Calma v Winzar [1999] NTSC 129

PARTIES:	ANDREW JASON CALMA
	v
	KEVIN DAVID WINZAR
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICATION
FILE NO:	JA 51 of 1999 (9817527)
DELIVERED:	19 October 1999
HEARING DATES:	14 October 1999
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal – criminal law – breach of suspended sentence – whether breach aggravated because second offence is of similar kind

Appeal – criminal law – not manifestly excessive – sentencer entitled to have regard to circumstances of breach but not to use to specificially increase sentence.

Appeal – criminal law – sentencing principles – proportionality – regard must be had to the objective circumstances.

Appeal - criminal law – sentencing – no element of double punishment if court decides to breach bond – failure of court of first instance to carefully weigh mitigating factors against the circumstances of the breach.

TEXTS:

1. *Fox and Freiberg, Sentencing,* first and second editions
2. *Ruby on Sentencing*, second edition, Butterworths

LEGISLATION

1. *Sentencing Act*

CASES

1. *The Queen v Miyatatawuy* (1996) 6 NTLR, distinguished.
2. *R v Mulholland* (1991) 1 NTLR 1, discussed.
3. *R v Gray* (1977) VR 225, followed.
4. *R v Richards* (1981) 2 NSWLR 464, referred.
5. *R v McInerney* (1982) 46 SASR 111, referred.
6. *Driver v R* (1989) 97 FLR 23, referred.
7. *Veen v The Queen, No 2* (1986) 164 CLR 465, followed.
8. *Baird v The Queen* (1991) 104 FLR 113, applied.

REPRESENTATION:

Counsel:

Appellant:	Mr K Kilvington
Respondent:	Mr J Birch

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid
Respondent:	Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Calma v Winzar [1999] NTSC 129
No. JA 51 of 1999 (9817527)

BETWEEN:

ANDREW JASON CALMA
Appellant

AND:

KEVIN DAVID WINZAR
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 19 October 1999)

[1] This is an appeal against sentence. The appellant had pleaded guilty to aggravated assault on Natasha Nasavera, the circumstances of aggravation being that the appellant was a male and that Natasha Nasavera was a female, and that Natasha Nasavera was indecently assaulted. The offence occurred on 22 August 1998.

[2] The facts were somewhat unusual. The victim lived in a flat at 18 Cawood Crescent, Alice Springs with her boyfriend and the appellant also lived in this flat at sometime prior to the date of the offence. The appellant had a separate bedroom. He was Ms Nasavera's boyfriend's second cousin. There was a normal flatmate relationship between the appellant, the victim and

her boyfriend and the three socialised together. Eventually the appellant left the flat on amicable terms and moved to another address.

[3] On the evening in question the appellant went out and became heavily intoxicated. He could not remember why, but he was dropped off at the victim's flat. He believed that he knocked on the door and yelled out a few times without result. He knew the flat had a broken window where glass had been replaced by a piece of broken chipboard which was easily removable. He removed it and entered the flat intending to stay in the spare room, which I presume was the room he had formerly occupied.

[4] After entering the flat, he turned the lights on. He took his shoes off in the kitchen and went to the spare room where he removed his shirt. He called out to the victim but there was no response. He then entered the victim's bedroom. The victim was asleep therein, as was her ex-boyfriend and a young child. The appellant went up to her, spoke to her, called her name and commenced stroking her hair and her head. He licked her on the face, the lips and the neck, and then he put his legs on either side of her. The appellant admitted, via his counsel, that this was for sexual gratification.

[5] The victim awoke and called for the ex-boyfriend. The appellant immediately left the bedroom and went to the spare room. It is not clear what happened after that, but he left the premises.

[6] The appellant claimed to have no memory of the assault in the bedroom. The matter initially proceeded as a defended matter, but after hearing the

victim's evidence, the appellant decided to change his plea and a plea of guilty was entered.

[7] In sentencing the appellant, the learned Stipendiary Magistrate observed that:

> It is difficult to imagine a more terrifying offence for a woman, particularly one with a young child next to her, to be awoken by someone in these circumstances, and I note that the defendant for some reason put his legs on either side of her which restricted her movement. I note that the defendant desisted when the boyfriend awoke and that no further actions took place after that which makes the offence more serious. He left the premises as soon as he realised what was going on.

[8] The appellant was aged twenty-two years of age at the time of the assault, and is single. He grew up in Alice Springs and completed his education at the Alice Springs High School to grade 10, finishing in 1991. Subsequently he did an apprenticeship as a painter and decorator. In 1998, he was working full-time, as well as doing a building and construction course at the Centralian College.

[9] After his arrest for this offence, the appellant was bailed and went north seeking station painting work. He then got a full-time job in Darwin in February 1999. He saved up his money to pay for the fare to come to Alice Springs to meet his court commitments.

[10] Through his counsel, the appellant said that he was fully aware now that what he had done was wrong. After hearing the victim's evidence, which he accepted was truthful, he expressed remorse and regret for his actions.

[11] The appellant's counsel said in mitigation that since the offence the appellant had rarely gone out, that he had only gone out with his father when drinking, and that he drinks mainly at home at the end of the week. He has tried to live a quiet and modest life, concentrating on his work.

[12] A victim impact statement was tendered. The learned Magistrate noted that there had been 'some effect' on the victim because the victim did not realise who it was at the time of the assault.

[13] The learned Stipendiary Magistrate sought a report from the Correctional Services Department to see if the appellant was suitable for a home detention order. The report was positive. The employer was supportive of the appellant, as was the appellant's family. The appellant had agreed to attend drug and alcohol counselling.

[14] The learned Magistrate was made aware that at the time of committing this offence, the appellant was serving a suspended sentence imposed by Angel J on 11 October 1996. In those proceedings the appellant had pleaded guilty to four counts of carnal knowledge of a girl under the age of sixteen years and one count of maintaining an unlawful sexual relationship with a girl under the age of sixteen years.

[15] In that matter the appellant had met the girl in question when staying with his aunt and uncle in Darwin. The appellant and the girl became boyfriend and girlfriend. When sexual intercourse began, she was initially fourteen years of age and he was then eighteen. All but one of the offences alleged

sexual intercourse at a time when the girl was fifteen. His Honour sentenced the appellant to twelve months' imprisonment, which his Honour suspended forthwith upon the appellant entering into a good behaviour bond for two years, in the sum of $1000 on his own recognizance.

[16] Her Worship considered this factor to be very important to her sentencing process. Her Worship said:

> The information provided to me is on 11 October 1996 the defendant was sentenced to 12 months' imprisonment, suspended upon his entry into a good behaviour bond for 2 years. That bond was still effective at the time of committing this offence for which I must sentence him.
>
> Counsel for the defendant has made submission (sic) with regard to the offence which resulted in that sentence in 1996 and has noted that it may well be that the sentence imposed was a heavy one. I do not think that I can take into account any views which may have been expressed with regard to that sentence.
>
> What I must take into account is the fact that at the time of committing this offence, the defendant was on a suspended sentence for an offence which could be considered to be an offence of a similar kind, in that it was an offence involving, or of a sexual nature, although I note that on that occasion the sexual intercourse apparently was with consent.
>
> I have looked very carefully at the question of what sentence should be imposed in this matter. I am of the view that the facts of the matter are such that a sentence which deters not only the offender, but also other people from similar offending, must be imposed.
>
> I have taken into account the fact that the defendant has been assessed as being suitable for a home detention order. However taking into account all of the facts in this matter, and in particular, the fact that at the time of committing this offence, the defendant was on a suspended sentence from an offence of a sexual nature I do not consider it would appropriate to suspend the period of imprisonment which I consider should be imposed. I do not consider it would be

> appropriate to suspend it, even upon an order for a home detention order.
>
> I consider the nature of the offence is such that a period of imprisonment must be imposed and served.

Her Worship then imposed the sentence to which I have already referred.

[17] The grounds of appeal are set out in the amended notice of appeal, and they are as follows:

(a) that the sentence imposed by the learned Stipendiary Magistrate was in all the circumstances manifestly excessive;

(b) that the learned Stipendiary Magistrate gave undue weight to the prior convictions of the appellant when sentencing him;

(c) that the learned Stipendiary Magistrate gave undue weight to the fact that the appellant was on a suspended sentence at the time of the offence;

(d) that the learned Stipendiary Magistrate imposed a sentence of imprisonment which was not proportional to the objective circumstances of the offence;

(e) that the learned Stipendiary Magistrate failed to properly consider the appellant's prospects of rehabilitation and placed undue emphasis on the need for deterrence;

(f) that the learned Stipendiary Magistrate:

(i) failed to properly consider the appropriateness of a home detention order; and

(ii) failed to give proper reasons for rejecting a disposition of House Detention.

[18] The nub of Mr Kilvington's submission is that the learned Stipendiary Magistrate gave undue weight to the fact that the appellant was on a suspended sentence at the time the offence was committeed. Mr Kilvington submitted that the suspended sentence was of a different character because it was not a crime of violence and that this was the appellant's first conviction for a crime of violence. I do not accept that there was any error by the Magistrate. The learned Magistrate said that the common feature was that the offences were both sexual offences and that is clearly correct.

[19] Mr Kilvington's second submission was that the learned Magistrate gave such weight to the suspended sentence that she imposed a sentence which was disproportionate to the crime and in effect treated the fact that the sentence was committed whilst on probation as an aggravating factor. Mr Kilvington referred the Court to the judgment of Martin CJ in *The Queen v Miyatatawuy* (1996) 6 NTLR 44 at 48-49, when the learned Chief Justice said:

> The circumstances were further aggravated by the fact that the offender was under a bond to be of good behaviour which had been imposed just five months before for a similar attack on her husband. She was shown to have a dangerous propensity and the question

> therefore arose as to whether it was appropriate to impose condign punishment to deter.

[20] In *The Queen v Miyatatawuy* the defendant in that case was on a bond for attacking her husband and committed a further attack on the same victim. I do not think that is any point of distinction, but the question is whether one should treat what the learned Chief Justice said as being strictly accurate when his Honour said the matter was aggravated by it.

[21] Perhaps in the light of the approach of the Court of Criminal Appeal in the case of *R v Mulholland* (1991) 1 NTLR at page 1, there is a good case for saying that in circumstances such as were being dealt with by the Chief Justice, the actions of the defendant in attacking the very victim in respect of whom she had been previously convicted and placed on a bond, illustrated the extent of her *mens rea* and therefore made her offence an aggravated one.

[22] Mr Birch has referred me to a number of authorities on the use which can be made by a sentencing court as to the fact that the instant offence was committed whilst on conditional liberty. The leading Australian authority is the case of *R v Gray* (1977) VR 225. In the judgment of McInerney and Crockett JJs at page 229, their Honours said:

> Commission of an offence whilst on probation suggests, on the face of it, that the offender had at the time of the commission of the offence no great regard for the law or for his obligations under the probation order, and casts doubt on the likelihood of his being of good behaviour in the future or of his taking advantage of any similar leniency extended to him in respect of the offence constituting the

> breach of probation. The sentencing judge is entitled, indeed bound, to take these circumstances into account. We do not think it is permissible for him to increase the sentence which he would otherwise have imposed, but it is permissible for him to take that circumstance into account in determining whether he should impose a custodial sentence as against releasing the offender on probation or on a common law bond. It may also have some bearing in determining the minimum sentence.

[23] Later, their Honours said at page 230:

> But whether (the sentencing judge) was entitled to increase the sentence which he would otherwise have awarded by reference to the circumstance that the applicant was on probation or on bail, is a matter which we find unnecessary to decide on this application.

[24] Similar principles have been applied when the defendant has committed an offence whilst on bail. See the case of *Gray* just referred to, at page 230; *R v Richards* (1981) 2 NSWLR 464 at 465; *R v McInerney* (1982) 46 SASR 111; and *Driver v R* (1989) 97 FLR 23. Text book writers have also dealt with the topic. See *Ruby on Sentencing*, second edition, Butterworths at pages 138-139; *Fox and Freiberg, Sentencing*, first edition, at pages 467-8; and in the second edition at paragraph 3.721, which says this:

> The nature of the offender's response to previous court orders, particularly those involving conditional liberty is relevant to sentence. These include orders for release on bail, or under a sentencing order, or on parole. The fact that the offender has repeated the offence previously charged whilst entrusted to remain in the community, adds markedly to the gravity of the offence. If already sentenced, the fact of his or her reappearance in court signals the failure of the previous sanction. Though the fact of prior convictions or sentencing orders cannot, of themselves, lead to an increase in the current sentence, they can affect the concurrency rules and the obvious inadequacy of the earlier sentencing measures will serve to indicate what sentence is now more appropriate. The

> hierarchy of sentencing orders found in the *Sentencing Act 1991 (Vic),* s5(3)-(7), indicates what the next sentencing stage might be. This process of escalation is almost inevitable for offenders on intensive correction orders, suspended sentences of imprisonment, community based orders, other forms of conditional liberty or on parole. The fact that offences have been committed while on bail is relevant, 'at least to the extent of assessing the prospects of the applicant's reform'. Such offending may indicate a contempt for the law and suggest to the sentencer that the offender does not intend to obey its command. Offences on bail are also taken as revealing that rehabilitation is an unrealistic hope because the commission of the later offences 'is inconsistent with the existence (in the offender) of a firm purpose of amendment of his ways.

[25] Leaving aside the special kind of case which Martin CJ was dealing with in *The Queen v Miyatatawuy, (supra)* the correctness of which I do not have anything to say, in my opinion, consistently with *Veen v The Queen, No 2* (1988) 164 CLR 465, the proper conclusions to be drawn from the authorities are that the principles of proportionality prevent a court from using this factor as justifying the imposition of a sentence which is more than that which would be justified by the objective circumstances of the offence with which the court is dealing.

[26] However the existence of the breach may justify the court in taking the view that a heavier sentence than that which would otherwise have been imposed, but not heavier than the objective circumstances would warrant, should be imposed either because there is a need to deter or to protect the community, or because the offender has shown that he or she is not taking the court's orders seriously and has no regard for the law and is unlikely to respond to leniency in the future.

[27] These factors look at the need for general and special deterrence and the need to protect the community on the basis that the prospects of rehabilitation have been proven to be less than that warranted, and because the offender has breached the trust given to him or her by the court in dealing with him or her by allowing that person to be released conditionally.

[28] This answers a point made by Mr Kilvington that there is an element of double punishment involved if the court decides to breach the bond. Very clearly there is not. There is nothing in her Worship's sentencing remarks, apart from the sentence itself, which in my opinion is a stern one, to indicate that her Worship erred in her general approach by treating the breach as an aggravating factor.

[29] However Mr Kilvington is correct in his submission that it is not inevitable that conclusions of the kind which I have just mentioned must be drawn in every case. It is still open to the appellant to persuade the court that notwithstanding the breach, leniency should still be afforded to him or her. This must be so because it sometimes happens that notwithstanding proof of a breach, the court may order that no further action be taken. The same factors which are relevant to the action to be taken in respect of breach proceedings are relevant to the considerations as to the weight to be given to the fact that the instant offence was committed whilst on conditional liberty.

[30] Those factors are referred to by the Court of Criminal Appeal in *Baird v The Queen* (1991) 104 FLR 113 at 119, where the Court of Criminal Appeal

referred to, amongst other things, the length of time which the person had left to go in the bond, and whether or not the instant offence which resulted in the breach, was of the same or a similar kind as the offence for which the suspended sentence had been imposed. There are a number of other factors mentioned, not all of which are relevant here; and the Court, I note, did not intend and made it quite clear that it was not intending, to make a list of all of the relevant factors.

[31] In the present case, Mr Kilvington submitted that her Worship did not approach this matter correctly by examining the material placed before her and taking it into account when weighing the fact that the offence was committed whilst on conditional liberty. In particular, he pointed to the following matters;

(a) the offence was committed after the appellant had obeyed the order of Angel J for twenty-two months out of the twenty-four month period, and I note the learned Stipendiary Magistrate had made no reference to this at all;

(b) the submission made which went to show that the appellant had taken his bond seriously and had determined not to breach it;

(c) the remorse and regret shown, and the steps taken since his release on bail, to avoid drinking except with his father or whilst at home;

(d) the submission that the appellant had become somewhat reclusive prior to the offence and had avoided forming relationships with women or girls because he was scared of getting into trouble and breaching his bond;

(5) the instant offence was an aberration caused by excessive alcohol consumption; was relatively minor because he did not, in fact, touch the breast or genitalia of the victim, and he retreated immediately when he was challenged.

[32] At first I was not inclined to interfere with her Worship's decision, which although severe, was not manifestly excessive. But Mr Kilvington has persuaded me that her Worship's decision seems to have reflected a conclusion that any further leniency, either by a home detention order or a partially suspended sentence, was not warranted solely because he had breached his bond and the offence was too serious.

[33] I consider that her Worship should have considered whether the factors which I have mentioned above tipped the scales and it seems to me that she did not do so. I consider that in failing to consider those factors, error has been demonstrated.

[34] I therefore allow the appeal.

[35] The prisoner has been in custody, I am told, for three months and four days, since 15 July 1999. It falls upon me to re-sentence him. I consider that it

would be wrong now to consider a home detention order as this would be excessive. I consider that the appropriate course is to confirm the sentence of imprisonment for eight months, but I order that it be backdated to 15 July 1999, and I further order that it be suspended forthwith. I fix a period of twelve months from today's date as the period under section 43 of the *Sentencing Act*, during which he is not to commit another offence if he is to avoid being dealt with by the Act.
