The Queen v Cavanagh-Novelli [2014] NTCCA 21

PARTIES:	THE QUEEN v CAVANAGH-NOVELLI, Jace
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 12 of 2014 (21333605)
DELIVERED:	19 December 2014
HEARING DATES:	21 November 2014
JUDGMENT OF:	RILEY CJ, SOUTHWOOD and BARR JJ
APPEALED FROM:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW – appeal against sentence – manifest inadequacy – where offender's term of actual imprisonment has concluded at the time of the appeal – appeal allowed and offender re-sentenced.

Criminal Code 1983 (NT), s 414(1)(a).

DPP v Anderson [2005] VSCA 68*; DPP v Fevaleaki* (2006) 165 A Crim R 524; *Liddy v R* (2005) NTCCA 4; *Morrow v R* [2013] NTCCA 07; *R v Best* (1998) 100 A Crim R 127; *R v Martin* [2005] VSCA 140; *R v Renwick* [2013] NTCCA 3; *R v Wilson* (2011) 30 NTLR 51; *The Queen v Holmes* [2009] NTCCA 16, *Yardley v Betts* (1979) 22 SASR 108, referred to.

REPRESENTATION:

Counsel:

Appellant:	M Nathan
Respondent:	J Tippett QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Maley & Burrows

Judgment category classification:	B
Number of pages:	9

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

The Queen v Cavanagh-Novelli [2014] NTCCA 21
No CA of 2014 (21333605)

BETWEEN:

THE QUEEN
Appellant

AND:

JACE CAVANAGH-NOVELLI
Respondent

CORAM: RILEY CJ, SOUTHWOOD and BARR JJ

REASONS FOR JUDGMENT

(Delivered 19 December 2014)

Riley CJ:

[1] This is a Crown appeal against sentence.

[2] On 27 June 2014, following a trial before a jury, the respondent was found guilty of unlawfully causing serious harm to NRP. At the start of the trial, the respondent pleaded guilty to an assault upon LK who suffered harm. On 18 July 2014, the respondent was sentenced to imprisonment for a period of 10 months for the offence of causing serious harm to NRP. The sentence was ordered to be suspended after he had served two months imprisonment on strict conditions. He was fined $500 for the aggravated assault upon LK.

[3] The sole ground of appeal is that the sentences are manifestly inadequate.

The offending

[4] The offending occurred in Darwin city in the early hours of the morning of 6 April 2013. The respondent, who was then aged 32 years, had been drinking alcohol and was intoxicated. He had been at the Tap Bar in Mitchell Street where he had an altercation with LK. The respondent took umbrage when LK was served before him. His reaction was said by the sentencing judge to be "out of proportion to the wrong (he) perceived had been done". LK tried to resolve the respondent's concerns by calling bar staff to ensure that the respondent was served. He then asked the respondent, "Are we good now?" and the respondent said, "Yes".

[5] At about 3 am, the two met up again at the Barra Bar on Mitchell Street. The events which followed were caught on CCTV footage which has been viewed by the members of the Court.

[6] The respondent was shown to be increasingly aggressive towards LK whilst LK remained seated and "totally passive in the face of significant provocation". The respondent slapped LK to the face three or four times. The blows were increasingly severe. LK made no complaint to police about this assault but it was revealed when the CCTV footage was viewed for the proceedings against the respondent for his assault upon NRP. LK suffered a sore lip and bruising inside the lip that lasted for four days. He made a full recovery.

[7] At the time he slapped LK, the respondent racially taunted staff in the Barra Bar. People in the shop tried to stop the respondent behaving in a manner which the sentencing judge described as “bizarre”. NRP was one of those people. He saw the violent actions of the respondent and attempted to restrain him. He did this by placing his left arm under the armpit of the respondent and his right arm over the respondent’s shoulder and taking him to the ground. There was a struggle on the ground and the respondent quickly gained the upper hand. He stood up and delivered four punches to the head of NRP and then kicked him once whilst he was on the ground. NRP managed to get to his feet and was then punched by the respondent with his right hand whilst using his left forearm to force NRP backwards. NRP was propelled into the bain marie, his head hit the glass with force and smashed it. The injury he suffered amounted to serious harm. The respondent then left the area.

[8] NRP suffered significant lacerations to his left eyelid and a large laceration to the cheek. He was taken to hospital where the wounds were debrided. He suffered blurred vision and was concerned about his eyesight. He received therapy as a consequence. He lost six weeks work and substantial wages. At the time of sentencing, he experienced ongoing emotional effects and also suffered some permanent scarring which he finds embarrassing.

[9] The sentencing judge concluded, and it is not challenged, that NRP was trying to calm the situation. The jury rejected the respondent’s claim that he acted in self-defence. However, when passing sentence, her Honour accepted

that the respondent reacted to the efforts of NRP to place him in a choke hold and "ground stabilise" him. Her Honour sentenced on the basis that the respondent did not intend to cause serious harm to NRP but must have foreseen such harm as a possible consequence of his actions.

[10] At the time of sentence, the respondent was aged 33 years. He was in a stable relationship and assisted in the care of his partner's child. He had no history of violence. He only had convictions for traffic offences including two for driving under the influence of alcohol. He had a good work and study history. He was remorseful. He had apologised to the staff at the Barra Bar and had paid for the damage he caused. Her Honour concluded that he was unlikely to offend in this way again.

[11] In sentencing the respondent the sentencing judge observed:

> Given the prevalence of this kind of violence in the Northern Territory, a gaol sentence is inevitable. However, in my opinion, it is also appropriate to suspend a major proportion of the sentence on conditions. Given you do not have a history of violence, given your good work record, your education and home background, in my opinion you are very unlikely to offend in this way again. Imprisonment, even for a relatively short time will be a significant punishment and I am sure there will be negative impacts on your employment and domestic situation.

Manifest inadequacy

[12] The principles applicable to a Crown appeal are well known. They have recently been discussed by this Court in *R v Renwick* where it was noted that:[1]

> … such appeals enable the courts to establish and maintain adequate standards of punishment for crime, to correct idiosyncratic views and correct sentences which are so disproportionate to the seriousness of the crime as to "shock the public conscience". 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.

[13] The amendments to s 414(1)(a) of the *Criminal Code 1983* (NT) of 27 April 2011 provide that the Court must not take into account any element of double jeopardy involving the respondent being sentenced again when deciding whether to allow the appeal or impose another sentence. The court retains a residual discretion to determine that, despite it having been established and being satisfied that a different sentence ought to have been passed, a Crown appeal should be dismissed.[2]

[14] As to an appeal based upon a claim of manifest inadequacy, it is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient. It interferes only if it be shown that the sentencing judge was in error in acting on a

[1] *R v Renwick* [2013] NTCCA 3 at [3].
[2] *R v Wilson* (2011) 30 NTLR 51 at 58 – 59 [27].

wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so inadequate as to manifest such error. In relying upon this ground, it is incumbent upon the appellant to show that the sentence was not just inadequate but manifestly so. It must show that the sentence was clearly and obviously, and not just arguably, inadequate.[3]

[15] The appellant referred to a range of sentences imposed by the courts in relation to offences of this kind. A wide range of sentencing dispositions was identified. As has been observed on many occasions this is not unexpected. There is no tariff in respect of penalties to be imposed for the crime of assault.[4] It is necessary to consider each case on its own merits having regard to the circumstances of both the offender and the offending.

[16] In my opinion, each of the sentences imposed on the respondent are manifestly inadequate.

[17] As to the aggravated assault upon LK, a fine of $500 was not proportionate to the seriousness of the offending. The respondent struck LK three or four blows to the head. Whilst he used his open hand, the blows were "heavy blows". His victim was seated at the time and unable to respond. The victim had offered no provocation and, indeed, was submissive. This was violent bullying conduct on the part of the respondent. In my opinion, a short term

[3] *Liddy v R* (2005) NTCCA 4 at [12].
[4] *Yardley v Betts* (1979) 22 SASR 108; *Morrow v R* [2013] NTCCA 7 at [35].

of imprisonment, albeit wholly suspended, is an appropriate sentence in all the circumstances.

[18] As to the offence of causing serious harm to NRP, I think the sentence was also manifestly disproportionate to the seriousness of the offending. The attack upon NRP was violent and occurred in circumstances where NRP was trying to calm the situation. He was punched to the head and kicked whilst he was on the ground. He was then punched some more before being propelled into the bain marie. He suffered serious injuries which, but for good fortune, could have been even more serious. He was off work for six weeks and suffered emotional effects. The matter went to trial and the respondent is not entitled to the discount afforded to those who plead guilty and accept responsibility for their conduct. In my opinion, a sentence in the order of imprisonment for two years would be appropriate in the circumstances. A period of actual imprisonment was also required. I would have suspended the sentence after the respondent had served a period of four months.

[19] I would allow the appeal.

Resentence

[20] In resentencing the respondent, it is necessary to consider the circumstances of the offending and, of course, the circumstances of the respondent as they now are. The respondent has served the term of actual imprisonment imposed by the sentencing judge. On the day after his release, he started a

mature age A Class electrical apprenticeship. There are a limited number of such apprenticeships and the respondent was successful in obtaining the apprenticeship in the face of very strong competition. He has honoured his obligations under the terms of the suspended sentence and has continued in the domestic arrangements which were seen by her Honour to be a positive aspect of his prospects for rehabilitation.

[21] At this time, the offender's prospects for rehabilitation must be regarded as very good. If this Court were to require him to serve an additional period in custody, it is likely he would lose the apprenticeship and his employment. The positive impact of his progress towards rehabilitation would be interrupted. All that has been achieved would be placed at risk. In those circumstances, I think it would be counter-productive to require him to return to prison and it would not be in the interests of either himself or the community for that to occur.[5] As was said in *Yardley v Betts:*[6]

> The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced.

[22] It is considered a very serious step to deny a person their freedom when they have been dealt with and released into the community, particularly where it

[5] *The Queen v Holmes* [2009] NTCCA 16 at par [23].
[6] (1979) 22 SASR 108 at 112 per King CJ.

may put at risk the rehabilitation which has been achieved and it would require a very strong case before this Court would intervene.[7]

[23] In all the circumstances, on the count of cause serious harm to NRP I would sentence the offender to two years imprisonment. That sentence of imprisonment would be back dated to 4 July 2014. For the count of aggravated assault upon LK, I would sentence the offender to three months imprisonment. That sentence of imprisonment is to be served wholly concurrently with the sentence of two years that I would impose on the offender. That gives a total sentence of two years imprisonment. The total sentence of imprisonment would be suspended after the respondent had served two months in prison on the same terms and conditions as were imposed by the sentencing judge.

Southwood J

[24] I agree with the reasons for decision of Riley CJ and the proposed sentence.

Barr J

[25] I agree with the reasons for decision of Riley CJ and the proposed sentence.

==========

[7] *R v Martin* [2005] VSCA 140; *DPP v Anderson* [2005] VSCA 68 at [59]; *DPP v Fevaleaki* (2006) 165 A Crim R 524 at 530-1 [24] – [27]; *R v Best* (1998) 100 A Crim R 127 at 132 -3.