R v Nabegeyo [2014] NTCCA 4

PARTIES:	THE QUEEN v NABEGEYO, Les
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 29 of 2013 (21309100)
DELIVERED:	7 February 2014
HEARING DATES:	7 February 2014
JUDGMENT OF:	SOUTHWOOD, BARR, HILEY JJ
APPEALED FROM:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – Sentencing – Crown appeal against sentence - Sentencing standards - Offence of sexual intercourse without consent involving highly intoxicated and/or sleeping victims – Sentence imposed significantly out of step with sentences imposed for similar offending and manifestly inadequate – Appeal allowed – Respondent resentenced.

Criminal Code 1983 (NT) s 192(3)

Moore v The Queen [2006] NTCCA 06, applied.

The Queen v Renwick [2013] NTCCA 3; *R v Osenkowski* (1982) 30 SASR 212; *R v Rindjarra* [2008] NTCCA 9; (2008) 191 A Crim R 171; *R v*

Tennyson [2013] NTCCA 02; *R v Riley* [2006] NTCCA 10; (2006) 161 A Crim R 414 at 18-20; *R v Hitanaya* [2010] NTCCA 3, referred to.

REPRESENTATION:

Counsel:

Appellant:	M Nathan
Respondent:	J Hunyor and G O'Brien-Hartcher

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Hil1402
Number of pages:	14

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

R v Nabegeyo [2014] NTCCA 4
No. CA 29 of 2013 (21309100)

BETWEEN:

THE QUEEN
Appellant

AND:

LES NABEGAYO
Respondent

CORAM: SOUTHWOOD, BARR, HILEY JJ

REASONS FOR JUDGMENT

Ex Tempore

(Delivered 7 February 2014)

THE COURT:

Introduction

[1] This is a Crown appeal against a sentence of three years imprisonment, suspended after serving 18 months,[1] imposed for the crime of sexual intercourse without consent, contrary to s 192(3) of the *Criminal Code 1983* (NT).

[1] The sentencing judge fixed an operational period of two years from the date of the respondent's release from custody.

[2] The appeal is about standards of punishment for the offence of sexual intercourse without consent in cases involving highly intoxicated and/or sleeping victims who are extremely vulnerable to sexual assault. The sole ground of appeal is that the sentencing judge erred in imposing a sentence which was manifestly inadequate in all the circumstances of the case. In our opinion, for reasons that follow, the ground of appeal is made out and the respondent should be resentenced.

[3] As pointed out in *The Queen v Renwick*[2]:

> "The principles governing Crown appeals are not in doubt and are well known. Crown appeals enable the courts to establish and maintain adequate standards of punishment for crime, to correct idiosyncratic views and to correct sentences which are so disproportionate to the seriousness of the crime as to "shock the public conscience".[3] The Crown is entitled to have sentences corrected which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards.[4]"

---

2 *The Queen v Renwick* [2013] NTCCA 3 at [3].

3 *R v Osenkowski* (1982) 30 SASR 212 per King CJ at 213; *R v Riley* [2006] NTCCA 10; (2006) 161 A Crim R 414 at 18-20; *R v Hitanaya* [2010] NTCCA 3.

4 *R v Riley* [2006] NTCCA 10; (2006) 161 A Crim R 414 at 19 citing *Barbara* (unreported) CCA (NSW) No. 60638 of 1996 (24 February 1997); *R v Rindjarra* [2008] NTCCA 9; (2008) 191 A Crim R 171 at [28], [29].

The Facts[5]

[4] At about 6.30 am on Saturday 2 March 2013 the victim, DN, was sleeping on the footpath outside the Air Raid Arcade on Cavanagh Street, Darwin city. She was heavily intoxicated.

[5] The respondent had been staying at the Air Raid City Lodge and had been drinking with two other persons, one of whom was the son of the victim. He was heavily intoxicated. He came downstairs and approached the victim and woke her up. He told the victim to go upstairs to bed. She told him that she did not wish to go upstairs. He helped her get to her feet. The victim was disoriented and unsteady and leaned heavily on the respondent, holding on to him for support.

[6] The respondent was surprised by the victim's close proximity and touching and he asked her if she wanted to have sex with him. The victim did not audibly respond but continued to hold onto the respondent. They both then walked about 30 metres down Cavanagh Street to Spain Place. The victim was still relying on the respondent for physical support.

[7] Upon reaching Spain Place, the victim fell against a door and fell to the ground on her back. The respondent loudly asked the victim to get

---

5 The facts are taken from the sentencing judge's sentencing remarks and the assessment prepared by a probation and parole officer of the Department of Correctional Services under s 103 of the Sentencing Act.

back up and then pulled her to her feet with his arms under her armpits. He then walked the victim in this fashion into Spain Place where she again slipped to the ground. Feeling exhausted and dizzy from the effects of alcohol, the respondent dropped down beside the victim.

[8] After a few minutes the respondent pulled his shorts down and knelt in front of the victim who was lying on her back watching him. He pulled up the victim's dress and proceeded to have penile / vaginal sex with her. The victim did not say anything during this time.

[9] The respondent was interrupted by uniformed police who attended in a marked police vehicle after being flagged down by concerned eyewitnesses. Police directed the respondent to stop. The respondent turned to the police and said: "It's okay, she's my wife." As the police got out of the vehicle and approached the respondent, he stood up and pulled up his shorts.

[10] The respondent was taken to Darwin Police Station. At the time that he had sex with the victim, he knew that she was very drunk and that in that condition she might not be able to tell him whether or not she wanted to have sex with him.

[11] At the time of the offence, the respondent was 27 and the victim was 42. They had kinship ties. The victim was not his wife.

[12] In her victim impact statement, the victim said that in a cultural way the respondent is her grandfather, and that he is not allowed to have sex with her. She said that she was scared of the respondent that night, that she never asked for sex, that she was screaming for help and that she feels no good. She said that it made her feel ashamed for what he had done to her, that she is an older woman and he a young man, and that he should have shown respect to her because they are family. She said that the family doesn't know what happened because she is too ashamed to tell them. She has to keep the secret to herself.

Objective seriousness

[13] The objective seriousness of the offence in this case is determined by the following factors. The maximum penalty for the offence is imprisonment for life. However, the offence covers a wide range of criminal conduct and the plea in this case was entered on the basis of recklessness, the lesser of the culpable mental states in cases of this kind. At the time he had sex with the victim, the respondent knew she was very drunk and that in that condition she might not be able to tell him whether or not she wanted to have sex with him. The offending involved unprotected penile / vaginal intercourse. The victim was highly intoxicated, vulnerable and incapable of physical or verbal resistance. She is a member of a very vulnerable group in the community. The offending occurred in full view of members of the

public. The offending had a significant emotional impact on the victim. Such offending is prevalent. Sexual offending subjects women, in particular, to degrading treatment. There is, rightly, great community concern about sexual offending.

[14] The objective seriousness of the offending is qualified by the following factors. The offending was spontaneous and unplanned. The offending did not involve gratuitous violence beyond the non-consensual sexual intercourse itself. The victim did not suffer further harm or physical pain. The offending was not prolonged or repeated and was not committed in company.

[15] The offending is towards the lower end of the range of such offences.

[16] Ordinarily the kinship relationship between the victim and the offender and the breaching of a sexual taboo contrary to their traditional laws and customs would be taken into account as aggravating factors. However we are precluded from taking such circumstances into account by s 16AA(1) of the *Crimes Act 1914* (Cth) and do not do so.

Mitigating features

[17] There are the following mitigating features of the offending. The offender is a first offender. The offending was out of character. The sentencing judge found the offender had not developed an attitude of

offending against women with a sense of impunity or entitlement. The offender had demonstrated a sense of shame and remorse. The sentencing judge found that he had good prospects of rehabilitation. This was supported by the offender's willingness to undergo any rehabilitation programs recommended by the Court and his desire to return to life on Marlwon outstation and see his young daughter grow up.

[18] The offender pleaded guilty four days before the commencement of his trial. Although he did not plead guilty at the earliest opportunity, his plea was of considerable utilitarian value and did demonstrate remorse and an acceptance of responsibility for his offending. The sentencing judge accepted that the respondent is incredibly ashamed and embarrassed about his offending.

[19] The offender had been on remand for eight months and it is accepted that conditions on remand are currently harsh.

[20] The respondent was born in Darwin and grew up in both Gunbalanya and Darwin. His grandfather took him through traditional law and both his grandparents introduced him to hunting and fishing when he was a young child. He completed year 12 at Nightcliff High School and worked for several years at Gunbalanya meatworks where he was trained in and received certifications in meat processing.

[21] At the time of the hearing (October 2013) the respondent was married but separated. He and his wife had a three year old daughter who lives with her mother at Gunbalanya. He does not normally drink alcohol except when in Darwin, and when there he sometimes drinks to excess. While on remand he commenced the Stay Safe and Strong program; an alcohol rehabilitation program.

[22] The respondent told the probation and parole officer who considered his suitability for general supervision by the Department of Correctional Services that he was extremely drunk at the time of his offending and that he feels "terribly sorry and wrong inside" acknowledging that he would never have willingly participated in such an offence in a sober state. The officer recorded that the respondent stated his remorse for the harm and shame he caused the victim and accepted full responsibility for his actions. He also regretted the fact that because he was in remand he was unable to see his sick grandfather and to attend his funeral. The officer considered him suitable for supervision by the Department.

Manifestly inadequate

[23] It is well established that there is no tariff applicable to the crimes of sexual assault, that although such crimes are serious they are committed in a wide range of circumstances and by a wide variety of

offenders, that the penalty must be determined according to the individual circumstances of the offending and the offender, and that the sentencing judge has a wide discretion.[6]

[24] In *R v Rindjarra,*[7] Southwood J observed that this Court has consistently applied the test enunciated by King CJ in *R v Osenkowski,*[8] where the learned Chief Justice said:

> "The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

[25] This Court has previously considered the range of sentences appropriate for this type of offence involving a heavily intoxicated victim who through her state of vulnerability cannot consent to sexual intercourse.

[26] In *Moore v The Queen,*[9] the offender had engaged in sexual intercourse with an intoxicated woman. He had no prior convictions, a positive work record and references attesting to his honesty and reliability and his respect for women. The sentencing judge found that he had good prospects of rehabilitation. Their Honours drew on their own

---

6 *R v Tennyson* [2013] NTCCA 02 at [24].
7 *R v Rindjarra* (2008) 191 A Crim R 171 at 187 [86].
8 *R v Osenkowski* (1982) 30 SASR 212 at 213.
9 *Moore v The Queen* [2006] NTCCA 06.

experiences and reviewed other decisions involving similar circumstances and concluded that the particular head sentence (of seven years and six months imprisonment) imposed in that matter was:

> "too high and well outside the range of sentences that have been imposed in like cases. In our opinion an appropriate sentence for an offence of this kind in circumstances of this kind following a trial, is in the order of approximately 6 years. That view of the case is reinforced by reference to cases from other jurisdictions of a similar nature."[10]

The Court reduced the sentence to five years and six months, and fixed a non-parole period of three years 11 months.

[27] We were informed of another nine sentences imposed for unlawful sexual intercourse over the last four years or so. Whilst they each involved different circumstances, only one of those involved a sentence with a starting point lower than four and a half years. Six of them involved a sentence with a starting point of six years or higher.

[28] It is clear that the sentencing judge gave substantial weight to rehabilitation given the respondent's age, his lack of criminal history and his work history. Whilst rehabilitation was a significant consideration in sentencing the respondent, in our view this was also a case where denunciation, general deterrence and protection of the community are significant sentencing objectives to be reflected in the sentence which is to be imposed.

---

[10] *Moore v The Queen* [2006] NTCCA 06 at [19].

[29] We consider that the sentencing judge failed to give sufficient weight to denunciation, general deterrence and the protection of this vulnerable group of people within our community. As we have stated above, these kinds of offences are prevalent, and drunken women in the position of the victim are in a very vulnerable situation. The Court must do what it can to protect them.

[30] In our opinion, the sentence imposed on the respondent was so disproportionate to the seriousness of the respondent's crime as to shock the public conscience[11]. The sentence imposed in this matter was significantly out of step with other sentences imposed for similar offending, and was manifestly inadequate. The starting point for this offence should be in the vicinity of six years imprisonment.

[11] *R v Osenkowski* (1982) 30 SASR 212 at 213.

Resentence

[31] In sentencing the offender we have taken into account all of the matters referred to above. As the sentencing judge recognised, this offending was serious. It involved a sexual assault upon a vulnerable woman in a public place. The sentence to be imposed should reflect the need for punishment, protection of other vulnerable women, general deterrence and should also reflect the fact that the community strongly disapproves of such conduct.

[32] We consider that the notional head sentence should have been six years imprisonment. In light of the respondent's guilty plea we discount that sentence by 12 months. This leads to a head sentence of 5 years imprisonment.

[33] Accordingly the appeal is allowed and the respondent is sentenced to five years imprisonment backdated to 2 March 2013. The sentence will be suspended after the respondent has served two years and six months in prison, on the same conditions as those imposed by the sentencing judge apart from those relating to the consumption of and testing for alcohol and other drugs. The operational period will be two years and six months from the date of his release from prison.

Orders

[34] We make the following orders:

1. The appeal is allowed.

2. The sentence of three years imprisonment is set aside.

3. The respondent is sentenced to five years imprisonment backdated to 2 March 2013.

4. The sentence will be suspended after the respondent has served two years and six months in prison, on the following conditions:

   (1) He will be under the ongoing supervision of a Probation Officer and must report to a Probation Officer within two clear working days after his release from prison.

   (2) He must tell a Probation Officer of any change of address or employment within two clear working days after the change.

   (3) He must not leave the Northern Territory except with the permission of a Probation Officer.

   (4) He will participate in assessment, counselling and or treatments as directed by a Probation Officer.

(5) He must not enter the Gunbalanya Sports and Social Club.

(6) He must remain at Oenpelli and not leave without written permission of a Probation or Parole Officer, except for urgent medical or dental treatment.

(7) He will have no contact directly or indirectly with the victim, DN.

5. The operational period for the purposes of sections 40(6) and 43 of the *Sentencing Act 1995* (NT) will be two years and six months from the date of the respondent's release from prison.

……