Melpi v The Queen [2009] NTCCA 13

PARTIES:	MELPI, Henry 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:	CA 7 OF 2009 (20834671)
DELIVERED:	2 November 2009
HEARING DATES:	2 November 2009
JUDGMENT OF:	MILDREN, RILEY & REEVES JJ
APPEAL FROM:	MARTIN (BR) CJ in proceeding 20834671

CATCHWORDS:

Criminal Code (NT), s 192(3)

Veen v R (No 2) (1988) 164 CLR 465; applied

The Queen v Bloomfield [1999] NTCCA 137; *The Queen v Goodwin* [2003] NTCCA 8; followed

The Queen v Talbot (2003) NTCCA 13; referred to

REPRESENTATION:

Counsel:

Appellant:	M Croucher
Respondent:	W J Karczewski QC

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	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

Melpi v The Queen [2009] NTCCA 13
No CA 7 of 2009 (20834671)

BETWEEN:

HENRY MELPI
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, RILEY & REEVES JJ

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 2 November 2009)

Mildren J:

[1] This is an application for leave to appeal against sentence, leave already having been refused by a single Judge of this Court.

[2] On 8 April 2009, the applicant pleaded guilty to one count that on 8 December 2008, at Wadeye, he had anal sexual intercourse with a male child who was then two years of age without consent, contrary to s 192(3) of the *Criminal Code* (NT).

[3] The learned sentencing Judge after hearing submissions, convicted the applicant and imposed a sentence of 10 years imprisonment, which was

backdated to 8 December 2008 to take into account time already spent in custody. A non-parole period of seven years was fixed.

[4] The applicant, who was an 18 year old Aboriginal male at the time of this offence, was living at the Wadeye community with family members at Manthape Outstation. At about midday on Monday 8 December, the applicant whilst at the Manthape Community, approached a number of small children playing outside of the home of a relative. He approached the group of children and singled out the victim who was playing naked.

[5] The applicant is related to the victim and considered to be his uncle. The applicant led the victim a short distance down a sloping embankment towards Manthape Road and into nearby bushland. He took the boy to a position out of sight of the community and there had anal sexual intercourse with him, during which he ejaculated. The victim got away from him and ran back to a nearby residence crying. He ran into the arms of his mother, who noticed blood coming from his anus. She took him to the local clinic. The applicant meanwhile had left the area. He returned to the house where he was staying.

[6] At about 3:00 pm on the same afternoon, he was located by police at this residence. He was arrested and conveyed to the Wadeye Police Station. Subsequently, he was transferred to Katherine and then Darwin to enable him to be interviewed through an interpreter. All accredited interpreters declined to participate. At about 1:50 pm on Thursday 11 December 2008,

the applicant participated in an electronic record of interview with police at the completion of which he was charged and bail was refused.

[7] Swabs were taken from the anus of the victim at the Sexual Assault Referral Centre. When tested by a DNA process, a match to the applicant's DNA profile was found in blood and semen on the victim's body. The victim was medically assisted by a paediatrician. The victim received multiple tears to his anus, resulting in bleeding and swelling. It was not necessary to admit the child to hospital. The learned sentencing Judge noted that, fortunately, the physical injuries had healed successfully.

[8] A Victim Impact Statement from the victim's mother dated 31 March 2009 was tendered. The learned sentencing Judge noted that the victim's mother was very upset about what the applicant had done, as was the rest of the family and that the victim's mother continued to get sad and at times cry.

[9] At the time of sentence, his Honour noted that the child was happy and does not have any memory of what the applicant did to him. His Honour noted, however, that it remains unknown whether there will be any long term effects either because the child may have a memory of what happened or because of other outside influences which might come to bear.

[10] The applicant had prior convictions in Western Australia as a juvenile when he was dealt with in the Kununurra Children's Court for two counts of indecent dealing with a child under the age of 13 years and with deprivation of liberty as well as aggravated burglary. These offences were dealt with on

26 February 2008 and resulted in conditional release orders whilst under supervision.

[11] The circumstances of the prior offending occurred whilst the applicant was residing in the Mirama Community in Kununurra. At about 10:00 pm on 16 November 2007, the applicant attended at an address in the Community in which a one year old female child had been left by her mother on a double bed wearing only a nappy and a shirt.

[12] After the applicant had been at the premises for a short time, he walked off and it was thought that he had left the premises. However, the applicant had gone to the room where the child was lying on the bed. He was discovered because the child's mother heard the child crying and went into the room where she found the applicant lying next to the child and touching the child's lower body.

[13] The applicant had ripped the child's nappy off, leaving the child naked from the waist down. At the insistence of the child's mother and others, the applicant then left the premises. However, the applicant later returned and entered through a rear door and went to a room where the child was asleep in her mother's arms.

[14] The applicant took the child from the mother as she slept, but fortunately, the mother woke up and demanded the child back. The applicant complied and left the premises. Moments later, he was seen spying into the room but fled when other members of the household approached him. It is not known

precisely what the applicant did to the child. On 26 February 2008, he was convicted of indecently dealing with the child.

[15] Between 5:00 am and 6:15 am the following morning, Saturday 17 November 2007, the applicant attended at another residence in the community and entered uninvited through an unlocked door. In those premises, a three year old female child was asleep with her mother on a bed in the lounge room. The child was unclothed. There were a number of other persons also in the premises.

[16] The applicant removed the child from the lounge room without waking the child's mother or the other occupants. Taking the child with him, it appears that he left the house and entered an exterior store room where he pulled down his shorts and began masturbating in front of the child.

[17] It is not known whether he did anything to the child, who began screaming. The screams woke the child's mother and other occupants. The mother opened the door of the store room and saw that the child was seated about 30 centimetres from the applicant who was lying on his side with his pants down masturbating. The child's mother became enraged and struck him with a large stick. The applicant fled but was later located by police asleep in another house. He received a broken arm as a result of the mother's attack.

[18] On 26 February 2008, he was dealt with in the Kununurra Children's Court for a number of offences, including deprivation of liberty and indecently

dealing with a child under the age of 13 years. At the time that the Kununurra Children's Court dealt with the applicant, he had been in custody since 17 November 2007. Orders were made which effectively released him to reside at Port Keats under supervision. It was in these circumstances that the applicant moved to the Wadeye community in March 2008.

[19] The applicant, who is now aged 18 years, has received limited schooling to about year 7, but he is, in effect, illiterate. He is unable to read and experiences significant difficulty in writing his name. Notwithstanding his limited education, a psychiatrist who examined him assessed him as being of normal intellectual ability. In the opinion of the psychiatrist, there are no signs of mental disorder. There is nothing to indicate an organic impairment of brain function.

[20] During the examination by the psychiatrist, the applicant was reluctant to talk about various matters, including men's business which the applicant had been through and about which he became furtive and mumbled when questioned.

[21] Perhaps this may have been due, in part, to the circumstances in which the psychiatrist examined the applicant, which were less than ideal. The psychiatrist understood that having been through men's business the applicant was entitled to have a girlfriend but he was too shy and that he thinks that girls do not like him.

[22] The learned sentencing Judge noted that it appears that the applicant was, generally speaking, shy and withdrawn and gave the psychiatrist a clear history of severe social anxiety. That anxiety was of such a magnitude that the applicant had been unable to form relationships with peers of either sex. In the opinion of the psychiatrist, the applicant had not formed an adult sexual identity.

[23] The learned sentencing Judge accepted that the applicant was immature and was satisfied that his social development had lagged behind his age to a significant extent. The learned sentencing Judge noted that there may be many factors which produced this slow social development, but he accepted what he was told by the applicant's counsel that as an 11 and 12 year old he was the victim of sexual predatory activity by a man in his late teens. The applicant, through his counsel, told the Court that he was a victim on about six occasions. At the age of 13, the applicant started to use cannabis.

[24] The psychiatrist was of the view that the applicant does not have a full mental disorder, but that unless something dramatic was done the applicant was likely to continue to re-offend.

[25] The learned sentencing Judge noted that although the applicant had some understanding that what he did was wrong and that he was ashamed of it, which gave a glimmer of hope, in reality at the present time the applicant's future was bleak.

[26] Noting that the applicant had been alienated from both of the Aboriginal communities to which he belonged, the learned sentencing Judge doubted that the applicant fully comprehended the enormity of his crime or had any true feelings of guilt.

[27] In this current mental state and immaturity the learned sentencing Judge assessed the risk of re-offending in a similar way as high. His Honour noted that had it not been for the applicant's plea of guilty, he would have imposed a sentence of 13 years imprisonment.

[28] The proposed grounds of appeal are as follows:

> **Ground 1**
>
> The learned sentencing Judge erred in failing to give any or sufficient weight to the applicant's stunted social and sexual development or his youth and immaturity.
>
> **Ground 2**
>
> The learned Judge erred in failing to moderate the weight to be accorded to general deterrence, condemnation and/or punishment in view of the impulsive nature of the offending, the applicant's stunted social and sexual development or his youth and immaturity.
>
> **Ground 3**
>
> The sentence was manifestly excessive.
>
> **Ground 4**
>
> The learned Judge erred in linking this young and afflicted applicant's offending with a need to deter "other young and older

men who are tempted to commit crimes like [the applicant's] with long sentences of imprisonment".

Grounds 1, 2 and 4

[29] Grounds 1, 2 and 4 were argued together. So far as these grounds are concerned, counsel for the applicant submitted that the learned sentencing Judge erred in failing to give any sufficient weight to the applicant's stunted social and sexual development or to his youth and immaturity.

[30] I am unable to read his Honour's sentencing remarks in such a way as to indicate that he failed to take those factors properly into account. It is not the case that no weight must be given to youth and immaturity even in the case of serious offending. In *The Queen v Goodwin*,[1] this Court observed:

> There is a well established line of authority to the effect that in the case of serious offending the youth of the offender is not the prevailing consideration in the sentencing. A number of cases are collected in the judgment of this Court in *Serra* (1996) 92 A Crim R 511; see also *Bloomfield* [1999] NTCCA 137 at paras 21 and 34. It is well established that if a young offender commits a criminal offence like an adult then that justifies sentencing him or her in a fashion more akin to an adult. Where crimes of considerable gravity are committed the protective function of a criminal court would cease to operate unless denunciation, general deterrence and retribution are significant sentencing consideration even in respect of juveniles: *Pham v Lee* (1991) 55 A Crim R 128 at 135; *Nichols* (1991) 57 A Crim R 391 at 395; *Hawkins* (1993) 67 A Crim R 64 at 66; *Gordon* (1994) 71 A Crim R 459 at 465; *AEM, KEM & MM* [2002] NSWCCA 58 at paras 95-102. As the Director of Public Prosecutions submitted in the present case, the offence in this case is by its nature an adult crime. It must be denounced by the Courts by the imposition of appropriate penalties.

[1] [2003] NTCCA 8 at [11].

[31] That passage was cited by this Court with approval in *The Queen v Talbot*.[2]

[32] Although this particular offence is not peculiarly by its nature an adult crime, nevertheless the principles there stated are appropriate for a crime of this seriousness.

[33] As to the alleged error where His Honour said, "There are no mitigating circumstances accompanying the commission of the crime", it was submitted that "the applicant's stunted social and sexual development (coupled with his youth and immaturity) which in turn appear to have given rise to his impulsive offending in light of his physical maturity, were surely factors that mitigated the seriousness of the crime".

[34] In my opinion, the learned sentencing Judge, when referring to a lack of mitigating circumstances accompanying the commission of the crime, plainly was not saying that there were no mitigating circumstances at all. Clearly, there were and indeed the learned sentencing Judge made a specific and generous allowance for the applicant's plea. That is not to say that the circumstances of the crime itself was accompanied by any circumstances of mitigation.

[35] It was submitted that in the circumstances of this case, the applicant was in a very narrow class of young and afflicted persons, in respect of whom general deterrence was not a consideration of any moment because of his inability to be deterred in the same way as an older, more mature, less

[2] (2003) NTCCA 13 at para 20.

afflicted person might be. I do not think there is any substance in that submission. As was said in the case of *Bloomfield*:[3]

> There is a point at which the seriousness of the crime overrides the mitigating factor of youth (*Brown* (1994) 73 A Crim R 353 at 366; *Nichols* (1991) 57 A Crim R 391; *Than* (1991) 55 A Crim R 128 at 135; *Hawkins* (1993) 67 A Crim R 64; *Gordon* (1994) 71 A Crim R 459.

[36] So far as the immaturity of the applicant is concerned, there is no doubt that the learned sentencing Judge was well aware that the applicant had a superficial understanding that what he did was a bad thing and that he was ashamed because he superficially understood that other people disapproved of what he did.

[37] The learned sentencing Judge said:

> You understand that you are alienated from both communities. However, I doubt that you fully comprehend the enormity of your crime. I also doubt that you, by reason of your lack of full understanding, have any true feelings of guilt. In your current mental state and immaturity, I assess the risk of your offending in a similar way as high. Protection of the community and particularly protection of children is of paramount importance.

[38] As was said by Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v R (No 2)*[4]:

> However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of

[3] [1999] NTCCA 137 at para 21.
[4] (1988) 164 CLR 465 at 476-477.

> others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guidelines to the appropriate sentence but sometimes they point in different directions. And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.

[39] The same can be said about an offender who, whilst not suffering from a mental abnormality, is by reason of his lack of maturity less able to understand the enormity of his crime. This is particularly so where the learned sentencing Judge forms the view on proper evidence that there is a likelihood, indeed a strong likelihood, of re-offending in the same way in the future. In my view, it has not been shown that the learned sentencing Judge erred.

[40] As to ground 3, the manifestly excessive ground, in my opinion, the sentence actually imposed was not manifestly excessive and was within range.

[41] I would grant leave to appeal but dismiss the appeal.

Riley J:

[42] I agree. I would add that care must be taken in considering sentencing remarks that are delivered ex tempore and particularly so when they are structured in a way designed to address a particular offender. It is, in my

view, inappropriate to treat such remarks as if they were part of a carefully constructed judgment delivered in the fullness of time.

[43] The use of language in such a case will necessarily be less precise. The circumstances in which such remarks are made need to be borne in mind when considered in an appellate context. The sentencing remarks in this case were both ex tempore and addressed to the offender and must be viewed by this Court accordingly. I agree with the orders proposed by Mildren J.

Reeves J:

[44] And I agree.
