Mitchell v The Queen [2000] NTCCA 4

PARTIES:	SIMON PETER MITCHELL
	v
	THE QUEEN
TITLE OF COURT:	NORTHERN TERRITORY COURT OF CRIMINAL APPEAL
JURISDICTION:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	CA8 of 1999
DELIVERED:	30 June 2000
HEARING DATES:	10 April 2000
JUDGMENT OF:	MARTIN CJ, ANGEL & MILDREN JJ

CATCHWORDS:

CRIMINAL LAW

Appeal – whether sentence manifestly excessive.

Appeal – general principles – interference with sentencing Judge's discretion.

House v The King (1936) 55 CLR 499 at 504-505, applied
Cranssen v The King (1936) 55 CLR 509 at 519-520, applied
Siganto v The Queen CCA NT 13 May 1999, referred to.

Particular offences – offences against the person - whether a sentencing tariff for rape exists-

Visconti [1982] 2 NSWLR 104 at 107, applied
Jabaltjari (1989) 64 NTR 1 at 20-21 and 32, applied
Mulholland (1991) 1 NTLR 1 at 13, applied
Breed v Pryce (1985) 36 NTR 23 at 27, referred to
Morabito (1992) 62 A Crim R 82 at 86, referred to

Sentencing Act 1995 (NT), s 55(1) and s 63(5)

REPRESENTATION:

Counsel:

Appellant:	S Cox
Respondent:	R Wild QC

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

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

Mitchell v The Queen [2000] NTCCA 4
No. CA8 of 99

BETWEEN:

SIMON PETER MITCHELL
Applicant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, ANGEL AND MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 30 June 2000)

The Court*:*

[1] This is an application for leave to appeal against sentence. The applicant was charged with having sexual intercourse without consent, contrary to s192(3) of the *Criminal Code*. At a late stage of the proceedings, but before the trial began, the applicant entered a plea of guilty. The applicant had spent two periods in custody before he was sentenced. The first was a period of five months from the time of his arrest on 23 November 1998 until he was released on bail on 27 April 1999. The second was a period of about two months from the time he entered his plea on 12 July 1999 until he was sentenced on 17 September 1999. The learned Sentencing Judge imposed a sentence of ten years imprisonment, which his Honour said he arrived at

after taking into account the first period of five months. His Honour backdated the sentence to 12 July 1999 and fixed a non-parole period of seven years.

[2] The grounds of the application are:

(a) that the sentence and non-parole period imposed are manifestly excessive; and

(b) that the learned Sentencing Judge erred in failing to give sufficient weight to the applicant's plea of guilty.

[3] The facts as found by the learned Sentencing Judge are as follows. The victim was walking home at about 4:30 am on Sunday 1 November 1998 when she was approached by a person whom she believed was the applicant. She became concerned and decided not to go home, but rather to go to Melaleuca Lodge in Mitchell Street in central Darwin. As she was walking along Peel Street in the direction of Mitchell Street, the applicant came up behind her, placed his hand over her mouth and pulled her into a yard which is known as "The Backpackers Market". He pulled her to the back of the yard and told her to be quiet. He pulled her to the ground, undid the front of her jeans, pulled her legs apart and pulled aside her underwear. He attempted to penetrate her with his penis, but was unsuccessful. The applicant then performed oral intercourse upon her on two separate occasions. He also penetrated her vaginally once and anally twice using his fingers. When he penetrated her anally with his fingers, she cried out in

pain and he told her to shut up. He then said to her, "Right. Now I want you to suck my cock and then I'm going to fuck you up the arse". He then forced her to perform oral sex upon him and asked her to bite his penis so hard that it hurt him, but there is no evidence that this in fact took place. The applicant then forced her on to her hands and knees and attempted to perform anal sex with his penis, and eventually he penetrated her anus. The assault went on over a lengthy period of time and lasted in excess of an hour. He stopped when it began to get light and let the victim go. The whole incident was an absolutely terrifying experience for the victim. He told her that he could cut her throat and leave her there; to "Shut up, don't say anything or you'll get hurt". At one point, he put his hands around her neck and threatened to hurt her. She suffered physical injuries of bruising and bite marks to the neck. Apart from the suggestion that he could cut her throat, there was no indication that he possessed a weapon of any kind, although the victim was not to know this.

[4] Looking at the incident from the point of view of the victim, one matter which was of major concern was the mood swings which appeared to engulf the applicant. On occasions he was talking of killing himself; he was apologetic, acknowledging that he knew what he was doing was wrong and that he was violating the victim. On other occasions, he was full of threats and demonstrated anger. The victim could not know whether she would be alive at the end of the attack. The learned Sentencing Judge accepted a victim impact statement from the victim. She feels she will never again be

the person she was. She has a fear of being outside, especially at nighttime, but also during the day. She is concerned when people walk behind her and is constantly looking over her shoulder if she is walking alone. She has nightmares; she is very nervous and very suspicious of people, especially men. The impact upon the victim has been significant and will be ongoing.

[5] The applicant had a bad prior criminal record. He has 109 prior convictions in the Northern Territory; two prior convictions in Queensland; five in South Australia and twelve in Western Australia. The applicant had spent substantial periods of time in prison and had only emerged from a period of imprisonment some two and a half months before committing the present offence. The nature of the prior offending involved matters such as unlawful entry, stealing, criminal damage, criminal deception, escape lawful custody and possession of dangerous drugs. The applicant had one assault conviction on 14 June 1990 for which he received two months imprisonment and another for sexual assault in 1987 for which he received a community service order.

[6] The applicant had been in trouble from around the age of ten years and has been in trouble ever since. He was almost thirty years of age at the time of sentencing. He has had a "spasmodic" education and did not complete year eight. He has a daughter aged four and a half years at the time of sentence. Up to the birth of this child, he had never been employed. He took courses in prison, one of which related to metal arc welding which led to a brief

period of employment after his last release from gaol. He left that employment without notice.

[7] The applicant's offending occurred in circumstances where his relationship with the mother of his child had broken down. He attempted unsuccessfully to revive the relationship. When this failed, he went through a period of drug and alcohol abuse. He is insulin dependent and neglected his diet.

[8] The learned Sentencing Judge was unable to accept that the applicant was a prime candidate for rehabilitation. He found that there were only some prospects of rehabilitation. No complaint is made about this finding.

[9] The plea came relatively late in the proceedings, but before the trial commenced. The Crown case was a strong one. The only issue was that of identity. The victim had identified the applicant in an identification parade. There was strong DNA evidence. The applicant had submitted that he had no memory of the offence. This was based on his becoming either hypoglycaemic or hyperglycaemic as a result of his diabetes. The learned Sentencing Judge rejected that submission. He found that the applicant was aware of his offending at all times. There is no challenge now to that finding. His Honour said that he gave a discount for the plea of guilty based upon the saving to the community of the cost of a trial and for relieving the victim from the trauma of having to give evidence. The applicant had, through his counsel, apologised to the victim and his Honour noted that that, together with his plea, was some indication of remorse. However, it is

apparent from these findings, none of which are challenged, that any remorse felt was very late in forthcoming.

[10] No specific error has been demonstrated by Miss Cox, counsel for the applicant. In appeals against the exercise of a sentencing discretion, it is not enough that the appellate court considers that, if they had been in the position of the Sentencing Judge, they would have taken some other course. But if, upon the facts, and notwithstanding that no particular error can be demonstrated, the sentence is unreasonable, unjust, or manifestly excessive, the appeal court may interfere on the ground that a substantial wrong has occurred: see generally *House v The King* (1936) 55 CLR 499 at 504-505; *Cranssen v The King* (1936) 55 CLR 509 at 519-520.

[11] Counsel for the applicant, Miss Cox, submitted that the sentence was manifestly excessive - it "leaps off the page", to use her expression. She sought to compare the sentence in this case with that imposed in *Siganto v The Queen* (Court of Criminal Appeal, NT, 13 May 1999) when, the appeal having been allowed, this Court resentenced Mr Siganto. It was put that the prosecutor had submitted to the learned Sentencing Judge that that case was closest to the present case (Appeal Book p 9), a submission repeated by the prosecutor later (Appeal Book p 63). His Honour heard submissions from both counsel; counsel for the applicant arguing that this case was less serious, the prosecution taking a different view. His Honour indicated that he thought the instant case to be worse, but would consider it further. In the

end result, his Honour did not refer to *Siganto*, nor to any of the other cases to which his Honour was referred.

[12] We consider that the applicant's approach is erroneous. There is no tariff for this offence, as the circumstances involving this offence can vary considerably: cf. *Visconti* [1982] 2 NSWLR 104 at 107 per Street CJ and to this Court's decision in *Jabaltjari* (1989) 64 NTR 1 at 20-21 per Martin J; at 32 per Angel J. See also *Mulholland* (1991) 1 NTLR 1 at 13. There is no warrant for a comparison between a single decision and the case at hand. What might sometimes be helpful in a case like this is a statistical survey of a large number of cases which might assist an appellate court to conclude that a particular sentence is vitiated by error: see *Breed v Pryce* (1985) 36 NTR 23 at 27; but even then it would be erroneous to put too much store on any sentencing survey: cf. *Morabito* (1992) 62 A Crim R 82 at 86

[13] We do not consider that a head sentence of ten years is manifestly excessive in the circumstances of this case. It is true that the applicant had no previous convictions for this offence, but his record was such that the learned Sentencing Judge was entitled to take the view that previous terms of imprisonment had not deterred him and that no leniency was warranted on the basis that an element of self-deterrence was either not warranted or minimal. There was nothing in the appellant's personal circumstances of a mitigatory nature and his Honour was entitled to conclude, as he did, that his prospects of rehabilitation were not good. His Honour was required to give weight to the plea, but because the plea was late and the remorse shown

came late as well, the amount of the discount would not have to be anywhere near the discount which could have been earned by an early plea indicative of full remorse. Whilst the sentence imposed was a stern one, we are not able to conclude that it has been demonstrated to be manifestly excessive.

[14] However, the learned Sentencing Judge, instead of fully back-dating the sentence, said that he took into account the five months spent in remand in arriving at the head sentence. In effect, therefore, the head sentence was one of ten years and five months. Looked at in this way, we would still not regard the head sentence as manifestly excessive, but it gives rise to the difficulty that the non-parole period of seven years is in effect less than the minimum required by s55(1) of the *Sentencing Act*, which requires the court to fix "a period of not less than 70% of the period of imprisonment that the offender is to serve under the sentence". Although the learned Sentencing Judge's order does not, strictly speaking, offend s55(1), it is undesirable that the intent of s55(1) is circumvented in this way. The usual practice is to back-date any sentence, taking fully into account the whole of any period spent on remand, pursuant to s63(5) of the *Sentencing Act*. Of course a sentencer has a discretion not to follow that course, but in our view if that course is not to be followed, there must exist some particular circumstances warranting it, which the sentencer has identified or which are apparent from the circumstances. None exist here, and in our opinion, the course taken was wrong and should now be corrected. This may be done by altering the learned Sentencing Judge's order so that the head sentence of ten years is

deemed to have commenced to begin from 7 February 1999, rather than from 12 July 1999. Otherwise we would dismiss the appeal.
