Melville v The Queen [1999] NTSC 56

PARTIES:	ROBERT TODD MELVILLE v THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SCC 127 of 1992 (9251364)
DELIVERED:	20 May 1999
HEARING DATES:	19 May 1999
JUDGMENT OF:	KEARNEY J

CATCHWORDS:

CRIMINAL LAW –
Sentencing – reopening sentencing under statutory power – appeal against sentence earlier dismissed – effect of High Court subsequent ruling that basis of that appellate decision erroneous – nature of legal error which may be relied on to re-open sentencing – factors in imposing sentence under s 112(2)(b) of the *Sentencing Act* (NT).

Sentencing Act (NT), s 112(1)(a), s 112(2)(b)

Melville v The Queen [1999] NTSC 55, applied.
Melville v The Queen (unreported, Court of Criminal Appeal (NT), 27 March 1995), referred to.
Siganto v The Queen (1998) 159 ALR 94, referred to.

REPRESENTATION:

Counsel:

Applicant:	R J Coates
Respondent:	M J Carey

Solicitors:

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

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Melville v The Queen [1999] NTSC 56
No. SCC 127 of 1992 (9251364)

BETWEEN:

ROBERT TODD MELVILLE
Applicant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 20 May 1999)

[1] I rule today on Mr Coates' oral application yesterday for leave to apply out of time to re-open the sentencing of the applicant on 18 November 1993, under s 112 of the *Sentencing Act* (herein 'the Act'); and, on that re-opening, to have a lower sentence imposed pursuant to s 112(2)(b) of the Act.

Background to the application

[2] I need not dwell at length on this aspect, because the background is fully set out in pars [4]-[11] of the judgment of the Court of Criminal Appeal of 19 May 1999, in proceedings CA7 of 1994; see [1999] NTSC 55. That Court there held that while it had no jurisdiction to entertain an identical

application under s 112 by the applicant, it was open to him to approach the learned trial Judge, or another Judge of this Court, for leave to extend time to apply under s 112. Hence this application, made urgently yesterday, soon after that Court's decision was delivered.

[3] Without objection from the Crown, Mr Coates sought to rely, in support, on the written materials and submissions the applicant had relied on before the Court of Criminal Appeal on 26 March 1999, on the identical application. I gave the applicant leave to rely on those matters; in the result, this application is founded on the same basis as the application to that Court – the application of 25 February 1999, the applicant's supporting affidavit of 25 February, the submissions to that Court on 26 March, and the materials placed before it.

The relief sought

[4] The applicant was sentenced on 18 November 1993. His appeal against sentence was dismissed by a Court of Criminal Appeal on 27 March 1995. Thereafter, he instituted no further proceedings until his application under s 112 of the Act to the Court of Criminal Appeal on 25 February 1999.

[5] An application under s 112 to re-open sentencing proceedings is required to be made within 28 days after sentence "or such further time as the court allows"; see s 112(3)(b)(ii).

[6] An application for leave under s 112(3)(b)(ii) to apply within an extended time, may be made "at any time". It is common ground that the applicant's

application of 25 February 1999 in the Court of Criminal Appeal is now to be treated as having been made in this Court, yesterday. An extension of time sufficient to enable the applicant to apply to re-open the sentencing proceedings of 18 November 1993 is therefore the first item of relief which he seeks. I will rule on this aspect, after considering the merits of his application to re-open those proceedings. I should say, however, that the applicant made this application under s 112 promptly (albeit initially to the wrong court) after he became aware that on 3 December 1998 the High Court in *Siganto v The Queen* (1998) 159 ALR 94 had overruled the basis of the decision of the Court of Criminal Appeal of 27 March 1995, dismissing his appeal.

Matters relevant to the application to re-open

[7] The applicant relies on s 112(1)(a) of the Act. He contends that the sentence imposed on him on 18 November 1993 by the learned trial Judge can now be seen, in light of the High Court's decision in *Siganto* (supra), to have been "a sentence that is not in accordance with the law."

[8] I note the views expressed, dicta, by two of the judges in the course of the Court of Criminal Appeal decision yesterday (Kearney and Priestley JJ) to the effect that –

> (1) A Judge of this Court entertaining an application under s 112 to re-open the sentencing proceedings of 18 November 1993, should now treat as established fact the conclusion reached by the Court of Criminal Appeal on 27 March 1995 that the learned trial Judge, when sentencing on 18 November 1993, made the legal error on which the applicant now relies – namely, that his Honour had treated as an aggravating

circumstance the distress occasioned to the victim by having to give evidence on five occasions.

(2) Section 112(1)(a) of the Act enables proceedings to be re-opened to correct a legal error of the type in (1) above on which the applicant now relies.

I apply that approach.

Conclusions

[9] Although it is important that an application such as this be dealt with by the sentencer, where practicable, the learned trial Judge in this case is out of the jurisdiction until the end of this month. A review of the merits of the application shows that there is an element of urgency in dealing with the application. Accordingly, I entertain and deal with the application.

[10] The facts and circumstances relating to the applicant's crime – an aggravated sexual assault on 12 March 1991 – were recounted at length by the learned trial Judge when sentencing the applicant on 18 November 1993. It is unnecessary to relate them again in any detail here. Suffice to say that the applicant unlawfully entered a flat at night, intending to steal, and carried out that crime. Later, he re-entered the flat, where the victim lay alone and asleep, placed a pillow over her head, and threatened her with a knife, and with death if she looked at him or made a noise. Having intimidated her by these means, he attacked her sexually, and penetrated her twice. Clearly, this was a very serious example of this serious crime, which carries imprisonment for life as a maximum punishment.

[11] As noted in par [8], I accept that the decision of the Court of Criminal Appeal of 27 March 1995 establishes that his Honour erroneously treated the distress occasioned to the victim by the fact that she had to give evidence on five separate occasions, as an aggravating factor when sentencing.

[12] Having reviewed meticulously the facts and circumstances of the crime and the applicant, his Honour imposed a sentence of 12 years imprisonment, with a non-parole period of six years, to take effect from 12 November 1993. In 1993 the *Sentencing Act* was not in force, and so the mandatory non-parole period now provided for in s 55 did not apply. On re-opening the sentencing proceedings of 1993 under s 112(1)(a), the applicant is to be dealt with according to the sentencing law as it stood at that time.

[13] I do not consider that in imposing a sentence under s 112(2)(b) of the Act, I can take account of the references handed up to the Court of Criminal Appeal on 26 March 1999 for the purpose of showing that the applicant has now been substantially rehabilitated, and a sentence imposed under s 112(2)(b) should be less than his original sentence. In the present case, in my opinion, what is required under s 112 of the Act is an assessment of the effect of the identified legal error on the original sentence, and an adjustment of that sentence to take account of that error. This approach is generally supported by the wording of s112(2)(c) of the Act. I consider that the exercise required by s 112(2)(b) of the Act is not the same as a re-sentencing on appeal under s 411(4) of the *Criminal Code*, as was the case, for example, in *Siganto v The Queen* [1999] NTSCCA 52.

[14] There can be no doubt that the sentencing error - which I must take to have occurred – would have resulted in the imposition of a sentence higher than that which otherwise would have been imposed by the learned trial Judge. I consider it is clear from the emphasis given in his Honour's sentencing remarks, that he must be treated as having given considerable weight to the distress occasioned to the victim by having to give evidence on five occasions; in other words, it would not have been an inconsiderable aggravating factor, when sentencing. In light of his Honour's sentencing remarks as quoted in par [7] of the decision of the Court of Criminal Appeal yesterday, I consider that that error in approach would have led to a sentencing error of the order of 12 months in the head sentence, and of about 6 months in fixing the non-parole period.

[15] Bearing in mind the views of the Court of Criminal Appeal of 19 May 1999, referred to in par [8], I consider that there was legal error at the time of sentencing, of the type earlier mentioned; and that this led, in terms of s 112(1)(a) of the Act, to the sentencing court failing 'to impose a sentence that the court legally should have imposed'. In the light of that conclusion, I consider that the time to apply to re-open should be extended under s 112(3)(b)(ii) of the Act, and the sentencing proceedings of 18 November 1993 should be re-opened. I do not consider that "the matter should more appropriately be dealt with by a proceeding on appeal", as it is put in s 112(1), even if such a proceeding were open.

Orders

[16] In light of the foregoing remarks I make the following orders –

(1) Pursuant to s 112(3)(b)(ii) of the Act, the application to extend time to the extent necessary to enable the application made on 19 May 1999 to re-open the sentencing proceedings pursuant to s 112(1)(a), to be entertained, is granted.

(2) Pursuant to s 112(3), the application to re-open the sentencing proceedings of 18 November 1993 is granted.

(3) Those sentencing proceedings having been re-opened, pursuant to s 112(2)(b) of the Act the following sentence is imposed in lieu of the sentence imposed on 18 November 1993, namely:

> The applicant is imprisoned for 11 years; a nonparole period of 5½ years is fixed; both sentence and nonparole period are to be deemed to have commenced from 12 November 1993.

(4) Pursuant to s 112(2)(c) of the Act, the sentencing imposed on 18 November 1993 is amended to the extent necessary to take into account the sentence imposed in order (3) above; that is to say, the head sentence of 12 years imprisonment imposed on 18 November 1993 is amended to one of 11 years

imprisonment, and the nonparole period of 6 years then fixed is amended to a period of 5½ years.

[17] Orders accordingly.

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