Marranya v Gokel [2001] NTSC 102

PARTIES:	LEIF MARRANYA
	v
	NOEL JOHN GOKEL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 62 of 2001 (20015339)
DELIVERED:	23 November 2001
HEARING DATE:	16 November 2001
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Appellant:	M Gibson
Respondent:	S Geary

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

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

Marranya v Gokel [2001] NTSC 102
No. JA 62 of 2001 (20015339)

BETWEEN:

LEIF MARRANYA
Appellant

AND:

NOEL JOHN GOKEL
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 23 November 2001)

[1] This is an appeal against a sentence of imprisonment for a period of 8 months and 17 days imposed for an offence of aggravated unlawful assault contrary to s 188(2)(b), (c) and (k) of the *Criminal Code*. The sentence was imposed in the court of summary jurisdiction, sitting at Daly River on 11 October 2001 after the appellant had entered a plea of guilty.

[2] The three circumstances of aggravation were that:

(a) the victim is a female and the appellant is a male;

(b) the victim is under the age of 16 years, namely, six years old and the appellant is an adult; and

(c) the victim was indecently assaulted.

[3] The circumstances of the offence, found by the learned magistrate, may be briefly summarised as follows. The 6 year old victim and the appellant, who was 18 at the time of the offence, resided at Daly River Community. On 16 September 2000, the victim was riding her bicycle at about 10.30 am when the appellant, her cousin, called her over to him. The victim went to the appellant. The appellant took her by the hand and led her to a nearby concrete platform. The appellant sat down on the platform and pulled down the victim's shorts and underpants. The appellant sat the victim on his lap so that she was facing the appellant. The appellant placed his hands on her hips and moved the victim up and down on the front of his pants with her legs straddling his body.

[4] When initially questioned under caution by the police, the appellant was co-operative and made admissions as to what he had done to the victim. Subsequently, he sought to challenge the admissibility of the record of interview in a voir dire. The record of interview was ruled admissible and subsequently the appellant pleaded guilty to the offence.

[5] In sentencing the appellant, the learned magistrate referred to the history of the proceedings and indicated that he took into account the appellant's plea of guilty only "in a very small way". He allowed a discount of 5% in the sentence he would otherwise have imposed if the matter had been contested fully.

[6] The learned magistrate also took into account the appellant's previous clear record, young age and his remorse. The latter had been demonstrated to some extent by the appellant submitting to family and community pressure that he reside at an outstation for several months and be banned from the Daly River pub. His Worship found that the appellant's prospects for rehabilitation were generally good, subject to the appellant learning to control himself after drinking alcohol. In the latter regard, the learned magistrate made no express findings as to the level of the appellant's intoxication at the time of the offence. It had been submitted in mitigation by the appellant's counsel that the appellant had been affected by alcohol at the time, but was not heavily intoxicated.

[7] The learned magistrate stressed that the circumstances of the offence called for a sentence including a substantial element of general deterrence. His Worship observed that:

> "… there's got to be something done to discourage the use of children as sexual tools or sexual playthings."

[8] After indicating that in his view an appropriate sentence was 9 months imprisonment (less approximately 5% or 14 days for the appellant's plea of guilty), the learned magistrate again reviewed the subjective mitigating factors in the appellant's favour and explained why he had decided that no part of the appellant's sentence should be suspended. In essence, the learned magistrate concluded that the need for general deterrence outweighed subjective mitigating factors.

[9] The appellant initially relied on the sole ground of appeal that the sentence is "manifestly excessive". At the outset of the hearing of the appeal, Mr Gibson was granted leave to rely on an amended notice of appeal which is in the following form:

> "1) That the sentence was manifestly excessive.
>
> 2) That the Learned Stipendiary Magistrate failed to give proper weight to the appellant's plea of guilty.
>
> 3) That the learned Stipendiary Magistrate erred in having insufficient regard to the youth of the Appellant.
>
> 4) That the Learned Stipendiary Magistrate gave undue weight to the need for general deterrence.
>
> 5) That the Learned Stipendiary Magistrate gave undue weight to the need for Specific deterrence.
>
> 6) That the Learned Stipendiary Magistrate failed to give proper weight to the Appellant's prospects for rehabilitation.
>
> 7) That the Learned Stipendiary Magistrate erred in giving undue weight to imprisonment as the only means of achieving community protection."

[10] The amended grounds of appeal, in effect, particularise why the appellant submits that the sentence is manifestly excessive. The gravamen of the submissions on behalf of the appellant is that an immediate custodial sentence of 8 months and 17 days is too severe for the eighteen and half year old appellant who was a person of clear record with good prospects of rehabilitation. In Mr Gibson's submission the need for the appellant's

sentence to include elements of general and personal deterrence could be adequately met by imposition of a non-custodial sentence, namely a fully suspended sentence and/or a community work order.

[11] The appellant's offence is subject to a maximum penalty of imprisonment for a period of 5 years or upon being found guilty summarily, 2 years imprisonment. The learned magistrate was required to exercise his discretion in relation to the maximum of 5 years imprisonment (*Kumantjara v Harris* (1992) 109 FLR 400) and if His Worship considered that the offence warranted a greater sentence than he was permitted to impose, he was obliged to refer the matter to the Supreme Court for sentence (*Maynard v O'Brien* (1991) 78 NTR 16).

[12] In my view, it is clear that the appellant's offence, while not in the upper range of seriousness for indecent assaults, was a very serious matter. There was a degree of premeditation in calling over his 6 year old victim and then leading her to the scene of the assault. The victim was, of course, entirely incapable of resistance. The appellant did not cease his assault of his own volition. The appellant admitted that he may have committed a more serious offence against his victim if he had not been interrupted by a nun who had observed what he was doing and attempted to apprehend him. The appellant was to be sentenced for what he did, not what he might have done. However, even taking into account that he had not removed any of his own clothes when interrupted, I think it is clear that the members of the general community would be appalled by the appellant's conduct. Six year old girls

cannot defend themselves against adult men. The law must do what it can to protect young girls from sexual attacks by demonstrating in unambiguous terms that conduct of the present kind is not to be tolerated or condoned.

[13] I consider that the objective seriousness of the offence cried out for a sentence of imprisonment. I do not consider that the learned magistrate's starting point of 9 months imprisonment can in any sense be regarded as excessive, let alone manifestly excessive. Mr Gibson's submissions to the contrary were not pressed with any real vigour. The main thrust of his submissions was that the appellant should have received the benefit of a fully suspended sentence. In considering those submissions, I will begin by repeating some remarks I made in the recent case of *Canet v Hales* [2001] NTSC 100, unreported, delivered 13 November 2001:

> "[36] The exercise of the discretion to suspend, in whole or in part, a sentence of imprisonment depends upon a number of factors which, in my view, cannot be conveniently listed or subject to strict guidelines. With respect, I agree with the observations of Perry J in *Wacyk* (1996) 66 SASR 530 at 536:
>
> > 'It will never be possible to isolate any single factor in a given case as being determinative of the exercise of the discretion whether or not to suspend. The exercise of that discretion one way or the other must turn upon a careful evaluation of the overall circumstances of the particular case, which will include consideration of the circumstances of the offending and the circumstances personal to the offender.'
>
> [37] A sentencing court is placed in a difficult position in determining whether or not to suspend or partly suspend a sentence of imprisonment. First, a sentencer is required to consider whether a sentence of (actual) imprisonment is the appropriate sentence in the light of all the circumstances of the

offence and the offender. If so, the sentencer is required to consider again those same circumstances of the offence and the offender to determine whether all or part of it need not be served in custody. On occasions, some courts have endeavoured to adopt a formal two-stage process, for example, Wright J (CCA, Tasmania) in *Jonceski* (1992) 60 A Crim R 189 at 193 held:

> '… a suspended sentence involves a two-stage approach. First, there is the necessity to fix an appropriate term of imprisonment for the crime in question. It is then necessary to turn to the individual circumstances of the offender to consider whether those circumstances justify suspension, see *Percy* [1975] Tas 62 at 72.'

[38] Other courts (notably those in Victoria: *Young* [1990] VR 951) have emphatically rejected attempts to divide the sentencing process into stages based on a distinction between the objective character of the crime and mitigating factors personal to the accused. In the Northern Territory, different judges have favoured one side or the other of the debate (see, for example, *Mulholland* (1991) 102 FLR 465 where Gallop J at 474 preferred the Victorian view in *Young*, while Angel J at 479-80 did not consider that there was 'really much to debate'; *Ireland* (1987) 49 NTR 10 at 22-24 where Nader J adopted a two-stage approach; *Jabaltjari* (1989) 64 NTR 1 at 20 where Martin J referred to a sentence commencing at an objective starting point 'not often disclosed'; and more recently, *Kelly* (2000) 113 A Crim R 263 where the Court of Criminal Appeal (Martin CJ, Angel and Mildren JJ) encouraged an express indication of the weight given to a plea of guilty as a mitigating factor).

[39] For my part, in the context of suspended and partly suspended sentences, whether expressly stated or not as part of a two-stage approach, I consider that subjective mitigating factors may be afforded greater weight in the decision whether to suspend or partly suspend a sentence than in relation to the fixing of a head sentence. Some support for this may be seen in *Kelly*, supra at 270:

> '… it may be appropriate in the circumstances, rather than reduce the head sentence, to give effect to the value of the plea by other means such as a partially suspended sentence or home detention order, or by the imposition of a fine, to mention only some of the obvious examples.'"

[14] Appeal ground no. 2 asserts that the learned magistrate failed to give proper weight to the appellant's plea of guilty. Mr Gibson conceded that it was a "late plea" (coming after an unsuccessful challenge to the appellant's record of interview). However, he submitted that the plea had not only saved time and inconvenience, but more significantly had spared the young victim from having to give evidence and be subjected to cross-examination.

[15] In a case such as the present, a plea of guilty at the earliest opportunity would be, in my view, a powerful mitigating factor. Such a plea could be interpreted, correctly I think, as a genuine demonstration of remorse by avoiding the need to subject a young child to the ordeal of giving evidence about personal and embarrassing matters. An early plea in such circumstances might well merit a discount of a quarter or even a third of what would otherwise be an appropriate starting point for sentence. In the present case, the appellant chose to challenge his record of interview. Once that challenge failed, as a practical matter, he was left with little choice other than to plead guilty. He saved the victim (and others) from having to give evidence, but he cannot be given credit for a true demonstration of remorse nor expect the same consideration as an offender who pleads guilty at the outset of proceedings. The appellant's plea had a utilitarian value. The learned magistrate valued it in percentage terms (in accordance with *Kelly v R* (2000) 10 NTLR 39) at 5% of the head sentence. Other sentencers may have been more generous in reducing the head sentence or may have given effect to the value of the plea by other means such as imposing a fully

or partially suspended sentence (*Kelly*, supra at p 49). The issue, however, in the present context, is not what other sentencers might have done. The question is whether the learned magistrate's approach falls within the limits of a sound exercise of sentencing discretion. I consider that the learned magistrate should have afforded slightly greater weight to the appellant's plea, but I would not be prepared to intervene on that account alone. To do so would amount to mere tampering with the sentence and simply substitute my exercise of sentencing discretion for that of the learned magistrate.

[16] Appeal ground no. 3 is a complaint that the learned magistrate paid insufficient regard to the appellant's youth. The appellant was 18 years and 7 months old at the time of the offence (and 19 years and 7 months old at the time of sentence). The appellant was a young adult of previously clear record. The courts are always reluctant to send a young first-offender to gaol (see for example, *Coles v Samuels* (1972) 2 SASR 488 at 492, *Smith* (1988) 33 A Crim R 95, *McCormack* [1981] VR 104 at 110 and *Edwards* (1993) 67 A Crim R 486 at 489). In his reasons for sentence, the learned magistrate demonstrated that the appellant's age and previous clear record were at the forefront of his mind. His Worship expressly commented that more mature offenders ("men in their thirties or forties") could expect greater punishment for similar offending than he imposed on the appellant. Nevertheless, the learned magistrate considered that the need to include an element of general deterrence (and to a lesser extent, specific deterrence) in

the appellant's sentence outweighed the appellant's youth and lack of a record of offending.

[17] The prominence given by the learned magistrate to general and specific deterrence forms the basis of appeal ground nos. 4 and 5. It will be apparent from what I earlier indicated as to the need to protect vulnerable young girls from sexual attacks that I do not accept that the learned magistrate gave undue weight to general deterrence as a sentencing objective in the present matter. Mr Gibson's submissions as to specific deterrence have rather more force. The learned magistrate speculated that there was a possibility that the appellant might re-offend in the future while under the influence of liquor. His Worship said:

> "The gaol term will help to remind the defendant that he has to be ever vigilant to ensure that it doesn't happen again if and when he drinks to excess."

[18] I do not consider that such an observation was merited on the materials before the learned magistrate. The appellant had no history of similar offending against young girls and he had apparently not re-offended in the year that had passed between the offence and the date of sentence. I am of the opinion that while the circumstances of the offence fully justified inclusion of an element of general deterrence in the sentence, the same cannot be said for specific or personal deterrence.

[19] Appeal ground no. 6 asserts that the learned magistrate failed to give proper weight to the appellant's prospects of rehabilitation. The learned magistrate

assessed the appellant's prospects of rehabilitation as good subject to the qualification that the appellant would need to keep his consumption of alcohol under control. On the materials before the learned magistrate, such an assessment might be considered generous in the appellant's favour. The pre-sentence report indicates that since leaving school in April 1997, the appellant had only ever worked in paid employment (CDEP) for the first six months after being expelled from St John's College. This suggests that the appellant had led an idle lifestyle at public expense for well over three years. The appellant blamed alcohol consumption for the offence (albeit largely discounted by the author of the pre-sentence report) which occurred at around 10.30 in the morning. It does not appear to me that the appellant's future rehabilitation prospects would be particularly good.

[20] The final ground of appeal (undue weight to imprisonment as the only means of achieving community protection) is in substance a repeat of the complaint that the learned magistrate gave undue weight to the need for general deterrence. It is evident that the learned magistrate considered and rejected alternatives to a sentence of immediate imprisonment.

[21] In the final analysis, I consider that the learned magistrate undervalued the appellant's plea of guilty and took into account the need for specific deterrence without sufficient justification. However, whether considered separately or in combination, these matters do not persuade me that the sentence imposed by the learned magistrate is manifestly excessive. The sentence, while stern for a young first-offender, is not such that this Court

should intervene. Those who are tempted to seek sexual gratification with six year old females should be left in no doubt that they will pay a high price in terms of loss of personal freedom and liberty.

[22] Before leaving this matter, there is one aspect which calls for comment. The learned magistrate had before him a pre-sentence report. This did not include any psychiatric or psychological assessment of the appellant. It would seem to me at least highly desirable that in the case of a sexual attack upon a six year old child that some form of mental health assessment of the offender should be available to a sentencer. In the present case, neither the prosecution nor defence called for such an assessment and the learned magistrate did not seek one on his own initiative.

[23] I have considered whether a psychological and/or psychiatric assessment of the appellant should be sought even at this late stage. Neither counsel for the appellant nor the respondent raised the issue – although when the matter was drawn to their attention both agreed such assessments might be particularly helpful in cases of the present kind. I decided against seeking an assessment in the absence of a proper basis to intervene with the exercise of the learned magistrate's sentencing discretion. In reaching that conclusion, I took into account that more than fourteen months have passed since the date of the offence without the appellant having come to attention for any similar offence. However, I consider that in the usual course of events, an offender who is guilty of conduct of the present kind should

be assessed by mental health professionals to determine the extent of his paedophilic tendencies and to recommend appropriate treatment.

Order

[24] The appeal is dismissed.

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