The Queen v Kunoth [2014] NTSC 41

PARTIES:	**THE QUEEN**
	v
	KUNOTH, Selissa
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21345752
DELIVERED:	30 September 2014
HEARING DATES:	17 June, 20 June, 12 September 2014
JUDGMENT OF:	BARR J

CATCHWORDS:

CRIMINAL LAW
Mental impairment – fitness to stand trial – Special Hearing – defence of mental impairment – liable to supervision

SENTENCING
Mental impairment – supervision order – relevant considerations – non-custodial supervision order

Criminal Code Pt IIA

The Queen v Madrill [2013] NTSC 23; [2013] 275 FLR 449, referred to

REPRESENTATION:

Counsel:

Prosecution:	T Jackson
Accused:	T Collins

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Central Australian Aboriginal Legal Aid Service

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

The Queen v Kunoth [2014] NTSC 41
No. 21345752

BETWEEN:

THE QUEEN
Plaintiff

AND:

SELISSA KUNOTH
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 30 September 2014)

Introduction

[1] The accused person was charged on indictment with two offences as a result of events which took place in an aircraft flying from Yulara to Alice Springs on 14 October 2013: on count 1, that she engaged in conduct that resulted in a substantial risk of endangering the safe operation of an aircraft; and on count 2, that she unlawfully assaulted Trent Walton, a police officer, in the execution of his duty. The second count alleged a circumstance of aggravation that Trent Walton suffered harm.

[2] On 17 June 2014, pursuant to s 43T(1) *Criminal Code*, I made an order dispensing with an investigation into the fitness of the accused to stand trial,

and recorded a finding that she was unfit to stand trial. Both prosecution and defence counsel agreed that the accused was unfit to stand trial. Their agreement was based on the evidence of Dr Kevin Smith, specialist forensic psychiatrist, contained in a report dated 17 February 2014.[1] Dr Smith considered that there was no doubt the accused had very severe schizophrenia, with marked disorganisation of her thinking, affect, judgment and behaviour. Although treated with antipsychotic medication (to the point of having noticeable side-effects), she continued to be distressed by psychotic experiences. In the opinion of Dr Smith, the accused was unable to understand the full significance of the charges against her; unable to plead appropriately to those charges; unable to follow the course of the proceedings and unable to give cogent instructions to her legal counsel.[2]

[3] Having recorded a finding that the accused was unfit to stand trial, I made a determination under s 43R(1) *Criminal Code* that there was no reasonable prospect that she might, within 12 months, regain the necessary capacity to stand trial. In making that determination, I relied on the opinion of Dr Smith that the accused's unfitness would remain indefinitely.

[4] The making of the determination under s 43R(1) *Criminal Code* triggered the court's obligation pursuant to s 43R(3) to hold a special hearing.

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1 Exhibit "A" tendered in proceedings 17 June 2014.

2 The accused thereby satisfied four of the six alternative criteria for unfitness to stand trial referred to in s 43J(1) *Criminal Code* – see sub-paragraphs (a), (b), (d) and (f).

[5] Counsel for the prosecution had earlier submitted that, in the circumstances, it was possible for the court to accept the accused's pleas of 'not guilty because of mental impairment', pursuant to s 43H *Criminal Code*. Counsel referred to my decision in *R v Madrill*.[3] There I held that, because a trial under the *Criminal Code* begins when the accused is called upon to plead, the court could, from that point in time, pursuant to s 43H, with the agreement of both parties, accept a plea of not guilty because of mental impairment without the need for jury involvement.[4] However, s 43H can only be utilized where the accused is fit to stand trial, since otherwise a trial could not lawfully take place and an accused could not be called upon to plead. In *R v Madrill* there was no question raised by prosecution or defence as to the accused person's fitness to stand trial, and hence the presumption of fitness to stand trial applied.[5] My statement in *R v Madrill*, to the effect that there was no issue that the accused was unfit to stand trial, should be understood in that context.[6]

[6] In the present case there was no lawful basis to avoid the court's obligation to hold a special hearing. The statutory requirements are clear. The special hearing duly took place in Alice Springs on 20 June 2014.

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3 [2013] NTSC 23; [2013] 275 FLR 449.
4 [2013] NTSC 23; [2013] 275 FLR 449 at [25].
5 See s 43K(1) *Criminal Code* (NT).
6 [2013] NTSC 23; [2013] 275 FLR 449 at [4].

The special hearing

[7] At the special hearing, the jury found the accused not guilty because of mental impairment of the two charges and of the aggravating circumstance for the second charge.

[8] There was no factual contest in relation to the conduct of the accused. Admitted facts were read to the jury and a document containing the facts was tendered. The accused was 20 years and 7 months old at the time of the events I now summarize.[7]

[9] On 14 October 2013, the accused was a passenger aboard a Police Wing aircraft flying from Yulara to Alice Springs. She was in Police custody.

[10] Approximately 10 minutes into the flight, with the pressurized aircraft at an altitude of 20,000 feet, the accused came up behind one of her in-flight police escorts, Constable Walton, and placed her hands over his head with the metal handcuff chain across his neck. She then pulled back hard on the metal handcuffs with both her hands and began to choke Constable Walton, severely restricting his breathing.

[11] This led to the necessary intervention of a second in-flight police escort, Constable First Class Van Ek, who attempted to pull the accused off Constable Walton. The accused struggled with the police officers and ended up on the floor of the aircraft as the two constables tried to restrain her. This occurred in close proximity to the pilot who turned around and issued an

[7] She was born on 3 March 1993.

instruction numerous times at the top of his voice, using the words “Sit down”. These instructions had no effect on the conduct of the accused.

[12] The accused got back to her feet and continued to assault Constable Walton striking him with a closed fist to the chest area and kneeing him continuously. She was pushed over onto the seat adjacent to Constable Walton’s seat but continued to kick out violently, striking Constable Walton in the abdomen area numerous times. Constable Walton was unable to release his seatbelt while this was happening.

[13] The pilot feared for the continued safe operation of the aircraft and the safety of the passengers. As a result, he struck the accused on the head several times with a torch, stunning her. The police officers were then able to regain control of the accused, place her back in handcuffs and return her to her designated seat.

[14] In brief, the conduct of the accused in relation to count 1 was that she acted violently, while the plane was in the air and in operation, and that her violent actions required the pilot to leave the task of operating the aircraft in order to restrain her. The jury’s finding on count 1 indicates that the jury was satisfied beyond reasonable doubt that the acts of the accused resulted in a substantial risk that the safe operation of the aircraft was endangered.

[15] The conduct constituting count 2 was that the accused choked Constable Walton using her handcuff chains; struck him with a closed fist to the chest area; kneed him continuously, and kicked him violently in the

abdomen area numerous times. The jury's finding on count 2 indicates satisfaction beyond reasonable doubt as to such conduct; also that Constable Walton was acting as a police officer in the course of his duty at the time he was attacked.

[16] The defence of mental impairment was established in this case by the evidence of Dr Kevin Smith, specialist psychiatrist, that the accused did not know that her conduct was wrong (that is she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); and she was not able to control her actions.[8]

[17] In brief summary, Dr Smith explained that Ms Kunoth at the relevant time was suffering a serious form of schizophrenia which was not responsive, or not fully responsive to medication. Dr Smith described intrusive and distressing auditory hallucinations: voices commenting on the accused's thinking and behaviour, voices taunting her, provoking her and causing distress and anguish. Ms Kunoth suffered paranoid feelings of being persecuted and tormented, without any basis in reality. She had significantly impaired judgment in social situations and in particular suffered great distress when physically confined. In the confined space of the aircraft, she became very agitated. Hers was not a normal "anxious response". She felt deeply threatened, based on her misunderstanding of the reality, and she was not able to control her conduct because she was in such a distressed state.

[8] See s 43C(1)(b) and (c) *Criminal Code* (NT).

[18] After the jury's findings, I declared under s 43X(2)(a) *Criminal Code* that the accused was liable to supervision under Division 5 of the *Criminal Code* and made an interim order under s 43Y(1)(b) that she be remanded in custody in prison, at the Alice Springs Correctional Centre. I was satisfied that there was no practical alternative given the circumstances of the accused. I also made an order pursuant to s 43Y(1)(c) that the accused undergo an examination by a psychiatrist, and pursuant to s 43Y(1)(d) and s 43ZJ(1) that a psychiatric report be provided to the court.

[19] Under s 43ZJ, where the court declares an accused person liable to supervision, the 'appropriate person' must prepare and submit a report to the court on the accused person's mental impairment relevant to the jury's finding of not guilty because of mental impairment. Although two psychiatric reports might be required, I indicated that for practical purposes I required only one report.

Recent psychiatric evidence

[20] I subsequently received a very comprehensive report from consultant forensic psychiatrist Dr Antonella Ventura, dated 22 July 2014, from which I obtained the information set out in [21] to [25] below.

[21] Ms Kunoth was her parents' eldest child. She had two younger siblings. The family moved between Docker River and Mutitjulu. Ms Kunoth's parents had a loving relationship. Her father was actively engaged in caring for the

children, and her mother was said to be exemplary in her home duties and even became involved in child health programs as a model parent.

[22] Ms Kunoth's parents encouraged her to attend school and she completed her primary schooling at Docker River before spending some time at Yirara College as a border.

[23] Ms Kunoth's mother died from rheumatic heart disease in 2007. The loss of her mother when she was only 14 meant that Ms Kunoth was required to assist her father by taking on parenting responsibilities for her younger siblings. This meant that she had less contact with her own peers and reduced participation in the activities she had previously engaged in with her peers.

[24] Ms Kunoth engaged in some employment as a ranger at Mutitjulu, and also worked at the Uluru Cultural Centre. However, there is no evidence as to the length of time she was employed in those roles.

[25] It appears that Ms Kunoth started to use cannabis at about the age of 16. She may also have engaged in petrol sniffing, but that is unclear. She started to abuse alcohol at the age of 16, when she would drink rum at night time. Medical records indicate that Ms Kunoth had her first episode of psychosis in July 2013. She was just over 20 years old. She suffered auditory hallucinations including hearing the Devil's voice. The diagnosis was 'first episode psychosis' and 'possible post-psychotic depression'. There had been no relevant background of depression, hypomania or psychosis.

[26] Dr Ventura's diagnosis, or most likely diagnosis, as at 22 July 2014 was "schizophrenia, multiple episodes, currently in partial remission".

Dr Ventura also identified another important diagnosis, namely "substance use disorder including alcohol, cannabis and possible inhalant abuse", which she stated was currently in remission in the controlled environment of the Correctional Centre.[9] These diagnoses were made on the basis of a one hour clinical interview with Ms Kunoth, with the assistance of an interpreter, conducted by audiovisual link to the Alice Springs Correctional Centre. Moreover, Dr Ventura consulted with Dr Corbu, Ms Kunoth's current treating psychiatrist, and also read a significant number of documents, including medical reports and clinical notes of other doctors and mental health services workers.

[27] Dr Ventura noted Ms Kunoth's impulsivity but considered that it was unlikely that she had any intellectual disability and unlikely also that her recurrent impulsivity was caused by brain damage. Moreover, Ms Kunoth's problematic impulsivity is probably not caused by her schizophrenia.

[28] Dr Ventura wrote (p 11.6):

> "It seems clear from the information provided to me that she has made a good response to antipsychotic medications and therefore if she continues to receive antipsychotic medications, her psychotic illness is likely to have a good prognosis."

[29] Dr Ventura added (at 12.3):

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[9] Report page 11.

> "In summary, Ms Kunoth has made an excellent recovery from her psychotic symptoms. Antipsychotic medication has been effective."

[30] She then wrote (at 12.8):

> "In my opinion, Ms Kunoth's psychotic symptoms are under adequate control and no longer increase the risk of violence towards the community or towards herself.

[31] Dr Ventura did however sound a note of warning (at 12.9) in relation to substance abuse:

> "Ms Kunoth's substance use disorder is in remission whilst in a controlled environment. She is very likely to abuse substances again unless this is appropriately treated. I note that specific substance use treatments are not available to her in Alice Springs Correctional Centre. In order to control the risk of reoffending it is therefore imperative that she receives appropriate treatment for the substance use disorder. This is available in the Alice Springs community."

[32] The two key components of the treatment plan emphasised by Dr Ventura were therefore that Ms Kunoth receive appropriate treatment for her substance abuse disorder (report p 13.3) and continue to have "ongoing assertive treatment" of her schizophrenia (report p 13.5).

Supervision order considerations

[33] Under s 43ZC *Criminal Code*, a supervision order is for an indefinite term.

[34] However, s 43ZC is subject to s 43ZG, subsection (1) of which requires that, when the Court makes a supervision order, it "fix a term in accordance with subsection (2), (3) or (4) which is appropriate for the offence concerned".

[35] Subsection (2) of s 43ZG is the first relevant subsection to consider. It requires that the term fixed under subsection (1) is to be "equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged."

[36] The hypothetical sentencing exercise under s 43ZG requires the court to assume that the supervised person has been found guilty of the offence or offences charged, and thus by necessary implication that mental impairment was not such as to affect the making of that assumed finding by providing a defence under s 43C(1) *Criminal Code*. However, Ms Kunoth's psychotic agitation and distress may properly be taken into account. In this respect I agree with the view of Mildren J in *R v Morton*[10] that s 43ZG does not exclude the application of normal sentencing principles.

[37] The maximum penalty provided by law for count 1 is imprisonment for life.[11] The maximum penalty provided by law for count 2, with the aggravating circumstance, is imprisonment for 7 years.[12] The objective seriousness of Ms Kunoth's offending on count 1 was in the low to medium range of conduct. Specifically, Ms Kunoth did not approach the pilot, interfere with flight controls or enter the cockpit area. Her actions were not

[10] [2010] NTSC 26 at [46].
[11] *Criminal Code* (NT), s 246(1).
[12] *Criminal Code* (NT), s 189A(1) and (2)(a).

directed at the pilot or at the aircraft itself, but rather at another passenger. The safe operation of the aircraft was at risk of being endangered because the pilot had to leave the controls to intervene in the altercation before things got out of hand. The pilot's actions were entirely justified, but were pre-emptive, done out of caution to avoid or minimise the risk that the safe operation of the aircraft would be endangered. Nonetheless, the conduct which Ms Kunoth engaged in was itself serious enough to require the pilot's intervention.

[38] The objective seriousness of Ms Kunoth's offending on count 2 was high. The unprovoked assault on a police officer by the use of handcuff chains to choke the officer was very dangerous and hence very serious, particularly in circumstances where the officer was restrained by his own seatbelt and unable to adequately protect himself, let alone defend himself. The assault led to significant psychological sequelae.

[39] Although Ms Kunoth has a record of prior criminal offending, she did not start to offend until the age of 19.

[40] She committed a string of offences in March 2012: one count of aggravated unlawful entry of a building, one count of entering and damaging business premises, two counts of stealing and one count of unlawfully possessing property. She breached her bail on 4 April 2012.

[41] She committed another string of offences on 25 and 26 December 2012: two counts of stealing, two counts of aggravated unlawful entry of a building, two counts of consuming liquor in a restricted area, and a breach of bail.

[42] Then, on 2 February 2013 she trespassed on enclosed premises and went armed with an offensive weapon.

[43] There were subsequent proven breaches of the conditions of two suspended sentences; both breaches had taken place in March 2013 or previously.

[44] The record of prior offending gave no indication that Ms Kunoth would commit the serious offences in respect of which she was found not guilty because of mental impairment.

[45] At the time of the events which gave rise to the charges against Ms Kunoth, she was suffering a mental illness which caused her to have a severely compromised appreciation of her wrongdoing and a significantly reduced ability to control her actions. This condition in my view lessens the moral culpability of the offending conduct.[13]

[46] Because of Ms Kunoth's mental illness, I take the view that the hypothetical sentencing exercise required by s 43ZG *Criminal Code* would not be an appropriate vehicle for either general or specific deterrence.

[13] See *R v Verdins* (2007) 16 VR 269, which contained a restatement, in somewhat revised form, of the guiding principles which the Court of Appeal of Victoria laid down in *R v Tsiaras* [1996] 1 VR 398.

[47] However, the same mental illness, and its behavioural consequences, raise a need for community protection in sentencing. Even though Ms Kunoth will be under supervision for the foreseeable future, I still consider that community protection is a relevant consideration in the hypothetical sentencing exercise which I am required to undertake.

[48] Although Ms Kunoth has been found not guilty because of mental impairment of two counts, the offending conduct constituting both counts was the ongoing assault and the resulting disturbance caused in the cabin of the aircraft. The same conduct on her part was the basis for two separate and distinct charges. Accordingly, in ordinary sentencing, there would be substantial if not total concurrency in the sentences imposed.[14]

[49] Under s 43ZG(4) *Criminal Code*, because Ms Kunoth was charged with the commission of more than one offence, I must fix a term under s 43ZG(1) by reference to the offence carrying the longest maximum period of imprisonment. That means that I must fix a term by reference to count 1 and not count 2, even if in ordinary sentencing I would have imposed a higher sentence for count 2 than for count 1.

[50] Under s 43ZG(1) read with s 43ZG(4) *Criminal Code*, I am of the opinion that a term of imprisonment of two years would have been the appropriate

[14] I would not be permitted to impose an aggregate sentence under s 52 *Sentencing Act* because one of the offences is a "violent offence" within Schedule 2 of the Act.

sentence to have imposed on Ms Kunoth if she had been found guilty of the offence charged as count 1.

[51] Pursuant to s 43ZG(1), I therefore fix a term of two years for the purposes of the supervision order. The term so fixed is to be backdated and deemed to have commenced on 14 October 2013, pursuant to s 43ZG(4B) *Criminal Code*.

Conclusion and orders

[52] After hearing the further submissions of counsel, I determined that I should make a non-custodial supervision order pursuant to which Ms Kunoth would be released into the community under strict conditions. In making that order, I relied substantially on the opinion of Dr Ventura extracted in [23] to [27] above, noting in particular that treatment for Ms Kunoth's substance abuse disorder would not be available to her while she remained in custody.

[53] Final orders were as follows:

1. Ms Kunoth is subject to the existing interim custodial supervision order until such time as she enters into the Drug & Alcohol Services Association Inc of Alice Springs ("DASA") residential program.

2. Subject to and upon her entry into the DASA residential program, Ms Kunoth will be subject to a non-custodial supervision order, until further order.

3. Ms Kunoth will reside at the premises of DASA for a period of three months following which she will reside in suitable accommodation to be provided for her by Mission Australia.

4. Ms Kunoth must:

   4.1 participate in the program(s) offered by DASA to address her substance abuse disorder, and not do anything to bring about her early discharge from such program or programs;

   4.2 continue taking her medications (depot injection Flupenthizol 40 mg fortnightly, Aripiprazole 15 mg once daily in the morning, or as varied by the treating team if and when necessary);

   4.3 see the community consultant psychiatrist or delegate 7 days post release and then monthly or as clinically indicated; and

   4.4 otherwise continue to engage with mental health services including complying with all scheduled appointments (once a week for a month and fortnightly thereafter, or otherwise as clinically indicated) and assessments.

5. Ms Kunoth will attend life skills programs offered by DASA or Mental Health Association of Central Australia.

6. Should Ms Kunoth's mental health deteriorate she is to be transferred to the mental health unit at Alice Springs Hospital or the JRU at Royal Darwin Hospital for treatment, if considered clinically appropriate.

7. Ms Kunoth must refrain from alcohol and illicit drug use, and violent behaviour.

8. In the event Ms Kunoth breaches any condition of this order, a member of the Northern Territory Police is authorised to take Ms Kunoth into custody and convey her to Alice Springs Correctional Centre (ASCC). The Superintendent of ASCC is authorised to receive Ms Kunoth and hold her in safe custody, to be brought before this Court as soon as practicable.

9. The period fixed in accordance with section 43ZG(1) is 2 years, backdated to 14 October 2013.

10. A report to the Court under section 43ZK shall be filed and served by no later than COB 11 March 2015.

11. The matter is adjourned for further consideration to Friday 11 September 2015 at 9am.

12. Liberty to apply, including in relation to the mechanism of Ms Kunoth's removal from the ASCC to DASA.
