R v BABUI

Court of Criminal Appeal of the Northern Territory of Australia

Asche CJ, Gallop and Angel JJ

12, 13, 14 November 1990 and 19 December 1991 at Darwin

CRIMINAL LAW - Sentencing - appeal rape - recidivist - head sentence - whether manifestly excessive

CRIMINAL LAW - Rape - recidivist - whether incapable of controlling sexual instincts - whether question to be considered on appeal where not subject of an application at trial - s.401 Criminal Code

Cases followed:
R v Mulholland (unreported decision of NT Court of Criminal Appeal, 16 January 1991 at Darwin)

Cases considered:
Power v The Queen (1974) 131 C.L.R. 623
R v Brusch (1986) 11 F.C.R. 592
R v Creed (1985) 37 S.A.S.R. 566
R v Raggett, Douglas and Miller unreported 28 September 1990 Kearney J
Veen v The Queen (No. 2) (1987-88) 164 C.L.R. 465

Statutes referred to:
Criminal Code 1983 (NT)
Parole of Prisoners Act (NT)

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Solicitors for the Appellant:	Solicitor for the NT
Counsel for the Respondent:	D Mildren QC with S Cox
Solicitors for the Respondent:	North Australian Aboriginal Legal Aid Service

IN THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
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No. CA 17 of 1990

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY
SCC No. 58 of 1990

BETWEEN:

THE QUEEN

Appellant

AND:

PHILLIP MICHAEL BABUI

Respondent

BETWEEN:

PHILLIP MICHAEL BABUI

AND:

THE QUEEN

REASONS FOR JUDGMENT

(Delivered 19 December 1991)

Coram: Asche CJ, Gallop and Angel JJ.

ASCHE CJ:

I agree with the reasons of Gallop J and the orders proposed.

GALLOP J:

The Crown has appealed against the sentence imposed upon the prisoner on 7 September 1990 in respect of his

conviction when he pleaded guilty to the following offence:

> "On 8 March 1990 at Nguiu Bathurst Island in the Northern Territory of Australia, unlawfully assaulted Suzy Tipiloura with intent to have carnal knowledge of her
>
> and that the said unlawful assault involved the following circumstances of aggravation,
>
> (a) that the said Suzy Tipiloura suffered bodily harm;
>
> (b) that the said Suzy Tipiloura was under the age of sixteen years, namely seven (7) years and the said Phillip Michael Babui was an adult; and
>
> (c) that the said Phillip Michael Babui had carnal knowledge of the said Suzy Tipiloura.
>
> Section 192(1)(2)(3) and (4) of the Criminal Code."

The maximum penalty for the offence with those circumstances of aggravation is imprisonment for life.

The sentencing judge imposed a sentence of 16 years' imprisonment. The offence was committed while the prisoner was on parole. In addition to the sentence imposed, his Honour ordered that the prisoner undergo imprisonment for the term that he had not served at the time when he was released from prison pursuant to the parole order and ordered that the term commence at the expiration of the term of imprisonment to which he was then sentenced. He specified that that additional term be a period of four years to commence from the expiration of the term of 16 years, making a total of 20 years. The sentencing judge fixed a period of five years during which the prisoner would not be eligible to be released on parole and ordered that the head sentence and

the non-parole period commence from 8 March 1990.

The Crown not opposing an order extending the time for filing notice of cross-appeal, the Court made an order extending the time for filing notice of cross-appeal until 29 October 1990.

On the hearing of the appeal and cross-appeal the Crown pointed out that the trial judge had correctly ordered that the prisoner undergo imprisonment for the term that he had not served at the time when he was released from prison pursuant to the parole order, but submitted that his Honour erred in specifying that the further term was four years. His Honour had not taken into account remissions which the prisoner had earned on the portion of head sentence already served when he was released on parole as required by s.15 of the Parole of Prisoners Act.

For the reasons expressed in The Queen v. Mulholland, unreported decision delivered 16 January 1991, the sentencing judge should have ordered the prisoner to undergo imprisonment for the term that he had not served at the time when he was released from prison in pursuance of the parole order and that that term of imprisonment commence at the expiration of the term of imprisonment to which he was then sentenced. His Honour should not have fixed the period of four years, as that period did not allow for the partial remission of sentence earned by the prisoner before the

revocation of the parole order. The period so earned is to be deducted from the term of imprisonment that remains to be served as a result of the revocation of the parole order pursuant to s.15. The precise term is a matter for administrative determination.

Apart from that matter, the principal ground of appeal by the Crown is directed to inadequacy of the non-parole period of five years in that it:

(a) bears no adequate relationship to the gravity of the offence;

(b) fails adequately to reflect the fact that the respondent had been on parole for a similar offence when he committed the present offence;

(c) when measured against the totality of the respondent's criminality demonstrates manifest inadequacy;

(d) is inordinately low when viewed against the totality of the head sentence;

(e) fails adequately to punish the respondent.

The grounds relied upon by way of cross-appeal are that the head sentence was manifestly excessive and crushing, and that the difference between the head sentence and the non-parole period is too great.

Before turning to the facts of the offence to which

the prisoner pleaded guilty, and in respect of which the sentence under appeal was imposed, it is necessary to refer to the prisoner's prior criminal record for offences of a sexual nature as found by the trial judge, all of which the sentencing judge took into account.

On 16 October 1984 he was convicted of an offence of carnal knowledge and sentenced to imprisonment for a period of six months, which was suspended upon his entering into a bond to be of good behaviour for a period of two years containing conditions about his being under supervision. Less than two months later he was convicted of assault with intent to have carnal knowledge, for which he was sentenced to six months at Giles House and to three months' hard labour cumulative upon that sentence for the breach of the bond granted to him on 16 October 1984.

On 14 March 1986 he was convicted of aggravated sexual assault, sentenced to seven years' hard labour to commence from 10 December 1985 and a non-parole period of three years was fixed. That offence was assault with intent to have carnal knowledge and having carnal knowledge of a girl under the age of 16 years. It was directed that the prisoner be released on parole on 21 December 1988, which was three years after the date upon which the sentence of seven years was to commence. The parole order made on 21 December 1988 was expressed to remain in force until 9 December 1992. The offence which gave rise to the sentence now under appeal was

committed on 8 March 1990 while the prisoner was on parole.

His Honour found that the offence of carnal knowledge for which the prisoner was sentenced on 16 October 1984 was an anal assault on a five year old girl. The next offence was an attempt to rape an 11 year old school girl, which was only prevented by the intervention of the child's mother. The conviction on 14 March 1986 arose out of circumstances which the sentencing judge found to be very similar to those involved in the instant case. The victim, aged 11, was alone in a house which the prisoner entered. He attacked her using physical violence and had vaginal sexual intercourse with her causing physical injury.

The facts of the instant offence as found by the trial judge were that both the prisoner and the victim were residing on Bathurst Island and at the time of the offence the prisoner was living temporarily in the same household as the victim. They were both related to the head of the house and there were about 10 people living there. The victim shared a room with other children and adults, including the prisoner. Some time early in the morning of 8 March 1990 the prisoner, after drinking heavily, made his way to the house. The victim was asleep on a mattress on the loungeroom floor wearing only a pair of pants. While she was asleep the prisoner removed her pants, picked her up and took her outside to a nearby oval where he proceeded to have vaginal intercourse with her. She awoke, was frightened and screamed and the prisoner placed his

hand over her mouth. She was caused injuries to her vagina with heavy bleeding but he continued the act of intercourse until, it seems probable, he ejaculated. The girl's cries were heard by people nearby and when the prisoner realised they were coming to investigate he picked the girl up, went some distance away with her, eventually put her down and proceeded on his own. She was found by his pursuers in a very distressed state. The prisoner eventually returned to the household where he and the victim had been living and, when confronted by the girl's father, departed.

He was confronted by police some hours later. When the allegation of rape was put to him, he at first denied it, but was arrested and taken into custody.

On examination the girl was found to have suffered a superficial tear to the vagina, which had to be repaired under general anaesthetic. Medical opinion was that the tear is unlikely to give cause to any long term or permanent physical disability, but the possibility of some problem arising in childbirth remains. She will need a follow-up assessment to determine whether or not she suffered any problems in her emotional development.

The prisoner was taken to Darwin and then to the Berrimah Police Complex, where in a taped record of interview he made a full confession volunteering much of the relevant information.

His Honour noted that at the time of sentencing the prisoner was 21 years of age, having been born on 27 November 1968; that he had spent all his life in the Top End of the Territory; progressed to complete Year 10 at a school on Bathurst Island, was single and had never been married, usually worked as a labourer with no particular trade or skills; was the oldest of nine children, and his mother and brothers and sisters all resided on the Island. He is the father of a child aged 7, the child's mother is the same age as the prisoner, meaning that she became pregnant about the age of 13. The prisoner had told a psychiatrist that he had had a relationship with her over a period of about four or five years, but that after the child was born the girl's mother had refused to let him stay with her anymore. He had also had sexual relationships with adult women and had another child, a daughter approximately one year old.

On the whole of the evidence, including that of the psychiatrist, his Honour was satisfied that the prisoner suffered from a well known mental disorder, the effect of which was that he was, occasionally at least, unable to overcome his instincts to engage in most serious sexual conduct with young girls. He took into account all the other relevant subjective factors, including the prisoner's age, state of intoxication, the fact that the attack upon the victim appeared to have been opportunistic and not premeditated, the fact that after initial reluctance he co-operated fully with the police and accordingly had spared the

girl and those who were on or about the scene at the time the trauma associated with giving evidence.

It was submitted on behalf of the Crown that the non-parole period of five years fixed by the sentencing judge is out of proportion to the gravity of the crime, especially in the light of the prisoner's antecedent criminal history. That history, so it was submitted, illuminates the moral culpability of the prisoner in the instant case, shows his dangerous propensity and shows a need to impose a condign punishment to deter him and others from committing offences of a like kind. The submission was that the non-parole period fixed gives far too much emphasis to rehabilitation and insufficient emphasis to the factors of deterrence and retribution and the period should be substantially increased.

The Solicitor-General referred to Power v. The Queen (1974) 131 CLR 623 as applied by this Court in R v. Raggett, Douglas and Miller, unreported, 28 September 1990 per Kearney J.; R v. Creed (1985) 37 SASR 566 as applied by the Federal Court in R v. Brusch (1986) 11 FCR 592 and Veen v. The Queen (No.2) (1987-88) 164 CLR 465.

The application of the principles stated in those cases was discussed in the judgments of the Court in The Queen v. Mulholland, a decision of this Court delivered on 16 January 1991, and it is unnecessary to repeat what was

there stated.

Applying those principles, it was necessary to impose upon the prisoner an appropriate sentence which reflected the gravity of the crime and all other factors in both the head sentence and the non-parole period. As in the case of Mulholland, the stark reality in relation to this prisoner is that the offence for which he was sentenced on 7 September 1990 bears alarming similarities to the offences previously committed by him on 16 October 1984 and 14 March 1986. As previously stated, the offence which is the subject of the sentence under appeal was committed on 8 March 1990 while the prisoner was on parole.

The appropriate sentence has to be set against that background and against the maximum penalty of imprisonment for life. In my view the Court should impose a longer head sentence than the head sentence imposed upon the prisoner on 14 March 1986 for an offence of aggravated sexual assault which was a sentence of imprisonment for seven years with a non-parole period of three years. Further, the non-parole period should also be longer than the non-parole period of three years just mentioned.

I am of the opinion that the head sentence under appeal of imprisonment for 16 years may rightly be described as crushing, even allowing for remissions of one-third of that period. I would substitute a sentence of 12 years'

imprisonment and fix a non-parole period of seven years to date from the date of the sentence under appeal, namely 8 March 1990.

On the hearing of the appeal, the Court adverted to s.401 of the Criminal Code which, so far as relevant, provides:

> "(1) Where any person has been convicted on indictment of an offence of a sexual nature ... and it appears that by reason of the circumstances of the offence of which he has been convicted ..., the number of times he has been convicted previously of like offences or for any other reason that the offender may be incapable of exercising proper control over his sexual instincts, the judge may direct that 2 or more legally qualified medical practitioners named by the judge, of whom one at least shall be a psychiatrist, inquire as to the medical condition of the offender and, in particular, whether his mental condition is such that he is incapable of exercising proper control over his sexual instincts.
>
> (2) ...
>
> (3) If the medical practitioners report to the judge that the offender is incapable of exercising proper control over his sexual instincts the judge may, either in addition to or in lieu of imposing any other sentence where the offender was convicted on indictment ... declare that the offender is so incapable and direct that he be detained in such place and in such manner as the court thinks fit during the Administrator's pleasure.
>
> (4) The offender shall be entitled to cross-examine such medical practitioners in relation to and to call evidence in rebuttal of such report and no such order shall be made unless the judge shall consider the matters reported to be proved.
>
> (5) ...
>
> (6) ..."

Before the sentencing Judge, reference was made to the operation of s.401. Dr Joan Ridley, the Director of

Mental Health Services of the Northern Territory, was called to give evidence on behalf of the prisoner in relation to her psychiatric examination of him. She said that she had no doubt that the prisoner had a para-philiac disorder which manifested itself as an addiction or compulsion towards sexual contact with children. Dr Ridley then gave evidence of the treatment for this disorder. Asked whether she was able to say if the prisoner was a person capable of controlling his sexual urges, Dr Ridley said that because of his mental disorder the prisoner was sometimes unable to control his sexual instincts.

At no stage did the Crown assert that the prisoner fitted the criteria provided in s.401. The sentencing Judge raised squarely with the Crown whether it was appropriate for the Court to consider s.401. The Crown put no submission one way or the other and left the operation of the section to the sentencing Judge.

In his remarks on sentence, the sentencing Judge said, having referred to the circumstances of the offence and of the prior convictions:

> "The information as to these prior offences, coupled with the circumstances of this offence, and a report from Doctor Ridley, cause me to raise with counsel the provisons of section 401 of the Criminal Code, relating to the detention of a person as one incapable of controlling his sexual instincts.
>
> Your counsel resisted my putting in train the procedures under that section which may lead to the consequence of your being detained on an indeterminate basis.

> For its part the Crown, through its counsel, does not urge upon me that the court should set in train those procedures. It does not argue that, on the information before the court, I could come to the view that you may be incapable of exercising proper control over your sexual instincts.
>
> I do not think that, in a case involving the liberty of the subject, I should adopt such a view without the assistance of counsel for the Crown which, in more modern times, has the responsibility of assisting the court in relation to sentencing, especially if it maintains a severe penalty should be imposed.
>
> It is, I think, of no value for me to embark upon the procedures provided in section 401 even if I were of the view that you may be incapable of exercising proper control over your sexual instincts, without an indication, at the least, that the Crown is interested to pursue the matter with a view to having the intermediate and ultimate questions determined.
>
> There are a number of discretions along the way: whether the court should direct that two or more legally qualified medical practitioners be called upon to report; whether, if they were to report that the offender was incapable, a declaration to that effect should be made with the consequence of detention at the Administrator's pleasure. I will not, therefore, do anything further pursuant to section 401 of the Code."

It was those remarks by his Honour which caused this Court to invite submissions from the Crown and the prisoner about the implementation of s.401 by this Court. The Crown responded by a submission that it did not wish to adopt an attitude as to the application of s.401 different to that taken at the trial, as such a change of attitude would be unjust. In my opinion, that submission on behalf of the Crown is correct and precludes any further consideration of s.401 in relation to this appeal and cross-appeal.

Accordingly, the orders I propose are:

(1) that the appeal and cross-appeal be allowed;

(2) that the sentence imposed be set aside and in substitution therefor, the prisoner be sentenced to imprisonment for 12 years;

(3) that the prisoner undergo imprisonment for the term that he had not served at the time when he was released from prison in pursuance of the parole order, and that that term of imprisonment commence at the expiration of the term of imprisonment to which he is now being sentenced;

(4) that a non-parole period of seven years during which the prisoner will not be eligible for parole be fixed; and

(5) that the head sentence of 12 years' imprisonment and the non-parole period of seven years date from 8 March 1990.

ANGEL J:

I agree with the orders proposed by Gallop J and his reasons therefor, though not without some hesitation. My hesitation arises from the Crown's submissions with respect to s.401. Whilst it is true that, speaking generally, a change of attitude by the Crown between trial and appeal may seem unjust, here, the justice of the case demands a close consideration of the general protection of the public from any risk of future offending by the prisoner. In the end I have reached the conclusion that the abnegative attitude of the Crown to the question of whether s.401 should be invoked justifies this Court imposing a sentence of fixed duration. Should, unhappily, another occasion arise when s.401 needs to be considered in relation to this prisoner, the Crown may well adopt another stance.