

McCarthy v Kennedy [2007] NTSC 8

PARTIES: McCARTHY, Thomas David

v

KENNEDY, Gavin Dean

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: JA 21 of 2006 (20526974)

DELIVERED: 9 February 2007

HEARING DATES: 29-30 November 2006, 17 January 2007,
9 February 2007

JUDGMENT OF: RILEY J

REPRESENTATION:

Counsel:

Appellant: J Tippett QC

Respondent: J Down

Solicitors:

Appellant: Northern Territory Legal Aid
Commission

Respondent: Office of the Director of Public
Prosecutions

Judgment category classification: B

Judgment ID Number: ril0709

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McCarthy v Kennedy [2007] NTSC 8
No JA 21 of 2006 (20526974)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal
against sentence handed down in the Court
of Summary Jurisdiction at Darwin

BETWEEN:

McCARTHY, Thomas David
Appellant

AND:

KENNEDY, Gavin Dean
Respondent

CORAM: RILEY J

**EX TEMPORE
REASONS FOR JUDGMENT**

(Delivered 9 February 2007)

- [1] This hearing commenced as an appeal against a sentence of 12 months imprisonment, suspended after service of three months, imposed upon the appellant for the offence of assault accompanied by two circumstances of aggravation. The appellant, who pleaded guilty to the offence, complained that the sentence was manifestly excessive.

- [2] The facts placed before the Court revealed that the appellant and the victim lived next door to each other in a block of units. During the afternoon of Sunday 30 October 2005 the defendant and his girlfriend attended at the Beachfront Hotel. They left at about 8 pm having consumed a quantity of alcohol. At the appellant's unit an argument occurred between them. The victim came out of his unit as he had heard the yelling and screaming. He listened for a short time before returning to his unit.
- [3] A third person emerged from a different unit. An argument and scuffle occurred between the appellant and the third person during which the appellant fell down a flight of stairs. He lost consciousness as a consequence. By this time the victim had returned to his unit and was washing his dishes.
- [4] Upon regaining consciousness the appellant returned to his unit and grabbed an iron bar from a set of weights. The bar was approximately 30 centimetres in length, five centimetres in diameter and five kilograms in weight.
- [5] After taking possession of the bar, the appellant went to the glass sliding doors of the victim's unit and demanded that he open the door. The victim opened the door in an attempt to talk to the appellant who then demanded to know if the victim was the man that had "started on him" earlier. The appellant was saying: "I'm going to sort this out". The victim denied starting anything and said he had been doing his dishes. The appellant

replied: “Bullshit”. The victim invited the appellant in to have a look and see that he was doing his dishes.

- [6] Immediately after the invitation to come inside, and without warning, the appellant struck the victim with the iron bar forcefully on his face on two occasions. As the victim pushed the appellant outside on to a balcony, the appellant continued to strike out at the victim until he was restrained by a neighbour.
- [7] The victim suffered a broken nose, serious bruising and lacerations to his head. He was taken to hospital. His victim impact statement demonstrates that in addition to the significant physical injuries suffered he also suffered psychological damage.
- [8] When the matter came on for hearing before me counsel for the appellant made an application for adjournment to obtain further evidence. He expressed concern that the matter had proceeded in the absence of any investigation of the mental state of the appellant following the assault of which he complained leading to a loss of consciousness on his part. The adjournment was granted and a psychiatric report from Dr Stephen Robertson was obtained. In light of the content of that report the appellant sought leave to amend the grounds of appeal to include an appeal against conviction. The granting of leave was not opposed by the respondent and, in light of the contents of the report, the appeal was conceded by the respondent.

[9] In *Maxwell v The Queen* (1996) 184 CLR 501 Toohey J said (at 522):

“A defective plea of guilty may be withdrawn and a conviction set aside on various grounds. This is part of the inherent jurisdiction of the courts to see that justice is done and some, if not most, of the decisions mentioned are explicable on the footing that, in the view of the court, the accused lacked full understanding of the plea or there was some other mitigating factor. To this end the court may refuse to accept a guilty plea or direct that a not guilty plea be entered.”

[10] The grounds upon which a plea of guilty may be withdrawn and a conviction set aside are not confined. In cases cited by Toohey J an appeal has been successful where the accused did not understand the charge or did not intend to admit guilt or on the facts admitted on the plea he could not in law have been guilty of the offence. Further, such an appeal has been allowed where the plea was induced by intimidation, improper inducement or fraud. That list is not exhaustive.

[11] In the present case the psychiatric report reveals that, in the view of the psychiatrist, there was a “strong possibility that (the appellant), following his traumatic fall down the stairs was suffering the effects of a traumatic brain injury or in common language was concussed”. He went on to say that the description of events suggest that the appellant was “largely unaware of his actions over which he seemed to have limited conscious control” and that it could be said that he “was acting automatically”. The psychiatrist expressed the view that the appellant’s “disturbed level of consciousness may very well have been severe enough to prevent him from forming meaningful intent to harm”.

[12] In light of that evidence which was not available to counsel at the time of the plea and was not available to the court at that time, counsel for the Crown has now conceded that the conviction should be set aside and the matter returned to the Court of Summary Jurisdiction for a retrial.

[13] I am advised in an affidavit, filed by counsel before me, that counsel who represented the appellant at the trial acknowledged that she did not turn her mind to the effect of the head injury suffered by the appellant and she did not seek any report from an appropriately qualified expert. The appellant entered his plea on the basis of the legal advice provided to him. In my view it was appropriate to receive the report pursuant to s 176A of the Justices Act.

[14] In all the circumstances it seems to me appropriate that the appeal be allowed. The conviction is set aside and the matter is returned to the Court of Summary Jurisdiction for retrial.
