The Queen v Duncan [2015] NTCCA 2

PARTIES:	THE QUEEN v DUNCAN, Sharay
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 14 of 2014 (21419073)
DELIVERED:	9 February 2015
HEARING DATES:	9 February 2015
JUDGMENT OF:	RILEY CJ, SOUTHWOOD & HILEY JJ
APPEALED FROM:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – sentencing – Crown appeals against sentence – manifest inadequacy – whether sentence reflects objective seriousness of offending.

CRIMINAL LAW – sentencing – exceptional circumstances – exercise of discretion – s 78DI *Sentencing Act 1995 (NT)*

Sentencing Act 1995 (NT), ss 78CA; 78DI.

Whitehurst v The Queen [2011] NTCCA 11; *R v Cavenagh-Novelli* [2014] NTCCA 21; *R v Kelly* [2000]1 QB 198; *Griffiths v The Queen* (1989) 167 CLR 372; *Baker v The Queen* (2004) 223 CLR 513, applied.

Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 November 2012; *Owens v Stevens* [1991] VSC 91 (3 May 1991); *R v Tootell* [2012] QCA 273, referred to.

Yacoub v Pilkington (Aust) Ltd [2007] NSWCA 290, followed.

REPRESENTATION:

Counsel:

Appellant:	MN Nathan
Respondent:	GA Georgiou SC and J Hunyor

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Duncan [2015] NTCCA 2
No. CA 14 of 2014 (21419073)

BETWEEN:

THE QUEEN
Appellant

AND:

SHARAY DUNCAN
Respondent

CORAM: RILEY CJ; SOUTHWOOD AND HILEY JJ

REASONS FOR JUDGMENT
Ex Tempore
(Delivered 9 February 2015)

THE COURT:

Introduction

[1] This was a Crown appeal against sentence. On 9 February 2015 the Court allowed the appeal and resentenced the respondent. These are the reasons for so doing.

[2] On 17 September 2014 the sentencing Judge sentenced the respondent to 18 months imprisonment for the offence of unlawfully causing serious harm. The sentence was back dated to 15 September 2014 and suspended forthwith.

[3] The offence committed by the respondent was a level 5 offence under s 78CA(1) of the *Sentencing Act 1995* (NT). It carried a maximum penalty of 14 years imprisonment and, unless there were exceptional circumstances, the Court was required to impose a minimum sentence of three months actual imprisonment.

[4] The Crown appealed against the sentence on the following grounds:

1. the sentencing Judge erred in finding that the circumstances of the case were 'exceptional' pursuant to s 78DI of the *Sentencing Act* so as to displace the minimum mandatory term of imprisonment;

2. the sentencing Judge erred by imposing a sentence which was manifestly inadequate in all the circumstances of the case.

The main issue – manifest inadequacy

[5] The main issue was whether the sentence imposed on the respondent was manifestly inadequate. In our opinion, it was. The appeal was allowed and the respondent was resentenced.

[6] In all Crown appeals, the primary consideration for the Crown should be whether the sentence is manifestly inadequate. If a sentence is not manifestly inadequate the Crown should be very reluctant to exercise its right of appeal. While the principle of double jeopardy has been abrogated for Crown appeals against sentence, little is gained from subjecting an offender to a Crown appeal against sentence if the sentence imposed is not manifestly inadequate.

The facts

[7] The respondent and the victim lived at Kalkarindji. They were in a domestic relationship and have a one year old daughter. On 14 April 2014 the respondent, the victim and some of their friends were drinking alcohol at a drinking spot seven kilometres from Kalkarindji, and they got drunk. The alcohol was purchased from the Top Springs Hotel.

[8] After drinking for some time, the respondent asked the victim to return home with her. He refused. She became very angry and they had an argument. During the course of the argument the respondent threatened to stab the victim with a pen. The victim kicked her in the chest to prevent her from doing so.

[9] The respondent then turned away from the victim and asked her friend for a knife which the respondent had brought with her. As the victim started moving away, the respondent raised the knife to shoulder height, closed her eyes, and stabbed him once in the back. The knife handle broke off in her hand and the full length of the blade remained embedded in the victim's back. The victim then grabbed the respondent by her hair, pulled her to the ground and punched her to the head. She dropped the knife handle and bystanders stopped the victim from continuing to punch the respondent.

[10] The blade of the knife was 11 centimetres long.

[11] The respondent then called the police and an ambulance. The victim was taken to Katherine Hospital for assessment and was then medically

evacuated to the Royal Darwin Hospital. He underwent emergency surgery to remove the knife blade which had penetrated deeply into his back and chest. The blade missed his heart but pierced his right lung. Fortunately no major blood vessel was severed. The blade was removed and chest drains were put in place to drain the chest cavity of blood. The victim was given a blood transfusion. He was treated in the intensive care unit and discharged from the Royal Darwin Hospital on 28 April 2014.

[12] The victim suffered a life threatening injury. If the victim did not receive medical treatment, he could have died. However, after the victim received treatment, his injuries resolved and he has no ongoing disability.

[13] Such violent drunken assaults are prevalent in the Northern Territory.

Subjective circumstances

[14] The respondent was 19 years of age at the time of the offending. She is an Aboriginal woman who speaks Gurindji. She went to school in Kalkarindji and attended school until the end of year 6. She has never been in employment.

[15] The respondent lives with the victim, their child, and her brother and sister in law. She receives a Centrelink parenting payment.

[16] The respondent is a first offender.

[17] The sentencing Judge made the following important findings. The respondent was immediately remorseful following the incident. She waited

with the victim until the police and ambulance arrived. Her remorse was genuine and sincere. The respondent made spontaneous admissions to police when they arrived at the drinking spot and she subsequently made full formal admissions of her offending. The respondent's plea of guilty was an early plea of guilty. The respondent performed a useful role by looking after her young child who was still being breast fed at the time of sentencing. The respondent had not consumed alcohol since she committed the offence. The respondent and the victim were still together and the victim had forgiven her. The respondent had reasonable to good prospects of rehabilitation.

Consideration

[18] The offending is objectively very serious. Knives are very dangerous weapons. The respondent threatened to stab the victim with a pen and then stabbed him with the knife with such force that the whole blade went into the victim's body, and remained embedded in his back. It is fortunate that the victim did not die. Such crimes are a great drain on the medical resources of the Northern Territory and are an enormous cost to the community. The victim had to be medically evacuated to the Royal Darwin Hospital, where he remained for 14 days. The blade of the knife had to be surgically removed and the victim required a blood transfusion. While the objective seriousness of the offending is qualified by the fact that it was spontaneous and unplanned, the respondent's reaction was utterly disproportionate to the victim's conduct which gave rise to the domestic argument. Further, it was the respondent's conduct which escalated the

argument from a verbal argument to a physical altercation. There is no apparent reason why she could not have gone home by herself.

[19] In our opinion, the sentence imposed on the respondent was manifestly disproportionate to the objective seriousness of her offending. While the subjective circumstances do entitle the respondent to considerable leniency, such factors cannot result in a sentence which is not justly proportionate to the respondent's offending. The sentence imposed on the respondent was so manifestly disproportionate to the seriousness of the offending that it shocks the public conscience.[1]

[20] In those circumstances the appeal was allowed, the sentence was set aside and the respondent was resentenced.

The mandatory minimum sentencing scheme

[21] Because we have upheld ground 2, and imposed a sentence that involves actual imprisonment for a period exceeding three months, we do not need to consider ground 1. However, as there was extensive argument concerning the expression "exceptional circumstances" in s 78DI of the *Sentencing Act* we add the following observations.

[22] In 2013, the *Sentencing Act* was amended to provide a regime of mandatory minimum terms of actual imprisonment for violent offences. It is important to appreciate that the regime has application only where the sentence which would otherwise have been imposed is less than the legislatively prescribed

[1] *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *R v Cavenagh-Novelli* [2014] NTCCA 21 at [12].

mandatory minimum. If, having regard to all of the surrounding circumstances, including: the circumstances of the offending; the circumstances of the offender; the maximum penalty and the terms of any other statutory requirement, the appropriate sentence exceeds the mandatory minimum sentence, then the need to consider exceptional circumstances does not arise.

[23] The mandatory minimum sentencing regime created five levels of violent offences. The offence to which the respondent pleaded guilty was a level 5 violent offence. Section 78D of the *Sentencing Act* required the court to impose a minimum sentence of three months actual imprisonment for such an offence. However, s 78DI of the *Sentencing Act* created an exemption from the mandatory regime in "exceptional circumstances". The section provides:

> (1) This section applies if:
>
> (a) a court is required to impose a minimum sentence of a specified period of actual imprisonment for an offence; and
>
> (b) the court is satisfied that the circumstances of the case are exceptional.
>
> (2) If this section applies:
>
> (a) a provision of this subdivision requiring a court to impose a minimum sentence of a specified period does not apply in relation to the offender; and
>
> (b) the court must instead comply with s 78DG as if that section applied to the case.

(3) In deciding whether it is satisfied as mentioned in subsection (1)(b), the court may have regard to:

(a) any victim impact statement or victim report presented to the court under section 106B; and

(b) any other matter the court considers relevant.

(4) For subsection (1)(b), the following do not constitute exceptional circumstances:

(a) that the offender was voluntarily intoxicated by alcohol, drugs or a combination of alcohol and drugs at the time the offender committed the offence;

(b) that another person:

(i) was involved in the commission of the offence; or

(ii) coerced the person to commit the offence.

[24] The expression "exceptional circumstances" must be read in its statutory context. The terms of the section make it clear that, apart from the matters specifically excluded, the court may take into account any matter it considers relevant. The very wide scope of circumstances that may be considered by a court was confirmed by the observations of the Attorney-General in the second reading speech when he said:[2]

> The exceptional circumstances exemption is intended to be broad and the court may consider any matters it considers relevant. The bill provides that the court may take into account a victim impact statement or a victim report presented to the court before sentencing, which the court is required to take into account when sentencing an offender.

[2] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 November 2012.

> I note that a victim impact statement or victim report may include a statement about the victim's wishes with respect to the sentence the offender should receive, and that may include that the victim wishes for the court to sentence the offender more leniently. … Whether a victim's wishes are taken into account as exceptional circumstances will be a matter entirely for the court.

[25] The expression is not further defined in the legislation. However it has been discussed in the authorities, including in the following familiar passage from *R v Kelly*:[3]

> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.[4]

[26] In *Yacoub v Pilkington (Aust) Ltd*,[5] Campbell JA (with whom Tobias JA and Handley AJA agreed) said:

> [66] Another question of construction concerned "*exceptional circumstances*" in r 31.18(4). In *San v Rumble (No 2)* (2007) NSWCA 259 at [59]–[69], I gave consideration to the expression "exceptional circumstances" in a different statutory context to the present. Without repeating that discussion in full, I shall state such of the conclusions as seem to me applicable in the construction of r 31.18(4).
>
> (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).

[3] *R v Kelly* [2000]1 QB 198 at 208 per Lord Bingham of Cornhill CJ.
[4] See also *Baker v The Queen* [2004] 233 CLR 513 at 573 per Callinan J.
[5] [2007] NSWCA 290 at [66].

(b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] 1 All ER 907 (at 1268; 912–913).

(c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).

(d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).

(e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

[27] If, in determining a sentence, it is necessary to consider whether exceptional circumstances arise, the whole of the circumstances of the particular case must be considered. The "mitigating circumstances must be considered against a background of matters such as the egregiousness of the offending and the need for deterrence in determining whether they can be said to amount to exceptional circumstances"[6] for the purpose of the legislation. Although individual factors may not be exceptional, the relevant factors, considered in combination, may amount to exceptional circumstances.[7] Whilst reasons should be given for the exercise of the discretion, the

[6] *R v Tootell* [2012] QCA 273 at [25].
[7] *Griffiths v The Queen* (1989) 167 CLR 372 at 379; *Baker v The Queen* (2004) 223 CLR 513 at 574.

exercise remains part of the overall instinctual synthesis that is undertaken by the sentencing Judge.

[28] The content of the expression "exceptional circumstances" in the mandatory minimum sentencing provisions of the *Sentencing Act* should not be filled by the ad hoc examination of individual cases.[8] In *Baker v The Queen* Gleeson CJ observed:[9]

> There is nothing unusual about legislation that requires courts to find "special reasons" or "special circumstances" as a condition of the exercise of a power. This is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or whether circumstances of potential relevance are so various as to defy precise definition. That which makes reasons or circumstances special in a particular case might flow from their weight as well as their quality, and from a combination of factors.

[29] These observations apply to the exceptional circumstances provided for in the *Sentencing Act*.

Resentence

[30] In determining an appropriate sentence this Court took into account the youth of the respondent, her responsibility for her child and the other mitigatory factors referred to in the court below.

[31] The respondent was convicted and sentenced to a term of imprisonment of three years backdated to 7 February 2015 to take account of time spent in custody. It was directed that the sentence be suspended after six months. An

[8] *Owens v Stevens* [1991] VSC 91 (3 May 1991) at 16-17 per Hedigan J.
[9] *Baker v The Queen* (2004) 223 CLR 513 at 523.

operational period of two years and six months from the date of her release from prison was set.