PARTIES:	JACKY NAMANDALI
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL (NT)
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA No. 5 of 1993
DELIVERED:	Darwin 1 July 1994
HEARING DATES:	11 March 1994
JUDGMENT OF:	Kearney, Angel and Priestley JJ

CATCHWORDS:

Criminal law and Procedure - application for leave to appeal against sentence - requirement of "arguable case"

McDonald v The Queen (1992) 85 NTR 1, applied

Criminal Law and Procedure - general principles - dangerous acts or omissions - whether intoxication may mitigate in sentencing for a Code s154(1) offence

Criminal Code (NT), s154, s305(4)
R v Herbert (1983) 23 NTR 22, distinguished
R v De Simoni (1981) 35 ALR 265, applied
Baumer v The Queen (1988) 35 A Crim R 340, applied
Baumer v The Queen (No.2) (1989) 40 A Crim R 81, applied

REPRESENTATION:

Counsel:

Appellant:	W.R. Somerville
Respondent:	R.S.L. Wild

Solicitor:

Appellant:	North Australian Aboriginal Legal Aid Service
Respondent:	Director of Public Prosecutions

JUDGMENT CATEGORY: Cat 'A'

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

No. CA 5 of 1993

BETWEEN:

JACKY NAMANDALI
Applicant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, ANGEL AND PRIESTLEY JJ

REASONS FOR JUDGMENT

(Delivered 1 July 1994)

KEARNEY J:

The sole purpose of this application is to determine whether the fact that an accused was under the influence of liquor can be taken into account as a mitigating factor when sentencing for an offence under s154(1) of the Criminal Code. It is desirable to set out the background from which the question emerges.

The facts and the plea

In brief, the facts were that the applicant, after drinking at a social club with his wife, took liquor home, and drank some of it. He fell asleep. While he was asleep others drank the rest of his liquor. When he woke up, he became

angry because there was nothing more to drink. He attacked his wife with a knife, slashing her arm and stabbing her in the back, puncturing her lung. He was charged with this as a dangerous act under s154(1). The only circumstance of aggravation charged was under s154(2), that he thereby caused her grievous harm. He pleaded guilty to the aggravated dangerous act on 7 April 1993.

In mitigation, his counsel Mr Lawrence submitted inter alia that it was clear that the applicant was under the influence of liquor when he committed the offence, and that this "necessarily affected his wilfulness, his malevolence, his intentions." Mr Lawrence submitted that the ordinary principles of sentencing permitted the fact of his intoxication to be taken into account as a mitigating factor, because it was "highly relevant"; it explained why he committed the offence. In essence, the submission was that the attack was out of character for him, solely attributable to his intoxicated state, and unlikely to be repeated; this is the usual basis advanced when intoxication is sought to be relied on as a factor mitigating sentence.

On 14 April the applicant was sentenced to 2 years imprisonment; it was directed that he be released after serving 3 months of that term, upon entering into a good behaviour bond. The learned sentencing Judge took into account as a mitigating factor that the application was an alcoholic now seeking a cure, but rejected Mr Lawrence's submission that his state of intoxication was a mitigating factor, stating:-

> "The Crown alleges - - - that you were not sufficiently intoxicated to warrant it being alleged against you as a circumstance of aggravation [under Code s154(4)]. Mr Lawrence - - - has boldly submitted that you were intoxicated and that, but for that intoxication, this would not have happened.
>
> It was submitted that, in those circumstances, I ought to treat it as a mitigating circumstance. I disagree. In my opinion, Parliament has said that, in section 154 cases, intoxication is a circumstance of aggravation. In my opinion, it can't be turned into a circumstance of mitigation simply because it is not alleged against you by the Crown.
>
> The policy of section 154, it seems to me, is to cover cases where the Crown cannot prove a crime requiring intent or foresight. It would be contrary to that policy, if the lack of intent or foresight was due to intoxication, which Parliament says is an aggravating circumstance, for me to somehow or other turn it into a circumstance of mitigation simply because it has not been alleged against you." (emphasis mine)

The application and the appeal

On 24 February 1994 the applicant applied to extend the time within which to apply for leave to appeal against his sentence, and to obtain leave to appeal. On 11 March 1994 these applications came on for hearing. Having granted the application to extend time, the Court permitted the application for leave and the appeal to be argued together, as to obtain leave the applicant had to show that he had an arguable case; see *McDonald v The Queen* (1992) 85 NTR 1 at 2-3, and 5.

The only ground of appeal is that the learned trial Judge erred in his ruling, in the passage emphasized.

Section 154 provides, as far as material:

> "(1) Any person who does - - - any act - - - that causes serious danger, actual or potential, to the lives, health or safety of the public or to any

person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.

(2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.

(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.

(4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

(5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section."

Section 305(4) provides:-

"If any circumstance of aggravation is intended to be relied upon it shall be charged in the indictment."

The applicant's submissions

Mr Somerville of counsel for the applicant submitted that s305(4) requires that the Crown must charge in the Indictment that the accused was under the influence of liquor, if it wishes to rely on that state as a circumstance of aggravation under s154(4). That is clear. His thesis was that, absent such an allegation, an accused can rely on his state of intoxication as a factor mitigating his sentence for an offence under s154(1). In support, he relied on 3 submissions.

(1) First, intoxication had been treated as a mitigating factor by O'Leary J (as he then was) in *R v Herbert* (1983) 23 NTR 22 at 31. It is sufficient to note that that was a case of murder under pre-Code legislation; it has

nothing to do with Code s154. His Honour took into account to a limited degree the prisoners' state of drunkenness, in mitigation of sentence. In general, an accused's state of intoxication when committing a crime is a circumstance which may be taken into account in assessing his culpability, because it may substantially affect his judgment; it sounds sometimes in aggravation, sometimes in mitigation. At common law it was never a mitigating factor: qui peccat ebrius, luat sobrius. Now, not so. But we are here concerned with the particular statutory regime of s154, and in particular, the effect of s154(4).

(2) Second, as s154(4) had not been relied on here by the Crown, the significance of the applicant having been under the influence of liquor when committing the offence was at large and could in some circumstances, as here, mitigate the sentence. Mr Somerville referred to *R v De Simoni* (1981) 35 ALR 265, which makes it clear that a sentencing Judge cannot take into account the circumstance of aggravation under s154(4) when it has not been charged pursuant to s305(4). The reason characterized by Gibbs CJ at p268 as "a more fundamental and important principle" is that:-

> "- - - no one should be punished for an offence of which he has not been convicted."

Mr Somerville sought to distinguish what was said in *Baumer v The Queen* (1988) 35 A Crim R 340; that was a s154(1) case, where the circumstance of aggravation under s154(4) had been charged. The proper construction of s154(4) was the question

of general importance which persuaded the High Court to grant special leave to appeal. Their Honours said at p344:-

> "It would not be surprising if in many cases under s154, there being no necessity to prove an intention to cause a specific result, the influence of an intoxicating substance was the only explanation for the commission of the offence."

I note that this was the "only explanation" for the appellant's crime relied on by Mr Lawrence during the plea. Their Honours said at p344:-

> "In our opinion, s154(4) is a clear expression of concern by the legislature over the effect of intoxication on the level of crime in the community in the context of dangerous acts or omissions lacking an intention to cause a specific result."

(3) Third, and linked with the second submission, the Legislative Assembly in enacting s154(4) and 305(4) intended that intoxication be a circumstance of aggravation, but only if charged in the Indictment; if not charged, it can, in certain circumstances, be a mitigatory factor in sentencing for a s154(1) offence. Mr Somerville conceded that one effect of this interpretation of s154 was that the legislature must be taken to have contemplated that a person's state of intoxication could at one and the same time constitute a circumstance of aggravation (if charged by the Crown) and a factor in mitigation of sentence (if not charged by the Crown).

The respondent's submissions

Mr Wild QC of senior counsel for the respondent, opposing the application, made several submissions, but it is sufficient to note only two.

First, the Legislative Assembly did not intend when enacting the Code that intoxication could be relied on as a mitigating factor in an offence under s154(1); its intent was that, when intoxication is relevant under s154, it is only as a circumstance of aggravation (and then only when charged as such). Second, in ascertaining the legislature's intention on the point, the Court must take into account the existence of s154(4), even when it is not relevant as a circumstance of aggravation in the particular case because not charged in the Indictment.

Conclusions

In effect, the applicant's submission is that a sentencer should ignore the existence of s154(4) for the purpose of sentencing, when the Crown does not seek to rely on it pursuant to Code s305(4). To my mind, that approach does not accord with ordinary canons of statutory interpretation and leads to an absurdity (see the concession at p6) which could never have been intended by the Legislative Assembly. I reject the submission.

Clearly, in construing s154 due regard must be had to all of its provisions. It is clear from s154(4) that the Legislative Assembly intended that in relation to offences charged under s154(1) the fact that an accused at the time of doing the act is "under the influence of an intoxicating substance" is to be treated solely as a circumstance of aggravation. It has to be charged as such before the Court can treat it as a circumstance of aggravation in a particular case, for the fundamental reason stated in *De Simoni* (supra)

(p5); but that does not affect the significance of s154(4) as an indication of legislative intent. In my opinion it is a corollary from s154(4) that the legislature intended that a person guilty of an offence under s154(1) cannot rely on his intoxication as a factor mitigating sentence. As the High Court pointed out in *Baumer* (supra) (p6) "in many cases" it will be "the only explanation for the commission of the offence."

I consider that this interpretation is consonant with the purpose of s154; as to that, I adhere to what I said in *Baumer v The Queen (No.2)* (1989) 40 A Crim R at 81-82:-

> "The prime purpose of s154 was to provide for charges of criminal offences involving serious personal injury when the Crown was unable to establish some necessary mental element, solely because the jury was satisfied that the accused was too drunk to have the necessary intent or foresight. That is to say, s154 was introduced to stand as an alternative verdict when a charge failed because criminal intent or foresight could not be proved, because of the accused's state of intoxication at the time: see generally *O'Connor* (1980) 146 CLR 64; 4 A Crim R 348. However, it also embraces within its generality of expression the pre-Code specific offence of culpable driving.
>
> Section 154 was considered to be necessary because of the high incidence of serious alcohol-induced crime in the Territory. It was believed to be unacceptable that the citizen should be left legally unprotected from unprovoked violence, where that violence was the consequence of alcohol which had obliterated the capacity of the perpetrator to know what he was doing, or its consequences. In the absence of some penal sanction for such behaviour the social consequences could be appalling, as Lord Salmon said in *DPP v Majewski* [1977] AC 443 at 484. Section 154 was a corollary to framing the Criminal Code (NT) so as to accept the law as stated in *O'Connor* rather than, for example, as stated in s28 of the Criminal Code (Qld) or s19(a)(8) of the Criminal Law Consolidation Act 1935 (SA)."

I consider that s154(4) stands four-square in the way of treating intoxication as a mitigating factor when sentencing for s154(1) offences. In that respect it affirms the old position at common law.

I do not consider that the applicant has shown that it is arguable that the learned sentencing Judge erred in law; to the contrary, his Honour was plainly right, and the appeal could not succeed on the ground relied on. Accordingly, I would refuse the application for leave to appeal.

ANGEL J:

I agree that an accused can not rely on his state of intoxication as a mitigating circumstance for an offence under s154(1) of the Criminal Code NT whether or not it is charged in the Indictment as a circumstance of aggravation under s154(4). The application for leave to appeal should be refused.

PRIESTLEY J:

I agree with Kearney J. It seems to me that by far the better reading of s154 of the Code, and of the way subsections (1) and (4) interact, is that subsection (4) excludes the possibility that a person guilty of an offence under subsection (1) might rely on intoxication as a factor mitigating sentence.

In my opinion the application for leave to appeal should be dismissed.
