DF v The Queen [2006] NTCCA 13

PARTIES:	DF 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:	CA 6 of 2006 (20500378)
DELIVERED:	18 July 2006
HEARING DATES:	6 July 2006
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL and RILEY JJ
APPEAL FROM:	Southwood J, Supreme Court sentence SCC 20500378, 21 February 2006

CATCHWORDS:

CRIMINAL LAW – SENTENCING – SEXUAL OFFENCES

Offer to plead guilty to lesser charge not accepted by Crown – fresh indictment – weight to be attached to previous offer to plead guilty – whether plea entered at first reasonable opportunity

CRIMINAL LAW – SENTENCE – SEXUAL OFFENCES

Whether manifestly excessive – whether sufficient weight given to personal circumstances of appellant – appeal allowed.

Criminal Code Act (NT), s 127(1)(b), s 132(2)(c), s 192(3)
Sentencing Act (NT), s 5(2)(j)
Evidence Act (NT), s 21B

Cameron v The Queen (2002) 209 CLR 339 – followed.
Markarian v The Queen (2005) 215 ALR 213 – followed.
R v Marshall [1995] 1 Qd R 673 – followed.
Spencer v R [2005] NTCCA 3 – followed.

REPRESENTATION:

Counsel:

Appellant:	J Lewis
Respondent:	F Hardy

Solicitors:

Appellant:	David Francis & Associates
Respondent:	Office of the Director of Public Prosecutions

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

DF v The Queen [2006] NTCCA 13
No CA 6 of 2006 (20500378)

BETWEEN:

DF
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 18 July 2006)

MARTIN (BR) CJ:

[1] I agree that the appeal should be allowed for the reasons given by Riley J. I agree with the sentence proposed by Riley J.

ANGEL J:

[2] The appellant's plea of guilty was made at the first reasonable opportunity and the learned sentencing judge erred in describing and treating it as belated.

[3] The appeal should therefore be allowed, the learned sentencing judge's sentence set aside, and the appellant should be re-sentenced.

[4] I agree with the sentence proposed by Riley J.

RILEY J:

[5] On 6 December 2005 the appellant pleaded guilty to one count of unlawfully committing an act of gross indecency on a female under the age of 16 years. The maximum penalty for the offence is imprisonment for 16 years, that penalty having been increased from a maximum penalty of imprisonment of seven years in March 2004.

[6] At the time of the offending the appellant was aged 53 years and his victim 15 years. The victim is from Canberra and was on holiday visiting her mother and her sister in Darwin. On 28 December 2004 she stayed the night at her sister's flat. Her sister lives with her boyfriend and his father, the appellant. During the course of the night and the following morning the victim stayed up watching DVDs and playing on a computer whilst the appellant sat in an armchair drinking alcohol. At 5.30 am the victim lay on a couch to go to sleep. The appellant started massaging her feet. She fell asleep for about five minutes and awoke to find the appellant massaging her upper legs. He touched her vagina on the outside of her pants. She pulled her legs away from him and up onto the couch. She kept her eyes closed as she was scared of the appellant. He moved from where he was seated and knelt on the floor beside her couch. He brushed his left hand over her right

arm and touched her breasts on the top of her shirt. At the same time he used his right hand to brush under her shirt, touching her stomach. He then attempted to place his right hand down her pants but she held on to them. He pulled his hand away for a short time and then put his right hand down her tracksuit pants and under her underwear, rubbing his fingers over her clitoris. There is no suggestion that penetration occurred. She did not move as she was scared. The appellant said to her: "You are not asleep, are you?" She did not move or say a word and he then proceeded to lift her shirt and pull aside the bikini top she was wearing and kissed her on the right breast. She said: "Don't. Stop. Leave me alone". He responded: "Please don't tell anyone. You can't tell anyone".

[7] The appellant pleaded guilty on 6 December 2005. He was originally charged with an offence of digital rape and indecent dealing with a child under the age of 16. Prior to the plea being entered the evidence of the victim had been pre-recorded pursuant to s 21B of the Evidence Act and there had been a committal hearing. It was not until the day before the trial that the appellant was offered, and accepted, the opportunity to plead guilty to the less serious offence of committing an act of gross indecency.

[8] On 21 February 2006 the appellant was sentenced to imprisonment for a period of four years backdated to 6 December 2005 to reflect time in custody. The sentence of imprisonment was directed to be suspended after the appellant had served two years on condition that upon his release from prison, and for a period of two years thereafter, he obey the reasonable

directions of the Director of Correctional Services as to residence, employment and counselling and rehabilitation for alcohol abuse. The appellant appealed against that sentence on the primary ground that the sentence was manifestly excessive in all the circumstances. In support of that ground the appellant submitted that the learned sentencing judge erred in that he:

(a) failed to take into account the fact that the appellant pleaded guilty to the said offence at the first opportunity to do so and, instead, found that the appellant had belatedly pleaded guilty to the (offence) of which he was convicted;

(b) failed to give sufficient weight to the fact that the offending behaviour of the appellant which gave rise to his conviction was out of character with the appellant's normal behavioural history and that the appellant was unlikely to reoffend;

(c) failed to give sufficient weight to the appellant's age and lengthy history of previous good character;

(d) found that the interference of the appellant with the victim was not momentary, was persistent and involved more than one act notwithstanding that:

(i) the actions of the appellant constituting the offence did not form part of a number of separate incidents over a prolonged period of time but instead consisted of one incident which occurred over a short period of time;

(ii) the appellant ceased the offending actions immediately upon being asked to do so by the victim;

(e) failed to give any or sufficient weight to the fact that at the time of the commission of the offence the appellant was suffering from depression as a result of his wife's death.

[9] Leave to appeal was granted on 21 April 2006.

(a) - Guilty plea

[10] On 6 December 2005 the appellant entered a plea of guilty to the charge of committing an act of gross indecency contained in an indictment dated that day. The plea came shortly before the trial was due to commence and after the victim had pre-recorded her evidence in accordance with s 21B of the Evidence Act.

[11] The appellant had originally been charged with the offence of having sexual intercourse with another without consent contrary to s 192(3) of the Criminal Code. The indictment also included two offences of indecent dealing contrary to s 132(2)(c) of the Code. The principal allegation against the appellant had been that he had digitally penetrated the victim. Counsel for the Crown acknowledged that the Crown had not been prepared to consider any lesser charge against the appellant until after the victim had pre-recorded her evidence. Once that had occurred there were discussions between counsel and, ultimately, the Crown agreed to accept a plea to the lesser charge of committing an act of gross indecency contrary to s 127(1)(b) of the Code. It was to that charge that the appellant pleaded guilty.

[12] The appellant had earlier demonstrated a willingness to negotiate a resolution of the proceedings. He offered to plead guilty to an offence of

indecent assault. Following the taking of the evidence of the victim he agreed to plead guilty to the offence under s 127 of the Code.

[13] When dealing with this issue the learned sentencing judge said:

> "The offender has also belatedly pleaded guilty to the offence with which he has been charged. However he only did so after a committal and after the victim had given evidence in accordance with s 21B of the Evidence Act. The plea has simply avoided the necessity for a full trial. In the circumstances I have not given the offender the full discount for his plea of guilty."

[14] In the circumstances it was not correct to describe the plea as belated. Prior to the time of entering the plea the Crown was insisting upon proceeding with the more serious charge pursuant to s 192(3) of the Code, an offence of which the appellant maintained he was not guilty. Further, whilst it is factually correct to note that the appellant only entered his plea of guilty after the victim had given evidence, the reason for his failure to plead at an earlier time was because the Crown would not accept a plea to a less serious charge until the evidence of the victim had been taken.

[15] The fact that an offender has pleaded guilty to an offence is a matter to be taken into account in determining an appropriate sentence. By operation of s 5(2)(j) of the Sentencing Act a court is required to consider the stage in the proceedings at which the offender did plead or indicated an intention to do so. The issue for determination in such cases is what weight shall be given to an offer to plead in the particular circumstances of the case.

[16] In *Spencer v R* [2005] NTCCA 3 the Court of Criminal Appeal observed that, in determining what weight should be given to an offer to plead, it is necessary to consider all of the circumstances in which the offer is made. Matters to be considered may include any terms attached to the offer, the time at which the offer is made and the prospects, assessed at the relevant time, of conviction in relation to more serious offences on the indictment. Factors that will determine the extent to which leniency may be accorded those who plead guilty will include whether the plea demonstrates remorse, the utilitarian benefits that flow from the plea, the strength of the Crown case, and the extent to which the plea serves the self-interest of the accused.

[17] In the present case it is relevant that the appellant was willing to negotiate a plea but was unable to do so because the Crown was not then interested. No doubt the reluctance of the Crown to negotiate prior to the taking of the evidence of the complainant was based upon its assessment of the strength of the Crown case. The situation changed following the taking of that evidence and negotiations were then pursued leading to a resolution of the matter. The action of the Crown in declining to consider a lesser charge at the earlier time may have been quite reasonable, however the appellant's willingness to negotiate a resolution of the proceedings, and the fact that there was a subsequent negotiated settlement, is to be considered in his favour: *R v Marshall* [1995] 1 Qd R 673. The circumstances demonstrate a willingness on the part of the appellant to facilitate the course of justice and to take responsibility for his actions and is therefore a matter to be taken

into account in mitigation: *Cameron v The Queen* (2002) 209 CLR 339 at 343.

[18] As the majority pointed out in *Cameron v The Queen* (Gaudron, Gummow and Callinan JJ at 345) the question whether it was possible for a person to plead at an earlier time is not one that is answered by simply looking at the charge sheet. The question is when it would first have been reasonable for a plea to be entered. The plea may indicate matters to be taken into account in mitigation such as remorse and acceptance of responsibility but also may invite a consideration of the willingness of the particular person charged to facilitate the course of justice. As the majority observed:

> "The issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity".

[19] In the same case Kirby J said (363):

> "The test is not the time when theoretically or physically a prisoner might have pleaded. The test is when it was reasonable, in all the circumstances and as a matter of practicality, to have expected a plea of guilty to be announced. That question is to be answered in a reasonable way, not mechanically or inflexibly."

[20] In the present case his Honour gave the appellant credit for his plea but declined to give him "the full discount" because the plea was belated. In my view his Honour erred in proceeding in that way. The plea was made at the first reasonable opportunity. Error having been demonstrated, the appeal should be allowed.

[21] It is necessary for this Court to re-sentence the appellant. Prior to doing so I address briefly the remaining specific complaints made by the appellant.

(b), (c) and (e) - The personal circumstances of the appellant

[22] The appellant submitted that the learned sentencing judge failed to give sufficient weight to various factors personal to the appellant.

[23] The first of those was the fact that the offending behaviour of the appellant was out of character and that he was unlikely to reoffend. There was no dispute that the appellant was previously of good character and the learned sentencing judge acknowledged that to be so. The submission made on behalf of the appellant was simply that "the sentence imposed upon the appellant by the learned trial judge does not appear to give sufficient weight to such factors".

[24] As the respondent points out, the learned sentencing judge dealt with this issue directly. He said:

> "In the offender's favour is his previous good character. Friends of the offender gave evidence that the offender had a good reputation in the community and was well regarded by them. The offending is out of character. There is nothing in the offender's antecedents or criminal history to indicate a predilection for under-age girls or that he has been a risk to the community in the past. The main risk for the offender is his drinking. These comments are confirmed by both the pre-sentence report and the psychological report which has been provided."

[25] There is nothing in those observations or in the balance of the sentencing remarks to support the submission of the appellant.

[26] It was also submitted that the learned sentencing judge failed to give sufficient weight to the appellant's age. Reference to the sentencing remarks reveals that his Honour considered the age of the appellant. It was further submitted that he failed to give any or sufficient weight to the fact that at the time of the commission of the offence the appellant was suffering from depression as a result of his wife's death. In that regard his Honour said:

> "His wife's death affected the offender greatly as his wife was initially misdiagnosed and by the time she was correctly diagnosed as suffering from cancer it was too late to treat the cancer. He has suffered from depression since his wife's death and since her death he has become a heavy and frequent drinker."

[27] No submission was made to his Honour that the mental condition of the appellant was such that the appellant was not a suitable candidate for a sentence which included aspects of general deterrence. Again it is clear that his Honour took into account the matters referred to by the appellant. There is nothing to suggest that he did not accord that sufficient weight.

(d) - The nature of the offending

[28] The appellant submitted that the learned sentencing judge found that the interference by the appellant with the victim was not momentary but, rather, was persistent and involved more than one act. It was submitted that the actions of the appellant did not form part of a number of separate incidents over a prolonged period of time but rather consisted of one incident which occurred over a short period of time. It was also submitted that the

appellant ceased the offending immediately upon being asked to do so by the victim.

[29] Reference to the agreed facts indicates that the view formed of the offending by his Honour was correct. The offending started with the appellant massaging the upper legs of the victim. He then touched the victim's vagina on the outside of her pants. There was then a movement by the appellant when he got up off his couch and knelt down beside the couch upon which the victim was laying. He then brushed his left hand over her right arm and touched her breast on top of her shirt. At the same time he used his right hand and brushed it under her shirt touching her stomach. When he attempted to place his right hand down her pants she held on to them. He pulled away for a time and then again put his right hand down her tracksuit pants and under her underwear. He suggested to the victim that she was not asleep and when she did not say anything in response he pulled her bikini top to one side and kissed her on the right breast. At that point she told him to leave her alone. From that recitation of the facts it is clear that the offending took place over a period of time and involved different acts on the part of the appellant. I see no error in this regard.

Re-sentence

[30] There has been much legislative activity in relation to sexual assaults in recent years. The definition of sexual intercourse has been widened to include penetration of any part of a person's body into the vagina or anus of

another person and also to include cunnilingus and fellatio. Some acts which previously would have been dealt with under provisions of the Criminal Code relating to indecent assault are now dealt with under provisions of the Code relating to unlawful sexual intercourse. For present purposes s 127 of the Code was amended in March 2004 to provide that any person who has sexual intercourse with a child under the age of 16 years or who commits an act of gross indecency upon such a child is liable to imprisonment for 16 years. The previous maximum penalty had been imprisonment for seven years. That increase in penalty was significant and must be taken to reflect the view of the legislature that the pre-existing maximum was inadequate. As the High Court pointed out in *Markarian v The Queen* (2005) 215 ALR 213 (per Gleeson CJ, Gummow, Hayne and Callinan JJ):

> "It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken in balance with all of the other relevant factors, a yardstick."

[31] In light of the dramatic increase in the maximum penalty for the offence of gross indecency, penalties imposed for such offences prior to the passage of the amending legislation will no longer provide guidance for offences under s 127 occurring after the amendments.

[32] In determining an appropriate sentence in this case it is necessary to bear in mind the significant difference in the ages of the offender and the victim.

He was aged 53 years and she was aged 15 years. The conduct of the appellant occurred in circumstances where he was alone late at night with a young girl who was a guest of his son and his girlfriend, the sister of the victim. She was, in that sense, in a vulnerable situation. His conduct was not momentary but, rather, continued on for some time until she asked him to stop. It involved different acts on his part. His conduct was uninvited, unprovoked and unwelcome. Further, it is necessary to bear in mind the significant impact the offending had upon the victim.

[33] On the other hand regard must be had to the matters put in mitigation. The appellant is a 53-year old man without any relevant prior convictions. His offending was opportunistic and was accepted to be out of character for him. He was a man who was otherwise well regarded. It is to the credit of the appellant that he immediately desisted when called upon to do so by the victim. He is entitled to credit for the plea of guilty entered at the earliest available opportunity.

[34] As the learned sentencing judge remarked, there is nothing in the appellant's antecedents or criminal history to indicate a predilection for underage girls or that he has been a risk to the community in the past. The main risk factor for him is his drinking. In those circumstances considerations of personal deterrence are relevant to determining an appropriate sentence. Clearly in cases such as this it is necessary to impose a sentence which reflects the need for general deterrence. People who offend in this way should expect that serious consequences will follow.

[35] But for his plea of guilty I would have imposed a sentence of imprisonment for four years. In light of the plea I would impose a sentence of imprisonment of three years backdated to 6 December 2005 to reflect the time that the appellant has spent in custody. I would suspend the sentence of imprisonment after the appellant has served 12 months of his sentence on condition that upon his release from prison and for a period of two years thereafter he obey the reasonable directions of the Director of Correctional Services as to residence, employment and counselling and rehabilitation for alcohol abuse. I would set the operational period as two years from the date of his release.

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