The Queen v Tennyson [2013] NTCCA 02

PARTIES:	The Queen
	v
	Shane Jabanardi Tennyson
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 10 of 2012 (21117047)
DELIVERED:	12 February 2013
HEARING DATES:	5 February 2013
JUDGMENT OF:	Mildren ACJ, Kelly and Blokland JJ
APPEAL FROM:	Northern Territory Supreme Court 21117047, 13 September 2012

REPRESENTATION:

Counsel:

Appellant:	M Nathan
Respondent:	T Collins

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	C
Judgment ID number:	mil13524
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Tennyson [2013] NTCCA 02
No. CA 10 of 2012 (21117047)

BETWEEN:

The Queen
Appellant

AND:

Shane Jabanardi Tennyson
Respondent

CORAM: Mildren ACJ, Kelly and Blokland JJ.

REASONS FOR JUDGMENT

(Delivered 12 February 2013)

Mildren ACJ and Blokland J:

[1] This is an appeal by the Crown against a sentence of imprisonment of eight years with a non-parole period of 6 years and 6 months for the offence of having sexual intercourse with a female child committed on 28 May 2011 at Tennant Creek. The sole ground of appeal is that the sentence imposed is manifestly inadequate.

[2] After hearing submissions, we allowed the appeal and resentenced the respondent in accordance with the sentence indicated at the end of these reasons. We said we would provide written reasons at a later time. These are those reasons.

[3] The facts are that the victim, who was just over three years of age, was living with her mother and other family members at an address in Limonite Street at Tennant Creek. The respondent, who was aged about 22 years of age at the time of the offence, was the child's mother's brother.

[4] In the 24 hours prior to the offence, the respondent had consumed a considerable quantity of alcohol and became severely intoxicated. On the afternoon of 28 May 2011, the victim's mother and her partner and her two children, including the victim, were at home watching a movie. At approximately 3:00 pm, the respondent came to the house and asked the mother's partner for some money, apparently in order to purchase further alcohol. When told that he had no money, the respondent left the premises.

[5] At some stage, the victim left the group watching the movie. A few minutes later, the respondent returned to the house and led the victim away. He walked the victim towards his own residence a few houses away in the same street. Whilst doing so, the respondent encountered a woman called Rosina, who was the sister-in-law of the victim's mother. The respondent was asked for a cigarette. He had none, but gave Rosina a can of VB beer that he had with him at the time.

[6] The respondent led the victim into the backyard of the premises which he was occupying and around the side of the house to a concealed area near the external evaporative air-conditioning unit. He removed all of the victim's clothing and put her on the ground. He then pulled down his pants to his

ankles. He lay on top of the victim, supporting his weight with both of his hands on the ground. The victim's legs were sticking up in the air on either side of his body. He then penetrated the victim's vagina with his penis causing her to cry and scream so loudly that it alerted neighbours, who also heard the respondent repeatedly tell the victim to shut up. Meanwhile, the victim's mother became concerned about her daughter's whereabouts. She walked to the Food Barn Supermarket and encountered Rosina near it. She asked Rosina if she has seen the victim. Rosina responded to the effect that she had seen the respondent taking the victim along Limonite Street and that the respondent looked drunk. The two women then went to the respondent's home.

[7] The victim's mother entered the home whilst Rosina walked into the backyard. Rosina heard the victim crying and saw the respondent lying on top of her. She saw his pants down around his ankles. She immediately called out for the victim's mother. As soon as the respondent saw Rosina, he got off the victim and pulled his pants up.

[8] The mother came out of the house into the backyard and saw the respondent holding the victim on his left knee with his left hand around her waist. He was drinking from the VB can. At that stage, the victim must have still been naked. The victim's mother grabbed the child from the respondent and slapped him across the face with her hand. The respondent said to her: "Yeah, you can hit me, I did wrong." The mother, after re-dressing the victim, immediately went to the police station to report the matter. This was

about 3:30 pm. The police attended at the respondent's home at about 4:10 pm and found the respondent sleeping in the bedroom. However, when awoken by the police, the respondent gave a false name and, on being asked if he had seen or heard anything, he told the police officers that, when he had been walking to his home, he saw a lady with a pram arguing with a male. He claimed to have seen the lady slap the male and that the man ran off. He gave a description of the male as being Aboriginal, about 5'10" to 6' tall, slim and wearing a light-blue singlet with a skull on the front. That information was relayed to a police patrol searching for the perpetrator of the offence.

[9] A handwritten statement was taken from the respondent in the name of Rick O'Simpson. Upon completion of that statement, the respondent said to the police officer: "Are you going to look for that bloke who raped that kid?" On receiving an affirmative reply, the respondent then said: "If you're not, then I'm going to look for him and, if I find him, I'll kill him. It's not right to rape kids."

[10] The police officer was of the opinion that the respondent appeared to be intoxicated at this time, but not excessively so. The learned sentencing Judge accepted that assessment as well warranted because the respondent was able to relate this story in an apparently convincing manner. Not long afterwards, the respondent's brother arrived at the house and identified the respondent to the police. At that stage, the respondent became angry and

aggressive. He was arrested, handcuffed and taken to the Tennant Creek Police Station. He has been in custody ever since.

[11] On the following day, the respondent participated in a record of interview, in the course of which, he declined to answer most questions and denied any knowledge of the child bearing the victim's name.

[12] On the same day, the police arranged for the victim to be flown to Darwin for a medical examination by a forensic general practitioner, Dr Johns. Dr Johns found two scab abrasions running vertically along the outer aspects of both labia majora, which appeared chronic. On parting the labia, she found, first, a deep laceration extending through the child's fossa navicularis posterior fourchette and onto her perineum. The perineal part of the laceration was approximately 7 millimetres long and 3 millimetres wide.

[13] Dr Johns also found a separate 4 millimetres by 1 millimetre shallow laceration centrally on the child's perineum. There were also irregularly shaped abrasions on the inner aspects of both labia minora, 15 by 4 millimetres on the right and 10 by 4 millimetres to the left. The hymen was swollen with a localised area of blue bruising and the rest of the hymen showed red bruising circumferentially with a deeper redness is one area.

[14] It was not possible at that stage to see whether or not there was a tear at the hymen because of the swelling. Dr Johns also found two abrasions on the perianal skin. Three days later, Dr Johns examined the victim again and noted that there had been some healing of the injuries.

[15] The respondent pleaded guilty to the charge and the learned sentencing Judge observed that it was common ground that, although the matter had taken some time to come before the Court, the circumstances entitled the respondent to a reasonable discount in recognition of the utilitarian effect of his plea.

[16] Evidence was given by a senior psychologist and by a psychiatrist, Dr Armstrong. The learned sentencing Judge apparently accepted the evidence, which was in the form of reports, as well as oral evidence. Amongst the findings which the learned sentencing Judge accepted was that the respondent was of normal intelligence, and demonstrated a good understanding of the court process and of the possible sentencing outcomes. The respondent tended to minimise his offending. He had no psychiatric illness, although there was a diagnosis of anti-social personality disorder. Both the psychologist and the psychiatrist expressed the view that the respondent had a high risk of recidivism for both sexual and violent crimes, conclusions which the learned sentencing Judge accepted.

[17] The respondent was an Aboriginal male who grew up with his parents at an outstation located some 50 kilometres south-west of Tennant Creek. He attended primary school at Tennant Creek and, whilst doing so, lived with family members in the town. He then commenced secondary school at Tennant Creek. The respondent had a turbulent time at the school and was involved in episodes of fighting with other children. His parents sent the

respondent to a Christian secondary school in Townsville for a time. He remained there for about a year and then returned to Tennant Creek.

[18] The respondent's father was a Warlpiri man and, when the respondent was about 14 years of age, he undertook traditional initiation ceremonies. At the time that he left school, he had limited literacy and numeracy skills; but he was able to speak fluent English. Upon returning to Tennant Creek, he engaged with a resource agency and was employed by it for about six months labouring in town camps under a CDEP scheme. After that, he was employed as a station hand for a period of about three years. When the respondent had turned 20, he returned to Tennant Creek and resumed his employment doing CDEP work for about six months. After that, he resided at the village camp in Tennant Creek and received Centrelink benefits. The respondent's employment history was punctuated by a need to serve various terms of imprisonment.

[19] The respondent had a history of being a heavy drinker who resorted to binge drinking as well as cannabis use.

[20] The respondent had what the learned sentencing Judge referred to as a disturbing antecedent record. First, in May 2007, he committed the offence of aggravated indecent dealing with a child under the age of 16. Having served seven months of a partly suspended 18-month sentence, the respondent was conditionally released in December 2007. Thereafter, the respondent was brought before the court on not less than four occasions for

breaching the terms of the suspended portion of his sentence. Eventually, in May 2009, the respondent was ordered to serve the outstanding balance of the suspended sentence. He was ultimately released from custody on 4 December 2009. On 15 January 2010, the respondent committed the offence of aggravated unlawful indecent assault on a 15-year old girl. The victim in that case was sleeping in a drunken stupor at the time and the respondent cut away part of her clothing. In his subsequent interview with the police, the respondent admitted that he intended to have sex with the child; he was only prevented from doing so by the intervention of a relative. That offence attracted a custodial sentence of 14 months imprisonment. The respondent was released from custody in respect of that offence on 16 April 2011. The present offence was committed on 28 May 2011, only six weeks after the respondent had been released from prison.

[21] A victim impact statement was tendered, which indicated that the respondent's conduct had substantially adversely affected the young victim. The statement said that she did not sleep very well for a long time, that she was always hanging on to her mother, that she cried if she could not see or hear her, and only slept with her mother or her grandmother.

[22] The learned sentencing Judge observed that offences of the general nature now under consideration were by no means uncommon and the respondent's personal antecedent record was a matter of grave concern. He said that factors of both general and personal deterrence necessarily assume very considerable importance. He observed that the present offence involved a

young vulnerable child who was a family member of the respondent and that the offence stood well towards the top end of the scale of relative gravity. His Honour observed the offending was "the product of a deliberate, calculated series of acts on your part; and, because of familial relationships, it involved a serious breach of trust. It must have been a truly frightening experience for the young child and, as I have already recited, the emotional and physical effects of it had persisted for a considerable time." His Honour observed that because of the respondent's prior record, the respondent had long since exhausted any entitlement to leniency because of his young age and that the time had arrived when the protection of the community had become a paramount consideration. He also noted that he could see little indication of true remorseful insight by the respondent of the horrendous nature of the offence.

[23] In all the circumstances, his Honour took as his commencement point a sentence of imprisonment for 10 years, which he reduced by 20 percent to take into account the value of the plea.

[24] There is no tariff applicable to the crimes of sexual assault, including crimes of the type committed by the respondent. All such crimes are serious, but they are committed in a wide variety of circumstances and by a wide variety of offenders. The penalty must be determined according to the individual circumstances of the offending and of the offender. It is also well established that a sentencing judge has a wide sentencing discretion which, aside from actual error being established, will be interfered with on appeal

only if the sentence imposed was not only inadequate but manifestly so, so that error may be inferred. In *R v Rindjarra*,[1] Southwood J observed that this Court has consistently applied the test enunciated by King CJ in *R v Osenkowski*[2] 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] Southwood J[3] also referred to the observations of McHugh J in *Everett v The Queen*[4] where his Honour said:

> "But inadequate sentences also give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public. Inadequate sentences are also likely to undermine public confidence in the ability of the courts to play their part in deterring the commission of crimes. To permit the Crown, as well as convicted persons, to appeal against sentences assists in maintaining confidence in the administration of justice."

[26] Those observations must now be read in the light of the changes to Crown appeals introduced by section 414(1A) of the *Criminal Code*, as explained in *R v Wilson*.[5] One of the factors which might enliven the discretion not to interfere, or to impose a reduced sentence, is fault on the part of the Crown. It is well established that this includes a failure by the prosecutor to give adequate assistance to the sentencing Judge to arrive at the correct

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[1] (2008) 191 A Crim R 171 at 187 [86].
[2] (1982) 30 SASR 212 at 213.
[3] (2008) 191 A Crim R 171 at 188 [88].
[4] (1994) 181 CLR 295 at 306.
[5] (2011) 30 NTLR 51 at 58 – 59; [23] – [27] per Riley CJ; Kelly and Blokland JJ concurring.

disposition: see *R v Tait*;[6] *Director of Public Prosecutions (Vic) v Karazisis*.[7] In the present case, the prosecutor at first instance characterised the offending as "right up at the upper end of objective seriousness for such offending" and called for a "substantial period of imprisonment", and even, on one occasion, referred to the offending being in the "worst category". No specific submission was made about the length of the head sentence. However, the learned sentencing Judge's attention was not drawn to any of the decisions of this Court which particularly bear on the standards which this Court has set for this kind of offending, although those decisions were plainly known to her. This clearly should have been done, particularly in this case as the learned sentencing Judge is an Acting Judge from another state, and it cannot be expected that he would have been familiar with them. This is a factor which we consider ameliorates the full extent of the sentence which must ultimately be imposed.

[27] A number of decisions of this Court have established that crimes of sexual intercourse with a child without consent, such as that committed by this respondent, are to be treated as extremely serious crimes.

[28] In *Rindjarra*,[8] the Court accepted that decisions of this Court in *Green v The Queen*,[9] *R v Inkamala*[10] and *R v Riley*[11] provide empirical standards of comparison for very serious examples of digital/vaginal sexual intercourse

[6] (1978) 46 FLR 386 at 389 – 390.
[7] (2010) 206 A Crim R 14 at 41 – 42 [115].
[8] (2008) 191 A Crim R 171 at 182 [54]; 183 [59]; 189 [93].
[9] (2006) 19 NLTR 1.
[10] [2006] NTCCA 11.
[11] (2006) 161 A Crim R 414.

with a child without consent and provided a valid indication of the prevailing range of sentences for comparative conduct. To those decisions might be added *Melpi v The Queen*.[12] These cases demonstrate that, although there is no fixed range or tariff, this Court has set a standard for this kind of offending where the starting point at first instance is usually somewhere between 12 years and 16 years.

[29] We agree with the appellant's submission that the learned sentencing Judge's starting point of 10 years was manifestly inadequate and, although his Honour when imposing sentence used strong words of condemnation, they were not reflected in the actual sentence which his Honour imposed.

[30] It is also well established that, notwithstanding the appellant's youth, there is a point at which the seriousness of the crime overrides the mitigating factor of youth.[13] However, that does not mean that no weight is given to youth and immaturity in the case of serious offending.[14]

[31] There are a number of aggravating features which accompanied the commission of this crime including the very young age of the victim, the fact that the respondent was in a position of trust with the victim through his relationship with the child, the fact that he continued to penetrate the victim notwithstanding her cries and screams, the false information which the respondent gave to the police, the injuries sustained by the child, the fact

[12] [2009] NTCCA 13.
[13] *R v Goodwin* [2003] NTCCA 9 at [11]: See also, *R v Talbot* [2003] NTCCA 13 at [20].
[14] *Melpi v The Queen* [2009] NTCCA 13 at [30].

that the respondent has previously committed sexual offences upon young children, the fact that the current offence and the offence committed in January 2010 were both committed within a very short time after being released from custody, and the fact that the respondent is a high risk of recidivism. These are all factors that which demonstrate that the starting point of 10 years was manifestly inadequate. There were no mitigating factors of the offending. As to the respondent's personal circumstances, apart from his age, there was little by way of mitigating factors. Ms Collins pointed out that the respondent had not been given the opportunity to undergo sex offending programs, either in custody or when under supervision. To that extent, we accept that this case is less serious than a similar offender who had gone through such programs and immediately reoffended. The respondent had indicated a willingness to undergo a sex offender program, which is available to him as a sentenced prisoner. The respondent has also pleaded guilty at a very early opportunity, which has meant that neither the victim's mother nor Rosina has been required to give evidence. Undoubtedly, this saved them from considerable trauma and embarrassment.

[32] Mr Nathan submitted that, in the circumstances, we should resentence the respondent to a term of at least 16 years. Having regard to what was said about the lack of assistance given to the learned sentencing Judge as well as the matter generally, in our opinion, the appropriate starting point for the offending on this occasion was 14 years. No submission was made that we

should interfere with the discount which the learned sentencing Judge granted for the utilitarian value of the plea. In the circumstances where the prosecution was heavily reliant on the evidence of the client's mother and Rosina, we think that the discount allowed by the learned sentencing Judge was appropriate. This results in a head sentence of 11 years and 3 months. We would fix a non-parole period of 8 years. The non-parole period is backdated to commence from 28 May 2011.

Kelly J

[33] I agree that the appeal should be allowed for the reasons expressed by Mildren ACJ and Blokland J.

[34] This was the respondent's third conviction for child sexual offences in five years and his offending had seriously escalated. The second sexual offence was committed approximately six weeks after he was released from prison on the first such offence; and this offence was committed approximately six weeks after he was released from prison on the second offence. He has displayed no remorse and demonstrated no empathy for the victim. Alcohol appears to have played a part in all of these offences, yet when the respondent was conditionally released on a suspended sentence in relation to the first offence, he consistently breached his suspended sentence by consuming alcohol to excess and was eventually ordered to serve the balance of his sentence. Two psychological reports were tendered on sentencing for the present offence, in which the following opinions were expressed.

(a) Based on his sexual behaviour, the respondent meets the criteria of "Paedophilia" as determined in the Diagnostic and Statistical Manual of Mental Disorders, Volume IV.

(b) He is in the high risk category for re-offending for both violent and sexual offences, relative to other male sex offenders.

(c) He is alcohol-dependent and would experience considerable difficulty in cutting down on his drinking.

[35] No doubt these factors contributed to the observation by the sentencing Judge that the respondent had exhausted any entitlement to leniency because of his young age and that the time had come when the protection of the community had become a primary consideration. Taking these matters into account, it seems to me that it can rightly be said of the respondent that he is a serious danger to the community because of his antecedents, his character, his tendency to paedophilia, his alcohol addiction, and the severity of the violent sexual offence he committed against this very young child. Accordingly, had the appropriate notice of intention been given, and the application made under section 65 of the *Sentencing Act* at the time of the sentencing, in my view, it would have been appropriate to sentence the respondent to an indeterminate sentence. As that course was not sought by the Crown at the relevant time, I agree with the sentence proposed by Mildren ACJ and Blokland J.