violent attacks upon women and children notwithstanding the wishes of the victims. It is not uncommon for female victims in Aboriginal communities to express a desire that their violent partner not be imprisoned, even in the face of significant violence causing serious injury. Such victims often experience conflicting emotions. For example, they wish the violence to stop, but for family reasons they do not wish the offender to be imprisoned. The message must be sent to men in Aboriginal communities that the wishes of a victim, be they freely given or given under some form of duress, will not prevail in the face of serious criminal conduct.

[20] Notwithstanding the respondent's youth and good character and the other matters of mitigation to which counsel for the respondent referred, it is our view that the sentence of 18 months fully suspended was so manifestly inadequate as to demonstrate error in point of principle. The sentence was so manifestly inadequate as to "shock the public conscience": *R v Osenkowski* (1982) 30 SASR 212 at 213. Further, in our view, this is one of

those rare cases in which this Court should allow the Crown appeal and re-sentence the respondent.

Re-sentencing

[21] In re-sentencing the respondent, the court is required to consider not only the appropriate sentence to be imposed, but also whether the respondent should be required to serve any period of that sentence and, if so, what period. In this exercise the court is required to balance the objective seriousness of the offending against matters personal to the respondent which can reasonably be advanced by way of mitigation. In addition, in the particular circumstances of the respondent, the principle of double jeopardy is of particular significance because the respondent has been living in the community for nearly two years since the commission of the offence.

[22] Had the respondent not pleaded guilty and demonstrated genuine remorse, we would have imposed a sentence of four years imprisonment. After allowing a reduction of one year in recognition of the respondent's plea and genuine remorse, we impose a sentence of three years imprisonment. We emphasise that in recognition of the principle of double jeopardy, which is of particular significance because the respondent has not been in custody, the starting point of four years is significantly less than the period which would have been an appropriate starting point when sentencing at first instance. We also emphasise that the starting point would have been longer but for the respondent's youth and prior good character.

[23] In arriving at this sentence we have had regard to the guidance given by this Court with respect to penalties for this type of offending in *Wurramara*. We have also borne in mind the observations of this Court in *Massie v The Queen* [2006] NTCCA 15 that, generally speaking, penalties for violent crimes have increased since *Wurramara* was decided in 1999. As noted in *Massie*, however, notwithstanding that general increase a review of the cases suggests that a number of sentences imposed in recent years have been at the lower end of the scale of penalties and have not adequately reflected the gravity of the criminal offending.

[24] As to the question of suspension of all or part of the sentence, we were of the view that in the circumstances presented to the sentencing Judge, his Honour was plainly in error in suspending the sentence entirely. Notwithstanding the existence of strong mitigating factors, including the respondent's youth and prior good character, the objective seriousness of the respondent's crime far outweighed those mitigating factors and required that at least some part of the sentence be served.

[25] Although in December 2005 the sentencing Judge should have required that the respondent serve part of the sentence, additional factors now arise for consideration in re-sentencing approximately eight months after the original sentence was imposed and nearly two years after the offence was committed.

[26] First, as we have said, in these circumstances the principle of double jeopardy is of particular importance. The respondent is a young man who

has never been to gaol. Since committing the offence he has been living in his community without further difficulty for nearly two years. In substance, having received his penalty, the respondent has got on with his life and his progress towards rehabilitation, including the successful reconciliation with the victim. He now faces the prospect of not only an increased sentence being imposed, but of being removed from his community and family and being imprisoned.

[27] In *R v Hicks* (1987) 45 SASR 270, in the context of a Crown appeal against a sentence imposed for the offence of causing death by dangerous driving committed by a 66 year old who had no prior convictions, King CJ observed that when such a person has been told that he will not have to go to prison, a great load is lifted from the mind and the consequences of reversing that decision can be devastating. Those observations are equally applicable to the respondent who is a young Aboriginal person with no prior convictions. In *R v Davy* (1980) 2 A Crim R 254, Muirhead J made similar observations that a person in this type of situation is likely to become, not only bewildered, but embittered. The critical question is whether, having increased the penalty, considerations of justice and protecting the public require that notwithstanding these factors this young offender should be required to serve a sentence of imprisonment which will inevitably create disillusionment and subject a young person of previous good character to the corrupting influence of prison.

[28] In considering the question of suspension at this time, careful attention must be given not only to the seriousness of the respondent's offending, but to his progress in the last two years, his current circumstances and the prognosis for the future. These are factors which are particularly important in the ultimate consideration of what orders will best protect the public. The pre-sentence report confirms that the respondent has been very immature in managing his anger and has lacked the maturity to fully comprehend the complexities of his relationship with the victim. Both the victim and her mother have confirmed that the respondent has successfully resumed living with the victim and has not displayed any anger towards the victim. Given the respondent's prior good character, his progress since committing the offence demonstrates that there are very good prospects of rehabilitation and, if reasonably possible, it is in the best interests of the community not to interrupt that progress with imprisonment in an adult prison.

[29] Having regard to all the circumstances, we are of the view that in the exceptional circumstances facing this Court, notwithstanding that the sentence should not have been suspended by the sentencing Judge in December 2005, it is now appropriate to suspend the sentence entirely. In reaching this decision we note that while the Crown did not concede that the sentence should be suspended entirely, the Crown accepted that in the particular circumstances it would be harsh to now send this young respondent to prison.

[30] The suspension is on condition that the respondent be of good behaviour for a period of three years from today, that period being the operative period during which the respondent is not to commit any further offences for the purposes of the Sentencing Act. During the period of three years the respondent is to be under the supervision of the Director of Correctional Services and obey the reasonable directions of the Director or a probation officer including directions as to reporting, place of residence, training, employment, associates and counselling or treatment generally or for anger management.

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