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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT DARWIN

No. CA 11 of 1993

BETWEEN:

SHANE CHENERY
Appellant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, THOMAS JJ AND GRAY AJ

REASONS FOR JUDGMENT

(Delivered 29 July 1994)

KEARNEY J

I have had the benefit of reading the opinion of Gray AJ. I concur in his Honour's reasons and conclusion, and have nothing to add.

THOMAS J

I have read the draft reasons for judgment of Gray AJ and I agree. In my opinion, the application for leave to appeal should be granted and the appeal should be dismissed.

GRAY AJ

The appellant, who is presently aged 24 years, applies to the Court for leave to appeal against a sentence of 7 years imprisonment for manslaughter passed upon him by Angel J on 4 August 1993. His Honour fixed a non-parole period of 3 years.

Section 417 of the Code requires that notice of application for leave to appeal be given within 28 days of the sentence. The appellant did give a notice within time but, due to being unrepresented, he failed to comply with the procedural requirements of the Supreme Court Rules.

It was not until 15 July 1994 that the appellant swore and filed the affidavit required by the Rules. This affidavit sets out the grounds upon which leave is sought.

When the application came on for hearing, the Court indicated that it was prepared to treat the leave application as the hearing of the appeal. This proposal was accepted by Mr Wild QC who appeared for the Crown, Mr Cassells, of counsel, who offered to assist the appellant as amicus curiae and the appellant, who appeared in person. Accordingly, the appeal proceeded upon the grounds stated in the appellant's affidavit. The Court indicated that it would relieve the appellant from the consequences of non-compliance with the Court Rules.

By an indictment dated 10 June 1993, the appellant was charged with the murder of Gary William Bennett at Mandorah on 14 June 1992. He pleaded not guilty and was tried. By its verdict

returned on 18 June 1993, the jury found the appellant not guilty of murder but guilty of manslaughter. On 4 August 1993 Angel J passed the sentence the subject of this appeal.

The following account of the relevant facts is taken from Angel J's sentencing remarks.

> "At the time of the offence you were a long grass person. You had gone to Mandorah with your then girlfriend and were living at a rough bush camp some distance from the Mandorah Hotel. You and others met the deceased at the Mandorah Hotel on 13 June and started drinking together. Shortly after midday a group including yourself and the deceased went to the camp site. The camp site was some 2 kilometres from the hotel in an area often used by itinerant people.
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> The drinking continued there and everyone became intoxicated. The deceased who was previously known to Steven Thomas Taylor, Troy Anthony Forward and another person, there known as Fat Freddy, began abusing the group and amongst other things called them "dogs", a particularly derogatory prison term. They'd all spent time in prison before.
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> In the course of the afternoon and night the deceased was assaulted by you, by Taylor, by Forward and by Fat Freddy. The deceased was punched and kicked at various times by you and the others. He was struck with sticks and with an iron bar that had cement weights on either end. Three others used weapons. You didn't use any weapon. You told the others not to use weapons, however, you actively participated in the assault, kicking the deceased in the head and body at a time when he was defenceless.
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> The jury verdict means that you didn't intend to kill the deceased or intend to cause him grievous harm, but that you foresaw the possibility of the deceased's death as a consequence of the assault on the deceased by you, Taylor, Forward and Fat Freddy. The jury's verdict may have been arrived at on the view that your initial assault was a contributing cause to the death of the deceased. On the other hand, the jury may have arrived at their verdict on the basis that you aided and abetted Taylor and Forward at least in committing manslaughter. I'm of the view that the latter is the more likely view of the jury.

> On 4 June 1993, Taylor and Forward upon their pleas of guilty to manslaughter were sentenced by the Honourable, the Chief Justice. He took account of their co-operation with the police and the fact that they pleaded guilty at the first opportunity. He accepted that they were sorry for what they'd done. He sentenced each to 7 years imprisonment and fixed a non-parole period of 3 years in each case. He indicated that he was prepared to substantially discount their sentences on account of their assistance to police, and in particular the fact that they were going to give evidence against you.
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> In the course of your trial they gave evidence that on the morning of 14 June 1992, you gave the coup de grace to the deceased. That was the principal plank of the Crown case of murder against you. The jury obviously rejected their evidence as unsatisfactory. If I may say so, I wholly agree with that view.
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> Both counsel for the Crown and your own counsel have very fairly, I think, submitted that an appropriate sentence in your case would be the same as Taylor and Forward. Having considered the matter I agree with those submissions. Whilst it's true that Taylor and Forward received a discounted sentence on account of their co-operation with police and for pleading guilty to manslaughter, your plea of not guilty to a charge of murder was quite proper".

His Honour went on to say that he took into account the fact that the appellant genuinely regretted the events of 13 and 14 June 1992, that he had family support and better rehabilitation prospects than Taylor or Forward, that the appellant had played a less prominent part in the affair than his co-offenders and had endeavoured to dissuade them from the use of weapons. His Honour also noted that the appellant's criminal history was less serious than that of his co-offenders and that the appellant had been in prison only once for breach of a community service order.

His Honour then dealt with various aspects of the appellant's personal history and then imposed the sentence appealed against.

The first and third grounds set out in the appellant's affidavit complain of the learned trial judge's failure to take into account the appellant's remorse and his prospects for rehabilitation. It is sufficient to dispose of those grounds to say that his Honour did expressly take each of those factors into account in the appellant's favour. The remaining grounds all allege in various ways that the learned trial judge failed to distinguish in the appellant's favour between his case and that of his co-offenders who were sentenced by Martin CJ. This was the issue which was argued by Mr Cassells and, to some extent, by the appellant himself. The argument had three main threads. First, it was said that the learned trial judge wrongly concluded that counsel for the appellant had accepted that the appellant should receive the same sentence as the co-offenders. Secondly, it was submitted that the co-offenders had received discounts which were undeserved in the light of later events. Thirdly, it was said that the learned trial judge interpreted the jury's verdict in a way that did not do justice to the appellant's minimal involvement in the violence. I will consider each of these propositions in turn.

As to the first, it can be accepted that the transcript does not reveal any express acquiescence by counsel for the appellant that the appellant should receive the same sentence as the other men. But reference must be made to the following exchange which took place at the outset of Mr Norman's submissions on sentence.

> "MR NORMAN: Your Honour, it is a delicate issue that I raise at the beginning in that normally on a plea of not

guilty no advocate can properly address the court on facts. In this particular case - and on this particular case - Your Honour, I have had a quick word with my learned friend for the Crown, and I would like him to address the court before me as to what the Crown's view is on sentence".

After discussion with the learned trial judge, Mr Wild said he was prepared to accept Mr Norman's suggestion. This passage followed,

"MR WILD: Anyway, Your Honour, as far as the sentence is concerned, I wanted to remind Your Honour with respect of the results of the cases of Taylor and Forward. They both pleaded guilty, they both received sentences of seven years, with a minimum of three to be served, both backdated to commence at the time when their imprisonment commenced, which was 10 months or so ago - 12 months.

They were sentenced on the basis of being involved in the episode and their substantial participation in it which the Crown couldn't differentiate, nor could his Honour, the Chief Justice. Your Honour, they were given credit for pleading guilty implicitly - I don't think it is actually stated that they were given that credit, but no doubt they were - and secondly, they were given credit for the fact that they were then to give evidence in Mr Chenery's trial, as they subsequently did.

Now the facts that you find, Your Honour, subject to my learned friend's address to you, will be, in my submission, consistent with a finding by the jury that this man used improper force in respect of the deceased. Your Honour might take the view that the jury accepted that he did not inflict the final blows which the Crown case as far as the murder charge was concerned, but that nevertheless he played a larger part than he would have it during the course of the afternoon.

HIS HONOUR: With actual foresight of the possibility of death.

MR WILD: Yes, Your Honour. And the company aspect becomes important of course under section 8, in terms of the use of the other weapons etcetera, on the jury finding. Now, Your Honour is entitled to take the more lenient view of the facts that would justify a finding of manslaughter - in favour of the accused, in other words; the prisoner now. In fact, I think Your Honour is bound

> to do that. If Your Honour has some doubt about it, you take the more lenient view.
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> Having said that, Your Honour, it is the Crown attitude that the appropriate sentence is the same sentence as the other men got, having allowed for the fact that the other men are entitled to some discount for their pleas of guilty and for giving evidence. Nevertheless, Your Honour is entitled to take a view, given the jury verdict and the way the evidence ran in this case, that Mr Chenery played a slightly less pro-active part.
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> Now, I put to Your Honour that he should not receive less than the other men, but Your Honour might think he should not receive more, consistent with those matters. It is probably fair to say that he has a less imposing criminal record than the other men. I don't want to say anything more, Your Honour, unless I can be of assistance".

Mr Norman is then recorded as saying that he was obliged to Mr Wild for his comments. Mr Norman then proceeded with his submissions.

After hearing that exchange, it is hardly to be wondered at that his Honour concluded that Mr Norman was not only acquiescent in Mr Wild's proposal but actively supported it.

It is true that at a later stage Mr Norman made a statement which, although not clear, appeared to be an invitation to his Honour to make a non custodial order. Nevertheless, I consider that his Honour was justified in receiving the impression that doubtless explains the passage in his reasons to which I have already referred. However that may be, the conclusion is not warranted that the learned trial judge merely substituted what he believed was counsel's agreement for his own view of the appropriate sentence. His Honour's language makes it clear that he considered the matter for himself. In my opinion, the first contention has not been made out.

The second point was based upon the proposition that, when the co-offenders Taylor and Forward gave evidence at the appellant's trial, their evidence, inferentially, was not acceptable to the jury. The evidence of the co-offenders supported a case of murder and the jury's acquittal was said to show a rejection of this evidence.

It is putting the matter too high to say that the verdict implies a rejection of the co-offenders evidence but, assuming it does, the point has no foundation. The discount given by the Chief Justice was based upon the co-offender's willingness to support the Crown case by giving evidence. This they each did and, in that sense, earned the discount. In any event, a discount given upon a promise to give evidence, cannot be said to depend upon the evidence being accepted. There is, in my view, no substance in the second point.

The third matter involves the learned trial judge's interpretation of the verdict. This is a notoriously difficult matter in cases such as the present where there is more than one view of the facts capable of supporting the verdict. His Honour, having heard the evidence, considered that the most likely explanation of the verdict was that the jury was satisfied that the appellant was a party to the overall violence and aided and abetted the others in its execution.

The correctness of this opinion is, I think, supported by the fact that the appellant took part in the burial of the victim's body and took no step to report the death.

The reasons given by Martin CJ for the sentences passed upon the co-offenders show that his Honour gave those men "a substantial discount" for their pleas of guilty and their willingness to help the authorities by giving evidence for the Crown. The extent of the discount was not expressed in percentage or other terms. However, it seems to me that Angel J was on solid ground in equating the discount given by Martin CJ to the mitigating factors which favoured the case of the appellant.

The sentence itself is, in my view, perfectly appropriate to the culpability of the appellant and the gravity of the crime, for which a maximum penalty of life imprisonment is prescribed.

In my opinion, the application for leave to appeal should be granted and the appeal dismissed.
