

R v Fly [2016] NTSC 22

PARTIES: THE QUEEN

v

FLY, James

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 21519417

DELIVERED: 29 April 2016

HEARING DATE: 20 April 2016

JUDGMENT OF: BARR J

CATCHWORDS:

CRIMINAL LAW – Mental impairment – unfitness to stand trial – special hearing – accused not guilty of assault of police officer because of mental impairment – supervision order – nature of supervision order – considerations – no practicable alternative to custodial supervision in prison – hypothetical sentencing exercise – significant cognitive deficits and deteriorating mental state – impulsive conduct directly related to cognitive deficits – moral culpability lessened by mental impairment – general and specific deterrence less relevant factors – community protection – major review of custodial supervision order after twelve months

Criminal Code Part IIA

R v Morton [2010] NTSC 26; *R v Verdins* (2007) 16 VR 269, followed.

REPRESENTATION:

Counsel:

Crown:	C Roberts
Supervised Person:	T Collins
Chief Executive Officer Health:	J Ingrames

Judgment category classification:	B
Judgment ID Number:	Bar1607
Number of pages:	8

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

R v Fly [2016] NTSC 22
No. 21519417

BETWEEN:

THE QUEEN

AND:

JAMES FLY

CORAM: BARR J

REASONS FOR DECISION

(Delivered 29 April 2016)

Introduction

- [1] I now publish my reasons for orders made on 20 April 2016.
- [2] At a special hearing held on 4 March 2016 before Mildren AJ and a jury, Mr Fly was found not guilty, because of mental impairment, of assaulting a police officer in the execution of his duty.¹
- [3] After the jury's verdict, Mildren AJ declared, in accordance with s 43I(2)(a) Criminal Code, that Mr Fly was liable to supervision under Div 5 of the Criminal Code and made an interim order that he be remanded in custody in prison.

¹ The facts are set out in [7] below.

- [4] As a consequence of the declaration that Mr Fly was liable to supervision, the Court was required by s 43Z(a) to make a supervision order under Div 5. The order may be a custodial supervision order or a non-custodial supervision order. Under a custodial supervision order, the supervised person is committed to custody in a prison or in another place which the Court considers appropriate.²
- [5] In the circumstances, I decided to make a custodial supervision order under s 43ZA(1)(a)(i), committing Mr Fly to custody in a prison, namely the Alice Springs Correctional Centre. I was satisfied that there was no practicable alternative given his circumstances (s 43ZA(2)), although it might be possible in the near future to commit Mr Fly to an ‘appropriate place’, or to make an order that he receive treatment or other services at an ‘appropriate place’, subject to receipt of a certificate from the CEO (Health) pursuant to s 43ZA(3) and (4) Criminal Code.
- [6] I now review the events which gave rise to the charge against Mr Fly in respect of which he was found not guilty because of mental impairment. The single count in the indictment charged Mr Fly with an offence contrary to s 189A Criminal Code as follows:

On 4 May 2015 at Alice Springs in the Northern Territory of Australia, unlawfully assaulted Daniel Leighton, a police officer in the execution of his duty.

² Section 43ZA(1) Criminal Code.

[7] The facts relating to the alleged offence were contained in exhibit P1 tendered at the special hearing. In brief, on 4 May 2015, police officers were investigating a suspicious fire at House 42, Indarpa Camp. Mr Fly approached and entered the Community Centre. Constable Leighton ran over to Mr Fly and told him that he had entered a crime scene, and that he should leave. Mr Fly failed to respond and walked towards House 42. When stopped and asked for his name, he responded by growling and then striking the police officer with a half-open fist across his right eye. In doing so he transferred a large quantity of saliva and mucus from his hand to the officer's face and eye. Police officers then ground stabilized Mr Fly. When he was taken to the Watch House, he declined to be interviewed by police. Constable Leighton was obliged to wash his face several times with water and antibacterial gel, and also to undergo a blood test. Follow up blood tests were then required to exclude the possibility of transmission of a communicable disease to the victim.

Psychiatric evidence

[8] I summarize the psychiatric and other medical evidence relating to Mr Fry. According to the agreed medical facts, exhibit P2 tendered at the special hearing, Dr Kevin Smith, specialist psychiatrist, was of the opinion that Mr Fly suffered from a combination of focal and generalised deficits in mental function. That mental impairment was a product of dietary, infective, sniffing (of inhalants), and alcohol related factors, as well as seizure disorder and possibly some form of progressive dementia. Mr Fly may or

may not have been intoxicated with alcohol at the time he struck Constable Leighton, but in either case he qualified for a defence of mental impairment because he showed an inability to control his behaviour which would not have been the case in the absence of his underlying mental impairment.³

[9] The facts set out in the previous paragraph had been extracted from Dr Smith's report dated 28 October 2015. Dr Michael Lowe, specialist geriatrician, reviewed Mr Fly and provided a report dated 21 November 2015. Dr Lowe referred to medical records which showed that Mr Fly had suffered cerebral abscesses in 1999 which had left large calcium deposits in his brain, and which were the focus for future seizures. Dr Lowe's opinion was that Mr Fly had "severe cerebral injury secondary to multiple brain abscesses".

[10] Mr Fly has cognitive deficits in the areas of memory, inhibition and other higher executive functioning skills, as well as language deficits. His cognitive function appears to be progressively deteriorating.⁴

[11] Under s 43ZC Criminal Code, a supervision order is for an indefinite term. However, s 43ZC is subject to s 43ZG, subsection (1) of which requires that, when the Court makes a supervision order, it "fix a term in accordance with subsection (2), (3) or (4) which is appropriate for the offence concerned".

³ The relevant ground of defence is set out in s 43C(1)(c) Criminal Code.

⁴ Report, David Besanko, 18 April 2016 p 4 Pt 5.4.

[12] Subsection (2) of s 43ZG is the relevant subsection. It requires that the term fixed under subsection (1) is to be “equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged.”

‘Sentencing’ considerations

[13] The hypothetical sentencing exercise under s 43ZG Criminal Code requires the Court to assume that the supervised person has been found guilty of the offence charged, and thus by necessary implication that mental impairment was not such as to affect the making of that assumed finding by providing a defence under s 43C(1) Criminal Code. However, normal sentencing principles still require that Mr Fly’s mental impairment and severe cerebral injury secondary to multiple brain abscesses, and the resulting lowered inhibition and impulse control, should be taken into account.⁵

[14] The maximum penalty provided by law for the offence is imprisonment for five years.

[15] All assaults on police officers in the execution of their duty are serious. Mr Fly’s assault on Constable Leighton was unprovoked and involved some disgusting aspects. Because of the involvement of his eye, the officer was rightly concerned as to the possibility of transmission of infection of some

⁵ I respectfully agree with the reasoning in *R v Morton* [2010] NTSC 26 at [46], per Mildren J, as to the application of s 43ZG. See also *R v JW* [2013] NTSC 80 at [27], per Hiley J.

kind. I assessed the objective seriousness of Mr Fly's conduct to have been in the lower mid-range, taking into account the nature and extent of the harm actually caused. In terms of moral culpability, however, Mr Fly's conduct should be considered in the context of his mental impairment. He was suffering a condition which caused him to have a significantly reduced ability to control his aggression. This condition in my view lessened the moral culpability of the offending conduct.⁶

[16] Mr Fly was born on 21 February 1970, and so was 45 years old at the time of the assault on Constable Leighton in May 2015. He had a limited record of prior offending. In December 1990 he had been convicted of being armed with an offensive weapon, for which he was fined. In February 1992 he was convicted for using objectionable words. In February 1998 he committed two offences: disorderly behaviour in a public place and resisting police in the execution of their duty. He was convicted of those matters in October 2001, but no penalty imposed.

[17] Because of Mr Fly's mental impairment, I took the view that his sentencing would not be an appropriate vehicle for either general or specific deterrence.

[18] However, in the hypothetical sentencing exercise required by the Criminal Code, the same mental impairment, and its behavioural consequences, suggested a need to take into account community protection, even though Mr Fly might be under supervision for some time.

⁶ See *R v Verdins* (2007) 16 VR 269, which contained a restatement, in somewhat revised form, of the guiding principles which the Court of Appeal of Victoria laid down in *R v Tsiaras* [1996] 1 VR 398.

[19] Under s 43ZG(2) Criminal Code, I was of the opinion that a term of imprisonment of 12 months would have been the appropriate sentence to have imposed on Mr Fly if he had been found guilty of the offence charged.

[20] Pursuant to s 43ZG(1), I therefore fixed a term of 12 months for the purposes of the supervision order. The term so fixed was backdated and deemed to have commenced on 20 May 2015, pursuant to s 43ZG(4B) Criminal Code.

Conclusion and orders

[21] The formal orders made were as follows:

1. James Fly is subject to custodial supervision and committed to custody at the Alice Springs Correctional Centre pursuant to 43ZA(1)(a)(i) Criminal Code.
2. The custodial supervision order is subject to the condition that Mr Fly is to remain under the care and supervision of, and receive treatment from, the Office of Disability and any other staff, servants and agents of the Chief Executive Officer, Department of Health.
3. The term of 12 months is fixed for the purposes of s 43ZG(1) of the Criminal Code.
4. The term is backdated and deemed to have commenced on 20 May 2015.
5. The appropriate person is to file and serve a report pursuant to s 43ZK Criminal Code on or before close of business 13 May 2016.
6. This matter is adjourned to a review at 9.00 am on 20 May 2016.

7. Liberty to the parties to apply for such further orders, interim or otherwise, as may be required.
