Goddard v The Queen [2012] NTCCA 6

PARTIES:	GODDARD, Stephen Angus Bruce 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 5 of 2011 (20933420)
DELIVERED:	8 MARCH 2012
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JUDGMENT OF:	KELLY, BARR JJ & OLSSON AJ
APPEAL FROM:	RILEY CJ

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	M McColm

Solicitors:

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

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

Goddard v The Queen [2012] NTCCA 6
No. CCA 5 of 2011 (20933420)

BETWEEN:

STEPHEN ANGUS BRUCE GODDARD
Appellant

AND:

THE QUEEN
Respondent

CORAM: KELLY, BARR JJ & OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 8 March 2012)

KELLY J:

[1] I agree that leave to appeal should be refused for the reasons given by Olsson AJ.

BARR J:

[2] I agree that leave to appeal should be refused for the reasons given by Olsson AJ.

OLSSON AJ:

Introduction

[3] This is an application for leave to appeal against a sentence imposed by a Judge of this Court on the applicant at Alice Springs on 28 March 2011,

consequent upon his plea of guilty to a charge that, on 2 October 2009, at Tennant Creek he had sexual intercourse with a woman LB without her consent and knowing about or being reckless as to her lack of consent.

[4] The learned sentencing Judge indicated that he took, as a commencement point, a sentence of seven years imprisonment as being appropriate in the circumstances. In recognition of the applicant's plea, he reduced that period to imprisonment for five years and six months, to run from 2 March 2011. He set a non parole period of four years.

[5] The applicant was refused both an extension of time within which to appeal and leave to appeal by a single Judge. He thereupon sought a rehearing of those aspects by this Court pursuant to s 429(2) of the Criminal Code.

[6] When the proceedings were called on before this Court, the Crown consented to an extension of time, which was thereupon granted. With the concurrence of the parties, counsel were heard both as to the issue of leave and also the merits of the proposed appeal.

[7] It is important to note that this matter falls to be considered against the background that the applicant had separately been charged with an offence pursuant to s 192(4) of the Criminal Code in relation to an act of gross indecency on a young woman called LG without her consent and knowing about or being reckless as to the lack of consent. This Court was informed by counsel that such offending had occurred about two hours prior to the

offence the subject of this application. For the sake of brevity the earlier offence will be referred to as "the gross indecency offence".

[8] The applicant had appeared before the same sentencing Judge on 21 October 2010 and pleaded guilty to the gross indecency offence.

[9] On 3 November 2010 the applicant was sentenced for that offence to 18 months imprisonment (reduced from two years in recognition of his plea), conditionally suspended after 12 months, with an operational period of 12 months from date of release.

[10] The present application is limited to the sentence imposed on 28 March 2011. There was no appeal in relation to that imposed in respect of the gross indecency offence.

The relevant narrative facts

[11] It is necessary to recite the key facts relating to both offences, having regard to the issues arising on this application.

[12] On the night of 2 October 2009, the applicant, who was then 21 years of age, had been drinking at several venues in Tennant Creek and became intoxicated.

[13] Having left the Tennant Creek Hotel, he spoke to LG, a 23 year old female, who was also intoxicated. He asked her whether she wanted a lift and she asked him to drive her to a nominated house in Tennant Creek. He did so, but stopped short of the nominated address.

[14] When asked by LG what he was doing, he said that he wanted a head job for giving her a lift. She refused, whereupon he exposed his penis outside his pants and said, "Can you suck my cock?". He put his hand on the top part of her body near her neck, and pulled her towards his exposed penis.

[15] LG told him that she did not want to and resisted, so that he could not pull her face on to his penis. He then put his penis back in his pants and told her to get out of the car. When she did not comply, he got out of the vehicle, went to the passenger-side door and demanded that she get out. She then complied and he drove off.

[16] At a time said to be about two hours later (at about midnight) the applicant went to the house of LB, with whom he had had a casual sexual relationship since about January 2009. She had not invited him to her house on that occasion. She had previously made it plain to him that she would not entertain any sexual activity whilst her young son was in the house.

[17] On arrival, the applicant entered LB's house through an unlocked front door. LB had just put her 11 year old son and his friend to bed.

[18] The applicant went straight into her bedroom, removed his clothes, grabbed her under her dress and pulled down her underwear. He then forced her onto the bed and proceeded to have penile vaginal intercourse with her without her consent. In the course of doing so he grabbed LB by the hair, slapped her on the cheek and bit her a number of times on the neck and arms and

legs, before eventually falling asleep. She then left the premises and contacted the police.

[19] As a result of the assault upon her LB sustained a small abrasion to the labia minora and tenderness to her vagina, multiple bruises and abrasions, bite marks to her neck, a small bruise on the upper lip, scratch marks to her back, bite marks on her left arm and chest and hair pulled from her head.

[20] During a subsequent record of interview the applicant admitted having intercourse with LB but falsely asserted that it had been consensual, although he did concede to having slapped LB and agreed that he may have bitten her.

[21] The learned sentencing Judge noted that, although the applicant ultimately pleaded guilty, it was not an early plea. It was indicated shortly before the applicant's trial was due to commence and after LB had been required to give evidence in a pre-recorded session. He was therefore entitled to some credit for the utilitarian benefits of the plea, but not to credit for an early plea.

The personal circumstances of the applicant

[22] The learned sentencing Judge was informed that, although the applicant had been born in Sydney, he had spent much of his life in and around Tennant Creek. He attended school until about 2003, when he suffered a brain injury in a motorcycle accident. This necessitated ongoing treatment up to the time of sentencing.

[23] He left school and thereafter had a good history as a stockman and Station hand. He had a very supportive family and was well regarded in his community in relation to sporting activities and helping others.

[24] Although he was not a first offender, the applicant had no prior convictions for offences of significance for present purposes.

[25] The learned sentencing Judge accepted that the applicant's brain injuries had had an impact on his cognitive processes and impulse control, but concluded that his mental condition was not such as would make him an inappropriate vehicle for general deterrence. The learned Judge accepted that the applicant's prospects for rehabilitation remained positive, provided that he refrained from binge drinking. He further noted the applicant's good work record and that he had complied with the conditions of suspension of his sentence for the gross indecency offence.

[26] As was pointed out by the Director of Public Prosecutions, there was no expert evidence bearing on the extent to which, if at all, the applicant's brain injury may have contributed to the particular offending in issue other, perhaps, than the existence of some degree of lack of impulse control, coupled with the effects of intoxication. It seems common ground that the applicant had repeatedly been warned against consuming alcohol.

The basis of the proposed appeal

[27] The applicant seeks to pursue three specific grounds of appeal, although there is some degree of necessary overlap between them. Those grounds are:

(1) That, in all the circumstances, the sentence imposed was manifestly excessive;

(2) That the learned sentencing Judge failed to give adequate weight to the totality principle; and

(3) That, the learned sentencing Judge, erred in giving too much weight to the factor of general deterrence.

[28] The crux of the proposed appeal is that it is contended on behalf of the applicant that a starting point of imprisonment for seven years for the offence now under consideration was manifestly excessive, both because it failed to give adequate recognition to the totality principle in relation to the two offences committed on the night in question and also a series of specified mitigating factors.

[29] As the former aspect, it was argued that a total commencement point of nine years reduced to seven years in recognition of pleas, coupled with the aggregate non-parole periods of five years and one month, were simply "too high for the totality of the applicant's criminality" on the relevant night; and

that the aggregate sentence was manifestly disproportionate to the whole criminal conduct (*Waye v The Queen*[1], *Carroll v The Queen*[2]).

[30] As to the latter, reliance was placed upon the combined effect of these factors.

(1) The applicant and LB had been in an ongoing casual sexual relationship of about nine months duration.

(2) He suffered from an intellectual disability that affected his cognitive processes and ability to control his impulses.

(3) He was a youthful offender who had no significant criminal history.

(4) He had a good employment, community and family history.

(5) The offence was out of character.

(6) His progress towards and prospects for rehabilitation were good.

(7) He was candid with police as to certain topics.

(8) The plea was entered on the basis of recklessness as to consent.

(9) There is no evidence of either substantial physical or psychological harm having been occasion to LB.

(10) The offence was essentially opportunistic in nature.

[1] [2000] NTCCA 5 at [42]
[2] [2011] 29 NTLR 106 at 117

(11) The applicant had already served 13 months on remand in the Alice Springs Correctional Centre in harsher conditions than those applicable to sentenced prisoners.

[31] Although Mr Goldflam, counsel for the applicant, has said all that can be put in support of the foregoing matters, there are a number of obvious ripostes that greatly weaken the effect of them.

[32] Whilst it is true that the whole of the applicant's offending on the night in question must be looked at as a totality, an important aspect is that such offending conduct consisted of two quite different and independent acts or series of acts committed at two different locations, against two different victims and with a substantial time gap between them. The two offences did not arise from a more or less single continuous course of conduct and, prima facie, they merited separate substantial sentences, due cognizance being given to the totality principle in the end result.

[33] Moreover, at the time of the sentencing in respect of the gross indecency offence, the applicant had already been in custody on remand for in excess of 12 months – a fact made known to the learned sentencing Judge. It is clear from the relevant sentencing remarks that the learned Judge specifically took this into account in suspending the balance of the sentence imposed forthwith. The applicant is not entitled to again rely on the remand aspect in relation to the subsequent sentence.

[34] Whilst it is true that there had been some form of casual sexual relationship between the applicant and LB, there was no evidence that he was entitled to enter her house at will and demand sex. Indeed, there was specific evidence of the fact that LB had made it quite clear to the applicant that she would not have sex with him in the event that her child was in the house at the time, as he was that night.

[35] There was no evidence that the offence, the subject of the present application, was the result of the applicant's tendency to lack of impulse control, by way of contrast with the disinhibition resulting from his highly intoxicated state.

[36] To some extent there may have been some element of opportunism, but it is not to be forgotten that there was an appreciable time gap between the two offences. The compelling inference arising from the evidence is that the applicant deliberately went to LB's house and then entered it without invitation, with the specific intent of having sexual intercourse with her. Whilst he may have pleaded on the basis of recklessness, it must be said that he had no apparent reason to believe that LB would consent.

[37] Although the injuries suffered by LB were relatively superficial, she was nevertheless subjected to a most unpleasant and relatively forceful assault that, inter alia, caused some of her hair to be pulled out. This was by no means a trivial assault and was carried out by a highly intoxicated man who was clearly not going to brook any refusal on her part.

[38] Although it is true that the applicant did readily admit to the police that he had had intercourse with LB, he persisted in his assertions that this had been consensual right up to trial and LB was required to subject herself to the stress of attending and giving pre-recorded evidence.

[39] In truth the only real mitigatory matters of substance were a lack of significant prior criminal history, the applicant's good record of employment and community engagement and positive prospects of rehabilitation, evidenced by his progress immediately after his release from prison in relation to the gross indecency offence.

[40] The third specific ground of appeal asserts, in effect, that, despite the fact that the learned sentencing Judge acknowledged that the applicant's cognitive processes and impulse control were impaired, it is not apparent that this gave rise to any actual reduction in sentence. Mr Goldflam accepted that no positive evidence of a causal link between the applicant's impaired mental functioning and his offending had been led, but said that, nevertheless, this could readily be inferred by reason of the applicant's out of character, irrational and impulsive offending.

[41] The short answer to that proposition is that those features could equally have been the product of the applicant's high degree of intoxication and there is no compelling reason, absent relevant expert evidence, to conclude that they were substantially the product of his intellectual disability. His

own counsel at first instance conceded that the applicant had repeatedly been warned against drinking alcohol.

Conclusions

[42] At the end of the day, the key issue to be addressed is as to whether it can fairly be said that the imposition of a discounted sentence of five years and six months imprisonment with a non-parole period of four years, in addition to the sentence previously imposed in respect of the grossly indecent offence, without any concurrency, was manifestly excessive.

[43] That question is not to be answered by reference to what the members of this Court might have done in the circumstances. Error in the exercise of the sentencing discretion must be demonstrated, it being presumed that there is no error. The impugned sentence must be clearly and obviously, and not just arguably, excessive. (*House v The King*[3], *Moore v The Queen*[4], *Liddy v R*[5])

[44] In the instant case, whilst the impugned sentence may be toward the top end of the spectrum of reasonable sentencing outcomes, I remain unconvinced that the learned sentencing Judge fell into specific error or that the actual sentence imposed was clearly and obviously excessive on the face of it.

[3] (1936) 55 CLR 499
[4] [2006] NTCAA 6
[5] [2005] NTCAA 8 at [12]

[45] I would refuse leave to appeal. The application should be dismissed.