Siganto v R [1999] NTCCA 52

PARTIES:	COLIN JOSEPH SIGANTO
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA15 of 1996 (9419571)
DELIVERED:	13 May 1999
HEARING DATES:	26 March 1999
JUDGMENT OF:	MARTIN CJ, KEARNEY AND PRIESTLEY JJ

CATCHWORDS:

Criminal Law – Appeal and new trial – sentencing – whether victim's distress from having to testify is an aggravating sentencing circumstance – whether "some other sentence … should have been passed" – whether in re-sentencing all relevant sentencing material to date of re-sentencing must be received – power of court to receive fresh evidence on sentencing appeals – whether change in sentencing regime between time of commission of crime and time of sentencing, relevant in sentencing.

Criminal Code (NT), ss 410(c), 411(4)

Siganto v The Queen (1998) 159 ALR 94 (H.C.) revg. (1997) 97 ACrimR 60 (C.C.A.)
Skrjanc (1993-94) 71 A Crim R 347, followed
R v Maclay (1990) 19 NSWLR 112, followed
Dimozantos v The Queen (No.2) (1993) 178 CLR 122, distinguished

REPRESENTATION:

Counsel:

Appellant:	D. Grace QC
Respondent:	R.S.L. Wild QC, with him M.J. Carey

Solicitors:

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

Judgment category classification:
Judgment ID Number: kea99004
Number of pages: 13

kea99004

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

Siganto v R [1999] NTCCA 52
No. CA15 OF 1996 (9419571)

BETWEEN:

COLIN JOSEPH SIGANTO
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ., KEARNEY and PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 13 May 1999)

THE COURT:

[1] This appeal comes back before the Court, by way of remitter from the High Court.

Background to the remitter

[2] The appellant was convicted following his trial on a charge that on 27 September 1994 at Darwin he had sexual intercourse with one RH, without her consent. On 3 September 1996 he was sentenced to 9 years imprisonment; a non-parole period of 6 years and 4 months was fixed.

[3] In sentencing the appellant the learned trial Judge summarized the facts relating to the offence, as follows:

"On the evening in question you were driving along Bagot Road … Your victim was waiting for a bus to go home, … You offered her a lift, she got into your car. Against her wishes you drove her to a secluded bush area off Tiger Brennan Drive. You drove up a track with which you were familiar, having dumped rubbish there on a prior occasion.

It was dark when you parked the car, you dragged your victim from the car, once out of the car you punched your victim hard in the mouth, with a clenched fist, splitting her lip and causing it to bleed. You ordered her to remove her pants. Out of fear of further violence she removed her pants and a tampon, for she was menstruating. You bent her over the bonnet of the car and raped her from behind. You ejaculated inside her. In the course of this you said to her: 'You have a lovely cunt'. When you had finished you drove away abandoning your victim in the dark."

[4] Having then reviewed the evidence, his Honour observed immediately before imposing sentence:

"You pleaded not guilty, having always denied the charge, and have shown no remorse whatsoever. The jury took but a short time to find you guilty, an inevitable finding on the evidence. The jury were satisfied that you lied on oath in denying the crime, and that you lied to police during the record of interview when you said you were home on the night in question, and that you pretended to confuse your movements during that week when confronted with a Woolworths docket showing that you were out on the road on the night in question rather than at home as you had told the police.

Your victim, a full-blood Aboriginal woman, was greatly distressed by your crime. Her distress was evident to police officers who attended the Winnellie Post Office, and other police officers who interviewed her sometime after the event. *Your victim's distress was aggravated by having to give evidence against you, both at the committal and at trial.*

Your crime is a serious one. The crime of rape, as I have already said, is one of the most serious crimes in the criminal calendar, carrying the maximum penalty of life imprisonment. The circumstances of your crime are serious. You punched your victim in the mouth in order to overpower her and you heaped indignity upon

> indignity upon her, finally abandoning her at the scene in the dark and quite some distance from any help.
>
> You are a 27 year old single man with no prior offences of a sexual nature. You have never been in prison before. You have lived in the Top End for about 20 years." (emphasis added)

[5] The appellant applied to this Court for leave to appeal against his sentence; see now *Siganto v The Queen* (1997) 97 A Crim R 60. The appeal was argued at the same time. One of his grounds of appeal was that his Honour had erred "in characterizing his plea of not guilty effectively as an aggravating factor." When granting leave to appeal but dismissing the appeal on 3 October 1997, the Court observed at 63 in relation to this ground:

> "Ground 2 suggests his Honour erred in the way he treated the plea of not guilty. As the argument developed, it embraced objection to most of that which the learned Judge said at the commencement of the second passage quoted above [in par (4)] … *it is put by the applicant* that *his Honour's reference to … the victim's distress* occasioned by the commission of the offence, and to its *having been aggravated by her being obliged to give evidence at committal and trial, demonstrated that his Honour adopted an impermissible course of aggravating the crime and thus the sentencing discretion miscarried."* (emphasis added)

In dealing with this submission at 63-4, the Court said:

> "The other matter suggested by the applicant as demonstrating error lay in his Honour's reference to the victim's distress caused by the crime being aggravated by her having to give evidence at committal and trial. It is undoubted that the harm the crime causes a victim will usually be a relevant factor in sentencing, *Teremoana* (1990) 54 SASR 30;49A Crim R 207 per Cox J. at 38; 215. A judge is entitled to have regard to any detrimental, prejudicial, or deleterious effect that may have been produced on the victim by the commission of the

crime, *Webb* [1971] VR 147 at 151. In this Court, Martin CJ., Thomas J. and Gray AJ., held in *Melville v R* (unreported, Supreme Court (NT), 27 March 1995) applying *Webb*, that the sentencing Judge in that case was entitled to regard the distress suffered by the prosecutrix in having to give evidence on five occasions as an important aggravating feature. The case was referred to by the prosecutor in the course of submissions on sentence in this matter. It was submitted on behalf of the applicant that *Melville* was wrongly decided because it is at odds with the principle that an offender is not to be given a greater sentence because of the way in which the defence was conducted at trial. See also *Harris v R* [1967] SASR 316 at 327-8.

The Director [of Public Prosecutions] appearing on behalf of the respondent submitted that his Honour, having seen the witness, was in the best position to give proper weight to the effect which the ordeal had on her. By this we take him to refer to the ordeal of relating the details of the attack, in evidence. He submitted the ordeal aggravated the distress occasioned by the physical conduct of the accused when committing the offence; since harm occasioned to a victim is a relevant sentencing factor, any aggravation of that harm must also be relevant and may lead to an increased penalty. Here, the applicant maintained that he was not the offender, he was elsewhere at the time. The victim was accordingly obliged to tell her story in open court. The circumstances of the offence are set out at the beginning of these reasons."

[6] In a crucial passage, the Court continued:

"We do not think that it is necessary to consider the correctness of the decision of this Court in Melville. It might be reasonably inferred that his Honour looked at it, but it is not apparent that he increased the penalty because of the aggravation of the victim's distress caused by her having to give evidence at committal and trial. It is not possible to say that his Honour, by his bare statement of this and other facts, increased the sentence on account of any of them. They demonstrate at least as much the basis for his finding that the applicant had "shown no remorse whatsoever", going to the issue of mitigation. In our opinion none of the errors assigned in argument addressed to the proposed ground 2 have been made out."(emphasis added)

[7] It can be seen that the Court considered that the learned trial Judge had not in fact treated the victim's distress occasioned by having to give evidence at committal and trial, as an aggravating circumstance when sentencing. The appellant obtained special leave to appeal to the High Court from the decision of this Court. On appeal, he argued two grounds; see now *Siganto v The Queen* (1998) 159 ALR 94. He was unsuccessful on one of those grounds; as to the ground involving the '*Melville'* point in par [6] the High Court held at 100-2:

> [27] "Bearing in mind the current state of the law in the Northern Territory, as expressed in *Melville*, and that the decision in *Melville* was relied upon in argument before Angel J by the Crown Prosecutor, and having regard also to the manner in which his Honour expressed himself, *it is difficult to avoid the conclusion that he treated the distress of the victim at having to give evidence in the criminal proceedings as a matter of aggravation.* His Honour was bound by the decision in *Melville*, it was relied upon by the Crown, he found as a fact that the victim's distress was aggravated by having to give evidence, and *Melville* held that this was an aggravating circumstance relevant for sentencing purposes.
>
> …
>
> [34] The suggested principle in *Melville* should be rejected. The applicable principle is that stated in *Gray* ([1977] VR 225 at 231.). To some, it may appear a matter of semantics to distinguish between denying the existence of circumstances of mitigation and asserting the existence of circumstances of aggravation; and judicial statements intended as the former may sometimes by misunderstood as intending the latter. However, the distinction can be important.
>
> [35] In deciding that the distress occasioned to a complainant by having to give evidence is an aggravating circumstance for sentencing purposes, *Melville* was incorrect and should be overruled.

> [36] *The Court of Criminal Appeal should have concluded that Angel J followed and applied Melville, and that, in the result, his Honour's discretion miscarried. It would then have become the obligation of the Court of Criminal Appeal to consider, pursuant to s 411 (4) of the Code, whether some other sentence was warranted in law.* If that question were answered in the affirmative, the Court of Criminal Appeal would quash the sentence of Angel J and re-sentence the appellant. If it were answered in the negative, it would dismiss the appeal.
>
> [37] In the light of some of the comments made by the Court of Criminal Appeal, it is far from clear that, if the court had found that Angel J had followed *Melville* and thereby been compelled by authority to sentence on an erroneous basis, it would have concluded that some sentence other than that imposed by Angel J was warranted. That question did not arise for decision. The matter should be remitted to the Court of Criminal Appeal to enable that question to be addressed." (emphasis added)

The High Court accordingly allowed the appeal on this ground, set aside the orders made below, and remitted the case "for consideration of the issues raised by s 411(4) of the *Criminal Code (NT)*".

[8] This Court has now to consider, in light of par [36] of the High Court's judgment, the issue which arises under s 411(4) which provides:

> "On an appeal against a sentence the Court, *if it is of the opinion that some other sentence*, whether more or less severe, *is warranted in law and should have been passed*, shall quash the sentence and pass such other sentence in substitution therefor and in any other case shall dismiss the appeal." (emphasis added)

The appellant's submissions

[9] Mr Grace QC of senior counsel for the appellant submitted that because the High Court had detected sentencing error, the sentencing of the appellant

was now at large. Accordingly, in now determining whether "some other sentence … should have been passed", this Court was *required* to receive all materials relevant to sentence, including materials post-September 1996, just as it would have been if the appellant were now being sentenced for the first time.

[10] We note that it is clear that this Court in any event has power to receive such fresh evidence on appeal, it if considers it necessary or expedient to do so in the interests of justice. However, that power is sparingly exercised. The appeal against sentence under Code s410 (c) is an appeal in the strict sense. But credible evidence of events post-September 1996 would be admissible to show that the true significance of the circumstances at the time of the original sentencing was such that had that significance been known it would probably have led the learned sentencing judge to reach a different sentence. For example, evidence of post-September 1996 events may bear on the appellant's prospects for rehabilitation. This approach to the reception of fresh evidence on appeal is adopted in other jurisdictions, with legislation similar to s411(4). See, in Victoria, *R v Carroll* [1991] 2VR 509, *R v Eliasen* (1991) 53 A Crim 391 at 394 per Crockett J, *R v Rostom* [1996] 2 VR 97 at 101 per Charles JA, *R v Young* (1996) 85 A Crim R 104 at 108-9 per Charles JA, *R v Babic* [1998] 2 VR 79 at 81-2 per Brooking JA, and *R v W.E.F.* [1998] 2 VR 385 at 388-9 per Winneke P; in Queensland, *R v M* [1996] 1Qd R650 and *R v Maniadis* [1997] 1Qd R 593; in New South

Wales, *Fordham* (1997) 98 A Crim R 359 at 377 per Howie AJ; and in Western Australia, *Catts* (1996) 85 A Crim R 171 at 177 per Anderson J.

However, in the present case vitiating sentencing error has *already* been established and the task before this Court is as to the sentence which now be passed. The appellant is entitled to rely on all materials relevant to that task, up to the present time; see *Skrjanc* (1993-94) 71 A Crim R 347 at 353 per Legoe J. In re-sentencing, the discretion of the Court is not constrained by the sentence imposed on 3 September 1996, as it was imposed in the exercise of a sentencing discretion which miscarried.

[11] The post –September 1996 materials relied on by Mr Grace are as follows. The appellant has now been in prison for over 2½ years. The prison records include a favourable work report of 23 March 1999, and other excellent work reports; and a letter of 19 February 1999 from Correctional Services together with a document showing the courses he has undertaken since 1996 while in custody, and the skills he has thereby acquired. His only misbehaviour in prison was that on 17 September 1998 a sample disclosed cannabinoids in his urine. He is willing to undertake the Sex Offenders Course, which is said to indicate his acceptance of guilt. These materials are along the lines of those permitted to be adduced in *R v Young* (supra). Mr Grace also relied on 3 up-to-date references, dealing with the appellant's time in custody, and supporting the submission that he is rehabilitating himself.

[12] As well as this fresh evidence Mr Grace also relied on the matters relating to the appellant's personal history which had been put before the learned trial judge in August 1996, in mitigation of sentence. It is unnecessary to relate them again here. Mr Grace also informed the Court of some additional facts which bore on the appellant's situation in 1994, to indicate how it was that a man with his background could have committed the crime in question. These facts were that his wife had left him some five months before he committed the crime; she took with her their two children, and since June 1996 he has had no access to them, despite his efforts to obtain it. This resulted in depression, and his attempted suicide. He sustained serious injury in a motor vehicle accident in June 1994, and he lost his employment in September of that year.

[13] In summary, Mr Grace submitted that the appellant was now a different and better man than he had been both when he committed the crime in September 1994, and when he stood his trial in August 1996.

[14] Mr Grace also relied on what he termed 'dissonance'; this was said to arise from the fact that while the appellant committed his crime on 27 September 1994, the sentencing regime which existed at that time and until the *Sentencing Act* came into force on 1 July 1996, differed from the regime under that Act pursuant to which the appellant had been sentenced. He had been tried in August 1996, some 2 months after the *Sentencing Act* came into force, and almost 2 years after he committed the crime. The Legislative Assembly intended the sentencing regime under the *Sentencing Act* "to apply

to persons in the position of the appellant", as the High Court observed in *Siganto* (supra), at par [13]. Having considered a submission that "fairness and 'equal justice' required that the appellant should not be punished more severely than he would have been had he been sentenced before the commencement of the Act" the High Court concluded at par [17]:

> "This argument should be rejected. The Act was intended to apply to offenders being sentenced for offences committed before the commencement of the Act. *Giving effect to that intention produces the result that people who had previously offended but had not yet been sentenced would be treated differently from people who had previously offended and had been sentenced. This is not relevantly inequality before the law. It is a consequence of a change in the law.* The circumstances which, in a given case, meant that an offender came under the new regime could vary greatly. The Legislative Assembly could have enacted transitional provisions to cover such cases, but it did not do so, and this failure to do so must (in the light of the transitional provisions that were made) be taken to be deliberate. See also *R v Maclay* (1990) 19 NSWLR 112." (emphasis added)

[15] Mr Grace submitted, however, that there was a 'dissonance' between the *effective period of incarceration* served under a sentence imposed under the former sentencing regime, and that served under an identical sentence imposed under the Sentencing Act regime. He characterized this as a "similar but not identical issue" to that dealt with by the High Court in par [17] of its judgment in *Siganto* (supra). However, we consider that this is not a 'dissonance' which is relevant for sentencing purposes in this case; see generally *R v Maclay* (supra). Both the learned sentencing Judge and this Court were aware of and did not ignore the differences between the two sentencing regimes, as the High Court observed in *Siganto* (supra) at par

[8], in its discussion of the significance of sentences imposed prior to 1996 to which his Honour had been referred. In light of the High Court's observations at par [17] in *Siganto* (supra), we do not consider that the passage in *Dimozantos v The Queen (No.2)* (1993) 178 CLR 122 at 128 upon which Mr Grace relied, applies in this case.

Mr Grace also noted that the appellant was 25 years old at the time of his offence, and was now almost 30; and that none of the delay in bringing the appellant to trial in the first place, had been due to him.

[16] Mr Grace submitted that in light of what the High Court said in par[27] of its judgment – see par[7] above – it should now be concluded that the learned sentencing Judge had increased the sentence he would otherwise have imposed, on taking into account as an aggravating circumstance the distress of the victim at having to testify in the criminal proceedings. We accept that proposition.

[17] In the light of all these matters, Mr Grace submitted that the sentence now to be passed on the appellant, should be less severe than that imposed on 3 September 1996. We consider that it should not be more severe.

The respondent's submissions

[18] Mr Wild QC stressed the seriousness of the appellant's crime, which carries life imprisonment. That had been noted by this Court in *Siganto* (supra) at 68 when, in rejecting a submission that the learned trial judge had failed to

give proper weight to the appellant's prospects of rehabilitation, we said that –

> "General and personal deterrence undoubtedly play the most significant part in fixing an appropriate sentence for crimes of this type."

[19] Mr Wild submitted that the fresh evidence relied on by Mr Grace was of "little consequence", because of the nature of the crime and the need that the sentence reflect personal and general deterrence. He submitted that the sentence imposed by the learned trial Judge was appropriate and warranted, and that the fresh evidence from the prison, which went to the rehabilitation of the appellant showed no more than that the rehabilitative element of his Honour's sentence was effective. He submitted that the sentence of 3 September 1996 should not be disturbed.

We observe that in re-sentencing, this Court is not constrained by the earlier sentence since it was imposed in the exercise of a discretion which miscarried.

[20] Mr Wild also submitted that the sentence of 3 September 1996 was not manifestly excessive. However, since it was imposed in the exercise of a discretion which miscarried, we consider that whether or not it was manifestly excessive is not presently relevant to the task before this Court. The strength of the presumption that the sentence of 3 September 1996 was correct has been overcome by the sentencing error.

Conclusions

[21] The formal question for this Court under s 411(4) of the Code is whether we consider that "some other sentence …should have been passed". In view of the nature of the sentencing error which has enlivened this Court's own sentencing discretion, we consider that the answer to that question must be attended with some doubt. In our opinion that error could not have had much aggravating effect in the sentence imposed.

[22] In *Siganto* (supra) this Court said at 68:

> "General and personal deterrence undoubtedly play the most significant part in fixing an appropriate sentence for crimes of this type. After all, the maximum penalty is imprisonment for life. The Parliament intends that the offence be seen at the top end of the scale of gravity of criminal conduct".

Bearing in mind these considerations, the serious objective circumstances of this serious crime, which involved violence and degradation, and the circumstances of the offender as now more fully disclosed, we consider that in terms of s 411(4) "some other sentence … is warranted in law and should have been passed". We consider that the appropriate disposition is: the application for leave to appeal is granted; the appeal is allowed; the sentencing of 3 September 1996 is quashed and set aside; in lieu thereof the appellant is sentenced to 8½ years imprisonment; the nonparole period is fixed at 6 years; and both sentence and nonparole period are deemed to have commenced on 3 September 1996.

Orders accordingly.

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