Farrer v The Queen [1999] NTCCA 43

PARTIES:	LEE TRAVIS FARRER
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA3 of 1998
DELIVERED:	28 April 1999
HEARING DATES:	18 March 1999
JUDGMENT OF:	MILDREN, THOMAS & RILEY JJ

CATCHWORDS:

Appeal - criminal law - severity of sentence - finding of racist attack not infect sentencing process - community concerns relevant sentencing factor.

Appeal - criminal law - expert psychological report admissible - sentencing discretion open to Court to decide what weight to attach to reports.

Appeal - criminal law - co-offenders - different sentences reflect the different degree of culpability - lack of disparity between sentences.

Legislation:

1. *Sentencing Act (NT)* - s105; s106; s5(2)(s); s54; s55

Cases:

1. *Lowe v The Queen* (1984) 154 CLR 608, applied
2. *Lovelock v The Queen* (1978) 33 FLR 132, applied
3. *Postiglione v The Queen* (1996-1997) 189 CLR 295, discussed
4. *R v Mulholland* (1991) 1 NTLR 1, discussed

REPRESENTATION:

Counsel:

Appellant:	J. Tippett
Respondent:	J. Karczewski with J. Whitbread

Solicitors:

Appellant:	N.T. Legal Aid Commission
Respondent:	D.P.P.

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

Farrer v The Queen [1999] NTCCA 43
No. CA3 of 1998

BETWEEN:

LEE TRAVIS FARRER
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, THOMAS & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 28 April 1999)

THE COURT:

[1] This is an appeal against severity of sentence, leave having been granted by Thomas J on 8 October 1998.

[2] The appellant and his co-accused Bradley Garry Sullivan pleaded guilty to one count of unlawfully causing grievous harm to one Johnny Mununggurr on 10 January 1997 at Nhulunbuy. Sullivan was sentenced to imprisonment for seven years with a non-parole period of four years.

The appellant was sentenced to six years imprisonment with a non-parole period of three years. Sullivan was aged twenty-four at the time of the offence and had previous convictions including a partially suspended sentence of detention for three months for unlawful assault causing bodily harm in 1989 when he was fourteen years of age, and convictions for common assault in 1991 and 1993 when he received fully suspended sentences of imprisonment. The appellant was aged eighteen at the time of the offence and had no prior convictions of any kind. One ground of appeal is that the sentence imposed on the appellant reflected insufficient disparity between the appellant and Sullivan.

[3] The learned sentencing judge ordered pursuant to s105 of the *Sentencing Act*, pre-sentence reports and psychological and psychiatric assessment of the appellant and his co-offender prior to sentencing as a result of which, reports were received from a Correctional Services Officer, Mr Willcocks, a forensic psychologist, Mr Ré Acacio, a clinical nurse consultant, Mr Edward MacDonald, another psychologist Mr Paul Rysavy (whose report focused on an alcohol and other drugs assessment), and a forensic psychiatrist, Dr Vladimir Todorovic. Similar reports were received in relation to Sullivan. The appellant's counsel tendered a psychiatric report from Dr Lester Walton, and a number of references. Mr Ré Acacio's report contains the results of two "psychometric instruments" which were administered, the Minnesota Multiphasic Personality Inventory (MMP1-2) and the Carlson Psychological Survey as

well as the conclusions he has drawn. The results revealed two profiles, which are described in the report in general terms, but not specifically related to the appellant. This report was apparently relied upon by Dr Todorovic in preparing his report. The learned sentencing judge had been invited by counsel for the appellant to ignore Mr Ré Acacio's report, but his Honour declined to do so. This is the subject of another ground of appeal.

[4] His Honour also had before him the records of interview with the police of both prisoners. During his Honour's sentencing remarks, his Honour quoted extensively from both records of interview. He said that he accepted Sullivan's account and rejected that of Farrer in respect of two matters of fact. This is also the subject of a ground of appeal by the appellant.

The Crown Facts:

[5] The following Crown facts were admitted into evidence as Ext P1. They were not in contest:

> During the evening of Thursday 9 January 1997, the prisoners Bradley Sullivan and Lee Farrer were drinking at the Gove Resort Hotel in Westal Street.
>
> Both Bradley Sullivan and Lee Farrer left the hotel together, sometime between 12:15am and 12:45am and walked across the street to the taxi rank on the opposite side of Westal Street.
>
> They saw an adult male Aboriginal and the victim in this matter, Johnny Mununggurr (32 years), sitting on the grass in the park behind the taxi rank shelter.

Sullivan and Farrer approached the victim and Bradley Sullivan kicked the victim hard to his head, with his right foot striking the victim on the cheek. This blow felled the victim onto his back, and both prisoners proceeded to further kick the victim about his head and chest area, each kicking the victim a further four to five times. At the time of kicking the victim, the prisoner Sullivan's feet were clad in running shoes. By this time the victim was not moving and lay motionless and face down on the ground. Farrer located a metal rubbish bin near the taxi rank, from which the (sic) Sullivan removed the plastic bin liner and rubbish that it contained. Sullivan then ignited the plastic and rubbish with his cigarette lighter.

Farrer, who was standing 5 to 10 metres from the victim, then threw the metal rubbish bin at the victim. The bin struck the victim on his head.

The prisoners then saw a taxi approaching the rank. Bradley Sullivan then ran to get to the taxi and dropped or threw the burning plastic and rubbish, which landed on, or next to the victim's bare back. They then hopped into a taxi and went to Sullivan's home, where they played video games until Farrer also left to go home.

Sullivan boasted the next day to co-workers of his and 'a mate's attack on an Aboriginal male. His boasts were reported to police. Farrer was subsequently interviewed by police the same day. He gave an electronic recorded interview to police in which he made full admissions to his part in the assault on Mr Mununggurr.

The assault on Mr Mununggurr was unprovoked. He offered no resistance and was rendered unconscious early in the attack, which continued despite the unconsciousness of the victim.

Mr Mununggurr was evacuated to the local hospital and then medi-evacuated to Royal Darwin Hospital.

He was found to be suffering injuries as described in the attached medical reports dated 6 February 1997 and 12 November 1997.

On Sunday 12 January 1997 following police enquires into the matter, Bradley Sullivan surrendered himself to the Nhulunbuy Police Station where he was subsequently arrested. He participated in a video-audio taped record of interview with police during which he made full admissions to the above facts.

> Bradley Sullivan has remained in custody since that time. Lee Farrer was remanded in custody until 13 January 1997 when he was granted bail.

The consequences of the assault upon the victim:

[6] The injuries suffered by Mr Mununggurr were summarised by His Honour as follows:

> The assault on Mununggurr was unprovoked. He offered no resistance and was rendered unconscious early in the attack, which continued despite the unconsciousness of the victim. Mununggurr was evacuated to the local hospital and then medi-evacuated to the Royal Darwin Hospital. He was found to be suffering injuries described in medical reports dated 6 February 1997 and 12 November 1997, attached to the Crown facts. They state that the victim was admitted to the Royal Darwin Hospital on 10 January 1997 with a closed head injury. There was no fracture of the skull vault but a right subdural haematoma in the frontal parietal region of the brain. There was also a contusion to the right temporal lobe with oedema and two fractures to the right zygonatic arch. He also had patchy burns over a large proportion of his back with varying sizes and depths which required surgical debridement and grafting.
>
> As at 6 February 1997, the victim had yet to attempt to verbalise and was experiencing right-sided focal partial seizures which were being brought under control with medication. At that stage he was being fed IV fluids and was breathing spontaneously via tracheostomy. He had urinary incontinence and had a long-term urinary catheter.
>
> Due to the closed head injury the victim is now reduced from a healthy young man, 32 at the time of the assault, capable of looking after himself, to a wheelchair-bound hemiplegic who has high level nursing home-care needs. He is totally dependent upon the help of others for all his daily living needs, having suffered permanent cognitive and motor damage. He will not improve much, if at all, from his present condition.
>
> The Director of Medical Services at Gove District Hospital says, and I quote, 'He will never return to a semblance of normal living and his enjoyment of life is severely curtailed forever.'

Was there a racial motivation?

[7] After submissions had concluded, his Honour reconvened the Court as he had in the meantime, purely by accident, read a statutory declaration from a Mr Chapman, a work mate of Sullivan's, which suggested that the attack on Mununggurr was racially motivated. His Honour pointed out that Chapman's statutory declaration was not in evidence before him, and that unless it became admitted into evidence, he would have to ignore it, but that he was concerned that the Court might be mislead. His Honour referred counsel to authority to the effect that a racial motivation would be an aggravating feature. The statement was ultimately admitted into evidence, and his Honour heard further submissions. Ultimately his Honour accepted that it had not been shown beyond reasonable doubt that the attack was racist. His Honour then referred to certain comments in the pre-sentence reports to the effect that the attack had sparked racial tension in the region which will take some time to be resolved, and that there was "a profound air of suspense about the town at the time, with significant tension being experience particularly within the white community". He said that those remarks fell outside the purview of s106 of the *Sentencing Act* (which deals with the contents of pre-sentence reports) and that he placed "little weight" on these matters. Although not the subject of a ground of appeal, Mr Tippett submitted that no weight should have been attached to those comments, and that his Honour's concerns about a racial motivation for the attack, even though he

ultimately made no adverse finding against the appellant, "infected the sentencing process".

[8] We agree with his Honour that the observations of the authors of the reports on the effects of the attack in the region, strictly speaking, fell outside of the ambit of s106 of the Act. However, unless objection was taken, we do not consider that these consequences were irrelevant to the sentencing process. It must have been reasonably foreseeable that an unprovoked attack of this nature and severity upon an Aboriginal man was likely to cause deep disquiet in a community which has a large Aboriginal population, most of the members of which continue to maintain strong ties to their culture and traditional way of life. Such a factor was a relevant circumstance, pursuant to s5(2)(s) of the Act. Indeed, counsel for the appellant at the sentencing hearing accepted that, and did not specifically object to his Honour taking that material into account, but seemed to be inviting his Honour to advise the authors of these reports that, in the future, they should confine themselves to the matters listed in s106. His Honour specifically asked the appellant's counsel if he should ignore this material, to which counsel replied:

> I accept that community concerns are a relevant factor in this court and in the sentencing process, my client accepts that, and I merely raise this point as a comment on the report, and that it's not specifically within s106.

[9] We are satisfied that there is no substance to these submissions. The sentencing judge said he placed little weight on the effect on the community. It would have been open to him, in the absence of a proper objection, to give it more weight than he did. His Honour expressly found that the Crown had not proven a racial motivation for the attack. The course adopted by his Honour was proper. We do not see how it can be said that what occurred in any way infected the sentencing process.

The psychometric testing:

[10] No objection was taken by counsel for the appellant to the admissibility of Mr Ré Accacio's report. He submitted that the results of the tests were inconsistent with other material before the Court, and should be given little weight. He also relied upon excerpts from a text book on psychological assessment by Freckleton and Selby, which states at para 60.1000 that:

> There is a distinct danger of making incorrect statements about the subject if the textbook interpretation is strictly adhered to without consideration being given to the presenting symptoms, behavioural patterns and personal history of the subject. That is, the profile must be interpreted within the context of this information.

He invited his Honour to attach little weight to the report.

[11] Counsel for the appellant, Mr Tippett, submitted before us that the report was irrelevant and inadmissible:

(a) because the report was not based on identified facts proved in evidence;

(b) no opinion evidence was called as to the validity of the test results or the manner in which they could be usefully interpreted; and

(c) the results of the two tests appeared to contradict each other, and there was no way of testing which result should be preferred.

[12] In our opinion it has not been shown that the report was inadmissible or irrelevant. The report was apparently the result of recognised psychological tests. The tests were in fact administered by Mr Edward MacDonald who sent the results to Mr Ré Accacio for analysis. Mr MacDonald in fact interviewed the appellant. His assessment was that the test results and his own interview led him to conclude that the appellant had an alcohol problem due to excessive binge drinking. A similar result was obtained independently by Mr Rysary. The psychiatrist, Mr Todorovic, relied upon the reports of Mr Ré Accacio and Mr MacDonald as well as his own interview to conclude that, although not dependant, the appellant had poor control of his consumption, and this combined with some of his personality traits, contributed to his extremely violent behaviour, and that "his alcohol consumption was the relevant factor for disinhibiting Mr Farrer's aggressive and violent behaviour".

[13] The learned sentencing Judge's conclusions were as follows:

> The assessment of Farrer is some cause for concern. Tests show that Farrer is a person who may alternate between periods of complete insensitivity to the consequences of his actions and excessive concern of the effects of his behaviour and his temporary expressions of guilt and self-condemnation do not inhibit him from further episodes of acting out. He is a person

> susceptible to erratic and unpredictable behaviour with marked problems with impulse control who is likely to act in asocial anti-social way (sic).
>
> Without detailing the whole report it is apparent that there are discrepancies between some of the reports before me and what Farrer says about himself and the results of the psycho-metric tests taken on him.
>
> I was invited to ignore the psycho-metric testing as being inconsistent with all other evidence. I decline to do so. Alcohol played a major part in this offence. The offending itself indicates a person who at the time was completely insensitive to the consequences of what he was doing. That is consistent with the psycho-metric assessment. I cannot disregard it altogether.
>
> Farrer is at some risk for future offending, given his psycho-metric profile and given his past alcohol abuse. He requires self-motivation to rehabilitate himself. I am satisfied that he presently has that.

[14] The matters referred to in the first paragraph quoted above come from Mr Ré Accacio's report, and are part of the profile exhibited as a result of the MMP1–2 test. The learned sentencing judge's conclusions concerning the weight to be given to the report are contained in the next three paragraphs. It is apparent that his Honour gave some weight to that material. He was entitled to do so. It was supported in the major conclusions drawn by the sentencing judge by other material before him. We do no think he gave this material excessive weight. Even if the report had been inadmissible, the ultimate conclusions which his Honour drew were inevitable, given the other material before him which was not in contest, and we note that there was no adverse finding as to the

appellant's future prospects for rehabilitation. There is therefore no substance to this ground of appeal.

The records of interview:

[15] As is evident from the findings relating to the victim's injuries, one of the injuries sustained was patchy burns over his back which required surgical debridement and grafting. In the Crown facts, it is evident how this is alleged to have occurred. After the victim had been kicked by both the appellant and Sullivan, and was lying motionless and face down on the ground, the appellant located a metal bin from which Sullivan removed the plastic bin liner and the rubbish it contained. Sullivan then ignited the plastic and rubbish with his cigarette lighter, whereupon the appellant threw the bin, striking the victim in the head. As a taxi approached Sullivan ran to get to the taxi, dropping or throwing the burning plastic and rubbish which landed on or near the victim's back. It is clear that the appellant did not light the bag or the rubbish, but that he is also responsible for Sullivan's actions, as they plainly were acting in concert. There is no mention in this account of any dripping of burning plastic upon the victim's back.

[16] The learned sentencing judge, after referring to, and quoting at length from both records of interview said:

> That is the end of the quote from the interview. It is to be noted that, in the account, Farrer makes no mention of the deliberate dripping of burning plastic on the back of the victim or throwing the burning garbage bag onto the victim's back. I reject Farrer's

> version and I accept Sullivan's account to be true; that is I am satisfied beyond reasonable doubt that the bag was deliberately lit; that it was deliberately dripped onto the victim and that it was deliberately thrown onto the victim.
>
> I do not accept Farrer's account insofar as there may be any suggestion that his kicking of the victim commenced after Sullivan finished kicking the victim. I am satisfied, as per Sullivan's account, that both were kicking the victim at once, although hit (sic) was Sullivan who first kicked the victim. At page 15 of Farrer's interview, he spoke of the plastic bag dripping when Sullivan was trying to light the rubbish bag, but he makes no mention of deliberately dripping the plastic onto the victim.

[17] Counsel for the appellant submitted that his Honour erred in relying upon admissions made by Sullivan which were inadmissible as against Farrer, and denied Farrer natural justice in so doing. Mr Tippett supported his argument by the fact that the Crown prosecutor had conceded at the sentencing hearing that he could not lead evidence to prove beyond reasonable doubt that the burns suffered by the victim were deliberately inflicted.

[18] It was not suggested that the admissions made by Sullivan in his record of interview would not have warranted the findings made by his Honour as against Sullivan. The difficulty is, as Mr Karczewski conceded, that it is unclear what finding of fact the sentencing judge made in respect of the appellant and how that finding reflected itself in the sentencing process. The passage in the judgement quoted above, so far as it relates to the burning incident, is consistent with findings made against Sullivan only, or it could be a series of findings against both. Counsel for the appellant before the learned sentencing judge appears to have attempted to distance

Farrer from any knowledge of any deliberate burning of the victim. It may be that this is what his Honour was referring to when he said that he rejected the appellant's account. But Farrer says in his record of interview that he saw Sullivan light the rubbish bag; that at this time Sullivan was standing over the victim; that he saw the plastic dripping when it was set alight by Sullivan; and he saw Sullivan throw the lighted bag at the victim after he had thrown the empty bin at him. In all the circumstances, the findings made by the learned trial judge, in the light of the admitted Crown facts, are hardly surprising. It is also clear that, the appellant had, by his own acts, and knowledge of Sullivan's behaviour, urged Sullivan to burn the victim, and that therefore he is equally responsible in law for Sullivan's acts, just as Sullivan is for his acts. To attempt to dissect moral responsibility in the manner sought to be done in this case by the appellant's counsel is sophistry. It may be that Farrer did not do any burning of the victim himself, but nor did Sullivan hit the victim on the head with the rubbish tin. We do not consider that it has been demonstrated by the appellant that his Honour erred: but if we are wrong in that conclusion, we consider that, any error was of no significance for sentencing purposes.

Are the sentences not disparate enough?

[19] It has been settled law in Australia since *Lowe v The Queen* [1984] 154 CLR 608 that, all persons who have been parties to the commission of an offence should, if other things are equal, receive the same sentence; but

that often, all things are not equal, and that therefore it is appropriate that different sentences should be imposed to reflect the different degrees of responsibility of the offenders as well as the different personal circumstances of the offenders. In *Lowe*, the High Court accepted that if a sentence imposed on the offender who received the heavier sentence was so disparate from that of his co-offender, a court of appeal may interfere if it considers that the disparity is such as to give rise to a justifiable sense of grievance, or, in other words, the appearance that justice has not been done, notwithstanding that the sentence actually imposed is not in itself manifestly excessive.

[20] The present appeal is by the offender with the lesser rather than the heavier sentence, but in our opinion the principle must be the same, notwithstanding that what is being complained of is not that the difference between the two sentences is manifestly excessive but that the difference between them is manifestly inadequate. The case is therefore not really one of disparity, but of lack of disparity. But the justification for interfering with the trial judge's discretion will be the same, *viz* the difference in sentences, (or, we would add, the lack of difference) is such as to give rise to a justifiable sense of grievance on the part of the appellant: see *Lovelock v The Queen* (1978) 33 FLR 132 at 136-7 per Brennan J.

[21] However, mere disparity, or lack of it, is not enough. Where no particular error is shown, due allowance must be made for the fact that a

sentencing Court has a wide discretion. Appellate Courts will not interfere unless satisfied that the lack of disparity is so manifest as to engender a justifiable sense of grievance, in the mind of an objective observer, by giving the appearance that justice has not been done.

[22] In this case, it was submitted that the appellant's sentence, compared to that of his co-offender, lacked disparity having regard to the following matters; the less culpable role of the appellant; the age difference; the lack of prior convictions; evidence of positive good character, and profound remorse compared to that of his co-offender should have resulted in a larger difference than one year as a minimum term and one year as the head sentence.

[23] In *Postiglione v The Queen* [1996 - 1997] 189 CLR 295 at 338 Kirby J observed that the:

> … focus of attention is not upon the nominal sentence [i.e. head sentence] but upon the actual punishment which it appears likely the prisoners in suggested comparison will undergo.

This may cause some difficulties because of the provisions of ss 54 and 55 of the *Sentencing Act*, which impose minimum non-parole periods expressed as a percentage of the head sentence. These provisions may make it more difficult for a sentencing court to reflect disparity between co-offenders without also significantly reflecting that disparity in the head sentences, perhaps in a way which would otherwise be not justified.

That problem does not seem to have arisen in this case, as the learned trial judge imposed the minimum non-parole period for the appellant but imposed more than the minimum for Sullivan.

[24] In our opinion there is no significant difference in the moral culpability of the offenders such as to warrant significantly disparate sentences. Whilst the facts show that Sullivan was first to attack the victim, the appellant joined in almost immediately. Thereafter both were engaged in what the learned sentencing judge described as follows:

> This assault, which was carried out with sickening brutality and which resulted in such grave consequences for the victim is as bad a case of unlawful grievous bodily harm as I have hitherto encountered in my experience on the bench.

In our opinion those remarks were entirely justified. The only factors which it could be suggested differentiate the moral culpability of the two men were that Sullivan had prior convictions for assault, and Sullivan's cruelty in deliberately burning the victim. The first of these matters is supported by the observations of Angel J in *R v Mulholland* (1991) 1 NTLR 1 at 13, where his Honour said that prior offending is

> … a circumstance relevant to the mens rea of the offender in committing the instance (sic) offence and that there is prima facie increased criminal culpability pertaining to the instant offence.

(See also Asche CJ at 2).

[25] As to the second matter, we have already dealt with that in para [18] (supra). In our opinion these factors by themselves did not warrant any significantly disparate sentences.

[26] There is more force in the other matters pressed by Mr Tippett. Sullivan was twenty-four and the appellant eighteen at the time of the offences. Sullivan's prior convictions for assault disentitled him to the same degree of leniency as the prior good record and evidence of good character provided to Farrer. The learned sentencing judge found that both were remorseful; both were prone to anger and violence when affected by alcohol; both had realised the nature of this problem and the need for it to be professionally addressed; and that both had reasonable prospects of rehabilitation. In these circumstances a measure of disparity was called for in the appellant's favour. We are not satisfied that the level of disparity, particularly in the minimum term to be served, is such as to warrant the intervention of this Court.

[27] Accordingly, the appeal is dismissed.