Albert v The Queen [2009] NTCCA 1

PARTIES:	ALBERT, GARY AARON
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 6 of 2008 (20721405)
DELIVERED:	13 March 2009
HEARING DATES:	11 March 2009
JUDGMENT OF:	MARTIN (BR) CJ, THOMAS and RILEY JJ
APPEAL FROM:	Mildren J

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST SENTENCE

Criminal appeal from the Supreme Court – did not impose non parole period – serious offending – long history of prior convictions – low prospect of rehabilitation – insufficient allowance for plea of guilty – sentence reduced by 12 months – no remorse shown – appeal dismissed

Sentencing Act (NT), s 53(1)(b)

Cameron v The Queen (2002) 209 CLR 339, *The Queen v Shrestha* (1990-1991) 173 CLR 48, considered.

R v Place (2002) 81 SASR 395, *Veen v R (No 2)* (1988) 164 CLR 465, *Dinsdale v The Queen* (2000) 202 CLR 321, *Power v R* (1974) 131 CLR 623, *Sullivan v R* (1987) 47 NTR 31, referred to.

Wright v R (2007) 19 NTLR 123, distinguished.

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	R Coates with S Geary

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Albert v The Queen [2009] NTCCA 1
No. CCA6/2008 (20721405)

BETWEEN:

ALBERT, Gary Aaron
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, THOMAS & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 13 March 2009)

Martin CJ:

[1] At the conclusion of submissions, the Court dismissed the appeal. For the reasons given by Thomas and Riley JJ, I agreed that the appeal should be dismissed.

Thomas J:

[2] This appeal was dismissed following submissions and I now set out my reasons.

[3] This is an appeal from a total sentence of eight years imprisonment imposed on the appellant on 19 August 2008. A minimum non parole period was not imposed. The sentence was backdated to 7 August 2007.

[4] The grounds of the appeal are as follows:

1. That the learned sentencing judge did not make sufficient allowance for the plea of guilty.

2. That the learned sentencing judge erred in not imposing some non parole period.

[5] The history of the proceedings is summarised in the affidavit of Ian Leonard Read, solicitor for the appellant, sworn 1 September 2008 as follows:

> 2. On 18 August 2008 the applicant pleaded guilty to nine counts of aggravated assault, pursuant to s.188 of the Criminal Code with varying degrees of aggravation and one count of threat to kill, which involved the use of a shotgun. Attached and marked with the letter "A" is a copy of indictment 20721407 in which he pleaded guilty to counts 1, 3, 6, 10, 11, 12, 13, 14, 18 and 19. A nolle prosequi has now been entered in relation to the remaining counts, namely counts 2, 4, 5, 7, 8, 9, 15, 16, 17, 20, 21. A copy of the nolle prosequi is attached and marked with the letter "B".
>
> 3. The applicant has a long history over a period of greater than 10 years involving violence against women for which he had already served various periods of imprisonment. Annexed hereto and marked with the letter "C" is a copy of the applicant's prior convictions as alleged.
>
> 4. On Tuesday, 19 August 2008 the applicant was sentenced to a total effective sentence of 8 years imprisonment backdated to 7 August, 2007 without a minimum non-parole period. Attached and marked with the letter "D" is a copy of the Learned Sentencing Judge's remarks. The sentence and orders for accumulation are summarised and set out below:

Count	Charge	Sentence	Orders for concurrency
1	s.188(1) & (2)(a), (b) & (m) of the Criminal Code.	imprisonment for 12 months	Counts 1, 3, 6 & 10 concurrent
3	s.188(1) & (2)(a), (b) & (m) of the Criminal Code.	imprisonment for 12 months	
6	s.188(1) & (2)(a) & (b) of the Criminal Code.	imprisonment for nine months	
10	s.188(1) & (2)(a), (b) & (m) of the Criminal Code.	imprisonment for two years	
11	s.166(1) of the Criminal Code.	imprisonment for three years	Counts 11 and 12 concurrent but cumulative upon counts 1,3,6&10.
12	s.188(1) & (2)(a), (b) & (m) of the Criminal Code.	imprisonment for three years	
13	s.188(1) & (2)(a) & (b) of the Criminal Code.	imprisonment for nine months	Counts 13, 14, 18 & 19 concurrent but cumulative upon other sentences
14	s.188(1) & (2)(a), (b) & (m) of the Criminal Code	imprisonment for three years	
18	s.188(1) & (2)(a), (b) & (m) of the Criminal Code	imprisonment for nine months	
19	s.188(1) & (2)(a), (b) & (m) of the Criminal Code	imprisonment for 12 months	

Ground 1: That the sentencing judge did not make sufficient allowance for the plea of guilty

[6] In his reasons for judgment the learned sentencing judge made these comments with respect to the discount allowed for the plea of guilty:

> I take into account that you have pleaded guilty. I note that the first plea offer took place after the committal had begun. Nevertheless, thereafter there was an early plea. I do not consider that there is any real remorse shown by you by your plea. Nevertheless I give you some discount for your plea. I indicate that I have reduced the sentence that I would otherwise have imposed by 12 months.

[7] Counsel for the appellant submits that the sentencing judge did not give sufficient discount for the early indication of a plea of guilty. It was argued on behalf of the appellant that it was not the fault of the appellant the matter was not resolved in a more timely fashion. The discount of 12 months imprisonment represented a discount of 11.1 percent. In *Wright v R*[1] the Crown conceded that a discount of 15 percent was low and that in the circumstances the appellant would have a legitimate expectation that his early plea of guilty would have attracted a reduction in sentence greater than 15 percent. The Court of Appeal agreed the concession was properly made. However, in the matter of *Wright v R*[2] the early plea of guilty was accompanied by genuine remorse. It was in those circumstances the court found a discount of 15 percent was manifestly inadequate. Chief Justice Martin:[3]

[1] (2007) 19 NTLR 123
[2] (2007) 19 NTLR 123
[3] *Wright v R* (2007) 19 NTLR 123 at 127

> … I emphasise that there is no tariff or set range of percentage reduction and it is in the particular circumstances in which the appellant indicated and entered pleas of guilty that the reduction of 15% was manifestly inadequate.

See also *R v Place*.[4]

[8] In the matter before this Court the learned sentencing judge found there was no real remorse shown by the appellant in his plea. The appellant has not challenged this finding. The absence of remorse was significant when assessing the discount for the plea of guilty. In *Cameron v The Queen*[5] the majority in the High Court, Gaudron, Gummow and Callinan JJ considered:[6]

> **The relevance of a plea of guilty**
>
> [11] It is well established that the fact that an accused person has pleaded guilty is a matter properly to be taken into account in mitigation of his or her sentence. In *Siganto v R* it was said:
>
> > … a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.
>
> It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.

[9] An allowance of 11.1 percent for the plea of guilty was I accept at the lowest end of the appropriate discount for the plea of guilty. It is arguable the discount should have been higher, however, the discount allowed by the

[4] (2002) 81 SASR 395
[5] (2002) 209 CLR 339
[6] *Cameron v The Queen* (2002) 209 CLR 339 at 343 (citations omitted)

sentencing judge is not such as to be outside the reasonable exercise of his discretion and I am not able to find it amounted to error.

[10] I would dismiss this ground of appeal.

Ground 2: That the sentencing judge erred in not imposing some non-parole period

[11] The essential submission by counsel for the appellant is that the appellant should be eased back into the community under supervision. It was argued that his immediate release into the community at the completion of his sentence would be unacceptable.

[12] Section 53(1)(b) of the Sentencing Act provides as follows:

> 53 Fixing of non-parole period by sentencing court
>
> (1) Subject to this section and sections 53A, 54, 55 and 55A, where a court sentences an offender to be imprisoned:
>
> ....
>
> (b) for 12 months or longer, that is not suspended in whole or in part,
>
> it shall, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate.

[13] The appellant had pleaded guilty to nine counts of aggravated assault and one count of making a threat to kill.

[14] The learned sentencing judge made the following findings in the course of his reasons for sentence:

> You have 18 prior convictions for assault, extending over a period between 1994 and 2005. With the current nine convictions, that will make 27 convictions for assault. Only two of those previous assault convictions were not aggravated. In nearly every case the victim was a female with whom you were in a relationship. You have received terms of imprisonment on numerous occasions for your behaviour. It is clear that you are a violent bully, with no respect for women, and no respect, also, I might add, for orders of the courts. You have four previous convictions for breach of restraining orders. You have been breached for breaching the terms of a suspended sentence, you have been dealt with for breach of bail, you have had your parole revoked on one occasion, and you have been dealt with for a breach of a bond. You have also been convicted twice for driving whilst disqualified. Your behaviour shows that you are a control freak who wants to control the women that you are in a relationship with.
>
> I want to make it clear to you that I am not punishing you again for your prior offending, but your prior offending is of such a nature that you are not entitled to any mercy for the offences for which you are now being sentenced. It is also clear to me that the nature of these offences and your past history are such as to make the fixing of a non-parole period for your offending inappropriate.

[15] His Honour then went on to relate certain details concerning the appellant's personal history including the fact that he is a full blood aboriginal man who was 32 years of age as at the date of sentence on 19 August 2008. His prospects of rehabilitation are very low, he had no work history and had spent his life either in gaol or moving from community to community on one long drinking binge. In addition to his alcoholism he had also become a user of marijuana.

[16] With respect to the offences themselves, his Honour made the following findings:

> This is a particularly bad case of prolonged violence by a drunken man upon a defenceless woman. Three of the incident are

> particularly serious, especially count 10, when you broke the victim's right radius and ulna bones, and in relation to counts 11 and 12 when you threatened to kill the victim and held a shotgun within an inch of her mouth, and count 14, when you ignited the propellant from an aerosol can and burnt the victim on her left leg. Not content with bashing the victim, you resorted to torture as well with the use of dangerous weapons. On no occasion were you provoked. Your victim had a good job which she has lost through your behaviour. The effects upon her are profound and I would be surprised if she ever truly gets over them.
>
> It was submitted by you counsel that I should give you a non-parole period in order to ensure that when you are released you will be subject to supervision. That has already been tired once and it did not succeed. I think in the circumstances of this case, my duty to protect the community must override any considerations of mercy towards you which the fixing of a non-parole period might bring. There must also be, in crafting an appropriate sentence for you, condign punishment for what you have done to the victim and also the elements of general deterrence and personal deterrence must weigh heavily.

[17] I do not consider the appellant has demonstrated any error in the exercise of the sentencing judge's decision not to fix a minimum non parole period. The sentencing judge specifically noted the appellant was not to be punished again for his prior offending. The sentencing judge gave appropriate weight to the prior history of the appellant in deciding whether or not to fix a minimum non parole period.[7]

[18] His Honour was entitled to make the finding that the prospects of rehabilitation were low. The findings of fact with respect to each of the offences supported the conclusion that this was a particularly "bad case of prolonged violence by a drunken man upon a defenceless woman [which

[7] *Veen v R (No 2)* (1988) 164 CLR 465

also] involved torture as well with the use of dangerous weapons". His Honour was entitled to make a strong condemnation of the appellant's offending and to be concerned about the protection of the community.

[19] I would dismiss this ground of appeal.

Riley J:

[20] On 11 March 2009, the Court dismissed the appeal in this matter. These are my reasons.

[21] On 19 August 2008 the appellant was sentenced to imprisonment for a period of eight years in relation to nine counts of aggravated assault and one count of making a threat to kill. The learned sentencing judge declined to set a non-parole period. The appellant appeals against the sentence on two grounds: first, that his Honour erred in not making sufficient allowance for the plea of guilty; and second, that he erred in failing to provide for a non-parole period. There is no challenge to the individual sentences imposed by his Honour, nor is there any challenge to the length of the head sentence per se.

[22] The offending occurred between April and August 2007. The victim on each occasion was the de facto wife of the appellant. The learned judge described the offending as being a bad case of prolonged violence by a drunken man upon a defenceless woman. His assessment is unchallenged.

The plea of guilty

[23] In order to determine whether there was a failure to make sufficient allowance for the plea of guilty it is of assistance to look at how matters developed.

[24] The appellant was arrested on 7 August 2007 and participated in an electronic record of interview. He made no admissions to assaulting the victim. He was charged and bail was refused. The committal hearing commenced on 22 November 2007 at which time further allegations were made by the victim. As a result the committal hearing was further adjourned to 8 January 2008. Prior to 8 January 2008 the appellant indicated that he was prepared to plead guilty to a number of the offences. His offer was not accepted by the Crown and further negotiations ensued.

[25] The matter came before the Supreme Court on 8 August 2008 when the appellant was arraigned. The indictment contained 21 counts. The appellant pleaded guilty to counts 1, 3, 6, 10 (but not the circumstance of aggravation alleging that the victim suffered harm), 12, 13, 18 and 19. The offences to which he pleaded not guilty were offences of depriving the complainant of her personal liberty (counts 2, 5, 8 and 20), indecent assault (count 4), assault with an electric cord occasioning harm (count 7), assault occasioning harm (count 9), making a threat to kill (counts 11 and 15), assault with an ignited aerosol spray causing harm (count 14) and sexual intercourse without consent (counts 16, 17 and 21). The matter was confirmed as being listed for trial commencing on 18 August 2008.

[26] Negotiations between the prosecution and defence counsel continued and agreement was finally reached during the week before the trial was due to commence. On 14 August 2008 the appellant was rearraigned on some of the counts. In relation to count 10 he pleaded guilty to the circumstance of aggravation to which he had previously pleaded not guilty. In relation to count 11 (making a threat to kill) he changed his plea to guilty. In relation to count 14 (assault with an ignited aerosol spray causing harm) he changed his plea to guilty. In his sentencing remarks the learned sentencing judge described those three offences as being particularly serious. They were an assault where the victim suffered a broken right radius and ulna, an assault where the appellant ignited propellant from an aerosol can and burnt the victim on her left leg, and a threat to kill which was made whilst the victim had a shot gun placed within an inch of her mouth.

[27] Following the plea of guilty to each of those counts, the Crown accepted the pleas in full satisfaction of all of the remaining offences in the indictment. The allegations in counts 2, 4, 5, 7, 8, 9, 15, 16, 17, 20 and 21 were not pursued and a nolle prosequi to that effect was filed by the Director of Public Prosecutions.

[28] In his sentencing remarks his Honour observed that although the appellant did not, at the time of the committal hearing, offer to plead guilty to all of the charges to which he ultimately pleaded, there was "an early plea indicated to most of these charges." However it remains the fact that the appellant did not plead guilty to the very serious matters identified by his

Honour, and referred to above, until 14 August 2008, just four days before the matter was to proceed to trial.

[29] In dealing with the issue of the discount to be provided for the plea of guilty the learned sentencing judge observed:

> I take into account that you have pleaded guilty. I note that the first plea offer took place after the committal had begun. Nevertheless, thereafter there was an early plea. I do not consider that there is any real remorse shown by you by your plea. Nevertheless I give you some discount for your plea. I indicate that I have reduced the sentence that I would otherwise have imposed by 12 months.

[30] In effect the judge provided a discount for the plea of guilty in the order of 11 percent. The appellant submits that the allowance is inadequate and is more appropriate to circumstances where there is a last-minute plea rather than, as here, an indication of a plea at the time of the committal hearing. It was submitted that the appellant was prepared to plead guilty to the allegations of assault but steadfastly denied any allegations of sexual assault. However, as has been seen, the denials of the appellant went beyond mere denial of sexual assault to include the matters referred to in counts 10, 11 and 14. On the basis of the information before the learned sentencing judge, and contrary to the submission made on behalf of the appellant, it could not be said that the proceeding would have resolved during the committal hearing and prior to the complainant having to give evidence if the Crown had, at that stage, agreed to proceed without the allegations of sexual assault.

[31] It is clear that there may be a discount on sentence to recognize the benefits that flow from an accused person entering a plea of guilty.[8] The extent of the discount is to be determined according to the particular circumstances of each case.[9] In determining the appropriate reduction for a particular case, matters for consideration may include: the time at which the plea was offered; whether it was made at the earliest reasonably available opportunity; whether any delay in making an offer to plead guilty is explained by the conduct of others or in some other way; whether it came in the face of a weak or overwhelming Crown case; the extent of any assistance provided by the prisoner to the authorities; and whether the plea reflects contrition and remorse.

[32] In the present proceedings the respondent acknowledges that "the sentence reduction for the plea is at the lower end of the range" but argues that it was within the range. Further, it was submitted, if the allowance was outside the range it was not sufficient to require correction because this would amount to "tinkering" and should be avoided.[10]

[33] Although the circumstances leading to the plea being entered are somewhat confused it is not disputed by the Crown that there was an early offer to plead to a number of the offences in the indictment. The offer which finally resolved the matter came in circumstances where the appellant faced a range of charges and the trial would have taken some time to hear. Further, as was

[8] *Cameron v The Queen* (2002) 209 CLR 339 at 343
[9] *Wright v The Queen* (2007) 19 NTLR 123 at 125
[10] *Dinsdale v The Queen* (2000) 202 CLR 321 at 341

submitted to the learned sentencing judge, if forced to pursue some of the counts to which a guilty plea was entered the prosecution would have encountered difficulties of proof. On the other hand, the fact remains that the appellant did not agree to plead to the three matters referred to above until shortly before the trial and the offer was not accompanied by remorse or contrition.

[34] It is not for this court to interfere with the sentence unless it is satisfied that the allowance of approximately 11 percent was outside the proper range of reduction available to the sentencing judge so as to be manifestly inadequate.[11] Whilst the allowance is at the very bottom of the range I am unable to find that it is outside the range.

A non-parole period

[35] The learned judge declined to grant a non-parole period. In doing so he observed:

> It was submitted by your counsel that I should give you a non-parole period in order to ensure that when you are released you will be subject to supervision. That has already been tried once and it did not succeed. I think in the circumstances of this case, my duty to protect the community must override any considerations of mercy towards you which the fixing of a non-parole period might bring. There must also be, in crafting an appropriate sentence for you, condign punishment for what you have done to the victim and also the elements of general deterrence and personal deterrence must weigh heavily.

[11] *Wright v The Queen* (2007) 19 NTLR 123 at 125

[36] The High Court discussed the "basic theory of the parole system" in *The Queen v Shrestha*[12] where Deane, Dawson and Toohey JJ said:[13]

> The basic theory of the parole system is that, notwithstanding that a sentence of imprisonment is the appropriate punishment for the particular offence in all the circumstances of a case, considerations of mitigation or rehabilitation may make it unnecessary, or even undesirable, that the whole of that sentence should actually be served in custody... the parole system allows for a review of the offender's case after he has actually served a significant part of a custodial sentence, for the purpose of deciding whether he should be released on parole at that stage.
>
> ....
>
> All of the considerations which are relevant to the sentencing process, including antecedents, criminality, punishment and deterrence, are relevant both at the stage when a sentencing judge is considering whether it is appropriate or inappropriate that the convicted person be eligible for parole at a future time and at the subsequent stage when the parole authority is considering whether the prisoner should actually be released on parole at or after that time ... the legislative intent to be gathered from the terms of the parole legislation applicable in that case … was to provide for possible mitigation of the punishment of the prisoner only when the stage is reached where "the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence". This approach has been consistently accepted in subsequent cases in this court.

[37] The provision of a non-parole period is to provide for the mitigation of the punishment of the offender in favour of his rehabilitation through conditional freedom.[14]

[38] Section 53 of the Sentencing Act (NT) provides that, where an offender is sentenced to imprisonment for 12 months or longer and that sentence is not

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[12] (1990-1991) 173 CLR 48
[13] *The Queen v Shrestha* (1990-1991) 173 CLR 48 at 67-69
[14] *Power v R* (1974) 131 CLR 623 at 629

suspended in whole or in part, a court shall set a non-parole period "unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate." The structure of the provision creates a prima facie obligation on the sentencing court to specify a non-parole period unless the grounds for making such an order inappropriate are present.[15]

[39] In the present case the learned sentencing judge put counsel on notice that he was considering refusing to set a non-parole period. This was not surprising given the criminal history of the appellant. As his Honour pointed out, in addition to the matters then before the court, the criminal history of the appellant included 18 convictions for assault, 16 of which involved circumstances of aggravation. In almost every case the victim was a female with whom the appellant was in a relationship. Those offences occurred between 1994 and 2005. In addition the appellant had a series of convictions for failing to honour or obey orders of the court including four convictions for breaching domestic violence restraining orders, a breach of parole, a breach of bail, a breach of the terms of a suspended sentence, a breach of bond and two convictions for driving whilst disqualified. His Honour described the appellant as being "a violent bully, with no respect for women, and no respect ... for orders of the courts." His Honour recounted the personal circumstances of the appellant noting that there was no

[15] *Sullivan v R* (1987) 47 NTR 31 at 35

evidence to suggest that he was likely to reform and assessing his prospects for rehabilitation "as very low indeed". His Honour concluded:

> It is also clear to me that the nature of these offences and your past history are such as to make the fixing of a non-parole period for your offending inappropriate.

[40] In the circumstances there was an ample basis for the learned sentencing judge to conclude that the fixing of a non-parole period was inappropriate in this case. Error on the part of the learned sentencing judge has not been demonstrated.

[41] The appeal should be dismissed.

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