---

COURT OF CRIMINAL APPEAL

13 of 2019 (21812276)

DEAN STEWART MCMASTER

Appellant

and

THE QUEEN

Respondent

(Decision)

GRANT CJ
SOUTHWOOD J
BARR J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 12 DECEMBER 2019 AT 10:56 AM

Transcribed by:
EPIQ

BARR J: The applicant contends that his sentence was manifestly excessive, for a number of reasons. His application for leave to appeal against sentence has been referred to this Court pursuant to section 429(2) of the *Criminal Code*.

On 3 June 2019, the applicant entered a plea of guilty to Count 3 in the indictment charging him with assault, with the admitted circumstance of aggravation that it was a male-on-female assault. The offence carried a maximum penalty of five years' imprisonment.

The offending took place in Katherine in the evening of 24 August 2001.

At the time, the applicant was a Northern Territory Police sergeant. He had been posted to Katherine Police Station in or about February of 2001. He was a qualified firearms and defensive tactics instructor. The female victim was a 25-year-old probationary constable. Katherine was her first posting out of recruit training. Because she had not at that stage qualified in firearms and defensive tactics, the applicant had been tasked to train and qualify her before she could assume the role of an operational police officer.

After a social function at the Katherine Police Club on Friday, 24 August 2001, the applicant asked the victim for a lift home. He was intoxicated. The victim drove the applicant to his home, but he then asked her to keep driving. He said he did not want his pregnant wife to see him in his intoxicated state. The victim agreed to take the applicant to her residence until he sobered up and could return home. At the victim's home, the applicant consumed alcohol provided to him by the victim at his request while the victim prepared her 6-year-old son for bed. She then returned to the lounge room where the applicant was sitting on the couch. After a short conversation, the victim went to her bedroom, leaving the applicant in her lounge room. She expected that he would leave and return to his home when he was ready. She went to bed and fell asleep.

Meanwhile, however, the applicant had formed the view that the victim might be prepared to engage in sexual intimacy. As the agreed facts made clear, she was not. The applicant went into the victim's bedroom, on the agreed facts "reckless as to her willingness to reciprocate."

On the evidence, there was no basis for the applicant to have believed that the victim was willing to engage with him sexually. She gave him no encouragement whatsoever. It may be noted that, although she provided him with an alcoholic beverage at his request, she did not participate with him.

The victim was woken by the applicant standing at the side of her bed. He moved towards her until he was lying directly to her side. He put his arm around her in an attempt to cuddle her. She resisted saying "Sarge, don't do this. You don't want to do this." She raised her arms and placed them on the applicant's chest in an attempt to push him off. The applicant then realised that he was mistaken as to the victim's feelings towards him and got off the bed. A short while later, he left the victim's home and returned to his own home.

The victim provided a statutory declaration, made on 3 June 2019, in which she said she was extremely intimidated and frightened of the applicant, because of the significant power imbalance between them. She felt vulnerable and very much alone after the assault and had no one to turn to. She felt very isolated living in Katherine. She had suffered immense emotional trauma since the assault, even though it had happened long ago. She said it had affected her socially and emotionally every day since. She had found it very difficult to maintain relationships and trust people. She struggled with everyday life and suffered low self-esteem.

Counsel for the applicant in the Court below did not dispute the emotional harm complained of by the victim, but contended that these consequences were disproportionate to the offending and not foreseeable from the nature of the conduct engaged in by the accused.

On the agreed facts, the victim remained in the Northern Territory Police until 2013, that is, 12 years after the assault.

The learned sentencing Judge observed that the assault involved an uninvited entry by an intoxicated older man into the bedroom of a young woman, only a short distance away from the bedroom where her 6-year-old child was sleeping, followed by an attempt to initiate some sort of sexual intimacy. The fact that the applicant was in a supervisory role with authority over the victim made the offending more serious. Her Honour nonetheless accepted that the applicant desisted when he became aware that his attentions were not welcome. Her Honour also accepted that there had been no violence, no threats, no physical harm involved in the application of force, and that the application of force was of short duration. She nonetheless characterised the offending as extremely invasive and frightening for the victim: a serious invasion of the victim's personal privacy.

After reviewing the applicant's background and personal circumstances, the sentencing Judge convicted him and sentenced him to perform 400 hours of community work.

Part of the applicant's case in support of the proposed ground of manifest excess is that the sentencing Judge erred in imposing a conviction.

One of counsel's submissions before the sentencing Judge was that the applicant, at the relevant time, was suffering post-traumatic stress disorder and that "can mean that we can understand why he may have behaved in a way that was atypical for him at that point in time." In response to that, her Honour observed in sentencing that there was no suggestion that the offending was caused or contributed to in any way by post-traumatic stress disorder. Nonetheless, her Honour said that she would take into account that, at the time of the offending, the applicant's judgment may have been impaired by grief and upset by a tragic fatal climbing accident involving fellow climbers on Mount Everest some months before.

It is clear from the transcript that counsel for the applicant took her Honour to section 8 of the *Sentencing Act*. It is also clear that her Honour appreciated that she was required to take into account the component considerations set out in paragraphs (a), (b) and (c) of section 8(1) of the *Sentencing Act*. Hence her Honour's observations in the course of sentencing remarks:

> "As is often the case, these factors point in different directions. I accept that, apart from committing this offence, you have been a person of good character, both before and after committing the offence, with a good work record, who has made positive contributions to the community as a police officer, as a teacher and through your work in the Defence Forces Reserve."

> "I do not accept that there are any exculpatory factors in relation to your age, health or mental condition that would make it inappropriate or less appropriate to record a conviction. The offence is not of a trivial nature. Nor do I accept that the defence was committed under extenuating circumstances. Rather, the opposite: you, being older and in a supervisory role over the victim and intoxicated at the time."

Her Honour also referred to the fact that there had been no submission made by counsel for the applicant that the recording of a conviction on count 3 would or would be likely to have any effect on the outcome of disciplinary proceedings which had been commenced after the applicant had been charged with the three charges contained in the indictment. The judge's observation came from counsel's acknowledgement that the applicant did not know whether a conviction would disqualify him automatically or not.

We do not consider that the sentencing discretion miscarried because her Honour determined to record a conviction. Indeed, in addition to the matters referred to above, reflecting her Honour's analysis and characterisation of the offending, we would add that the applicant's uninvited entry into the bedroom of the victim was a significant breach of the trust she had placed in him by permitting him to remain at her house while he sobered up sufficiently to return to his own home. He abused that trust.

In *Carnese v R* [2009] NTCCA 8, the Court of Criminal Appeal approved the statement of Cox J in *R v McInerney* (1986) 42 SASR 125 that "a conviction is a formal and solemn act marking the court's and society's disapproval of the defendant's wrongdoing."

In our opinion, the recording of a conviction was appropriate to mark disapproval of the applicant's wrongdoing in this case.

We turn to consider other aspects of the sentence, in particular, the imposition of a community work order which required the applicant to carry out 400 hours of work.

In that context, it is appropriate to provide some analysis of the offending.

Clearly, there is an issue as to the applicant's inappropriate behaviour. While his pregnant wife was at home, he prevailed upon a junior officer to take him back to her home for the ostensible reason that he wanted to sober up before he went home to his wife. The relationship between the applicant and the victim was such that he was far more powerful: not only was he a police sergeant and she a probationary constable, but she had to satisfactorily complete further training under his supervision and be assessed by him in order that she could pass her probation. There is no evidence that he sought to remind her of those matters in order to persuade her to have sex with him, but they nonetheless weighed heavily in the mind of the victim. The applicant took advantage of being in the victim's house by entering her bedroom and trying to cuddle her as she slept. Much could be said about the failure of the applicant's moral compass, as well as his grossly inappropriate conduct in the employer/employee context, in going into a junior officer's bedroom uninvited in order to initiate sexual relations with her.

However, those matters must be distinguished from his moral culpability or criminality for the male-on-female assault. Importantly, notwithstanding his uninvited entry into the victim's bedroom, he was not charged with the aggravating circumstance of indecency, probably because he put his arm around the victim in such a way that he did not touch her breasts, bottom or genital area. The assault was thus constituted by his touching the victim, by putting his arm around her, but that was the extent of the force applied. Thus, there was no indecency and no physical force causing injury. Moreover, the applicant desisted as soon as the victim reminded him that he was her sergeant and made it clear that she did not agree to have sex with him. Finally, he apologised the next day, although the apology was probably not as full and sincere as the circumstances truly required.

In our opinion, once the "immoral" aspects are put to one side, the offending was a low level assault. While the event may have caused long-term emotional consequences for the victim, the applicant probably gave no thought to consequences of that kind. There is no evidence that he intended or was even reckless in relation to causing such harm.

The delay between the time of commission of the offence, the complaint by the victim and the commencement of the prosecution creates many difficulties in the present case. It must be acknowledged that there are often good reasons for a victim to not complain of a sexual assault or an assault which may have sexual overtones. In the present case, the circumstances of the assaults and the relative positions of the victim and the offender within the Northern Territory Police Force present clear reasons why the victim would have been reluctant to complain. However, in the intervening period of many years, the offender re-established himself as a person of good character and managed to successfully deal with some significantly adverse incidents in his personal life.

Indeed, given the very significant lapse of time between the date of offending and the date of sentencing and the applicant's good behaviour throughout, it would have been open to her Honour to have proceeded under section 12 of the

*Sentencing Act* to have convicted and then discharged the applicant without further penalty.

We consider that the component of the sentence which required the applicant to carry out 400 hours of community work was, in all the circumstances, manifestly excessive.

Accordingly, we grant leave to appeal and allow the appeal in part.

In making the orders which follow, we take into account that the appellant has now carried out approximately 140 hours of community work.

The orders that we make are as follows:

1. We affirm the appellant's conviction.

2. We set aside the order that the appellant perform 400 hours of community work.

3. Pursuant to section 12 of the *Sentencing Act*, the appellant is discharged without further penalty.

ADJOURNED 11:11 AM INDEFINITELY