O'Reilly v R [2014] NTCCA 14

PARTIES:	O'REILLY, Paul Joseph
	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:	CA 5 of 2014 (21330299)
DELIVERED:	24 September 2014
HEARING DATES:	24 September 2014
JUDGMENT OF:	RILEY CJ, BLOKLAND and HILEY JJ
APPEALED FROM:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – Sentence – Errors in agreed facts – Not significant enough to alter the objective seriousness of the offence or the appropriate penalty – Appeal dismissed - *Criminal Code 1983* (NT), s 411(4)

Damaso v The Queen (2002) 130 A Crim 206; *McDonald v The Queen* [2013] VSCA 89; *R v Beary* (2004) 11 VR 151 – referred to.

Criminal Code 1983 (NT), s 411(4)

REPRESENTATION:

Counsel:

Appellant:	I Read SC

Respondent:	W J Karczewski QC

Solicitors:

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

Judgment category classification:	C
Number of pages:	6

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

O'Reilly v R [2014] NTCCA 14
No. CA 5 of 2014 (21330299)

BETWEEN:

PAUL JOSEPH O'REILLY
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

EX TEMPORE

(Delivered 24 September 2014)

The Court:

[1] On 16 January 2014, in the Supreme Court, the applicant pleaded guilty to having unlawfully caused serious harm to Benjamin Dessent. He was sentenced to imprisonment for a period of two years and three months with a non-parole period of 14 months.

[2] On 4 April 2014 the applicant filed an application for an extension of time within which to seek leave to appeal and seeking leave to appeal. The

application was some 50 days out of time. The application was refused and the applicant has requested that it be considered and determined by the Court of Criminal Appeal.

The offending

[3] The applicant is an Irish national who was 23 years of age at the time of the offending. He had been working in Australia as a foreign worker for a period of about 12 months. He had no criminal history.

[4] On 14 July 2013 he consumed a significant quantity of alcohol and became intoxicated. Just before midnight he made his way to the Discovery Nightclub on Mitchell Street. He was refused entry because of his intoxicated state. He then walked the short distance to the Lost Arc Nightclub and sat on a car parked at the front entrance.

[5] The victim is a 28-year-old registered security officer who was employed as the head crowd controller at the Lost Arc. The victim directed the applicant to get off the car. The applicant then attempted to gain entry to the Lost Arc but was refused admission. He made lewd gestures to a female door hostess working at the nightclub. He was told that his behaviour was unacceptable and that he should leave. He then approached the victim who pushed him away with an open hand. He was again told to leave and advised if he did not do so the police would be called. The applicant said "Go on, call the police, I don't give a fuck" and walked up to the victim. The victim pushed him back with an open hand to his chest.

[6] The agreed facts, and consequently the sentencing judge's summary, then state that: "As the victim was looking away, the offender swung his fist backwards and hit the victim forcefully with a clenched fist to the left side of the victim's face. The force of the impact immediately broke the victim's jaw and he fell to the ground." The underlining added indicates the passages which are subject of a proposed fresh ground of appeal.

[7] The applicant was held by security and management staff until police arrived and arrested him. The victim was taken to Royal Darwin Hospital where he underwent an open reduction and internal fixation of the fractures. Titanium plates and screws were used to stabilise the fractures. The victim impact statement referred to the severe pain and shock experienced by the victim. He suffered permanent scarring to the left side of his face and scarring to the inside of his mouth. He suffered ongoing pain and swelling. He also suffered nerve damage which causes him to lisp on occasions and he lost sensation in the left side of his face. He has difficulty with some facial movements. He suffered from a lack of sleep and he became both irritable and angry. A relationship broke down. He became withdrawn. He suffered a significant loss of income. At the time of sentencing it was expected the victim would have to undergo further surgery to correct the alignment of his jaw. He was undertaking speech and physical therapy. He said he suffered significant loss of self-esteem.

The sentence

[8] In his sentencing remarks his Honour said:

> This is yet another incident of mindless drunken, cowardly violence that has caused serious injury and financial loss to the victim and, along with all such other cases, places a significant drain on the scarce medical resources of the Northern Territory. This incident is aggravated by the fact that the offender did not comply with the direction of the victim to leave and move on.

[9] We consider that this was an apt description of the offending. It is not disputed that offences of this kind are, regrettably, common.

[10] His Honour made the following further observations:

> By way of mitigation, I take into account the offender's relatively young age, his prior good character and his early plea of guilty. As a result of his plea of guilty, I have reduced the sentence of imprisonment that I otherwise would have imposed on the offender by 25%.
>
> Having said that, cases such as these are very prevalent and the primary sentencing objects in this case are punishment, denunciation and deterrence. The community strongly disapproves of such behaviour. The offender must be punished and he and others must be discouraged from committing the same or similar crimes in the future. The court must do what it can to keep members of the community safe from such drunken violence.

[11] His Honour then imposed the sentence of imprisonment for two years and three months with a non-parole period of 14 months.

[12] After pronouncing the sentence his Honour said:

> Members of the community, including foreign workers, who engage in such mindless, drunken violence, must learn that such behaviour has consequences. For a number of years now, there has been extensive media coverage of the harm that such violent conduct causes. All members of the community must appreciate how dangerous such conduct is and that such violent conduct will not be tolerated.

Proposed ground of appeal

[13] Two grounds of appeal were originally proposed, but they have now been abandoned. At the hearing leave was granted to argue a fresh proposed ground of appeal.

[14] The proposed further ground is that "the learned sentencing judge mistook the facts constituting the circumstances of the assault objectively recorded in the CCTV exhibit and wrongly described in the Crown Facts." This ground refers to the two passages underlined by us in paragraph 6 above.

[15] The respondent accepts that the Crown Facts which had been agreed, and which the sentencing judge relied upon, differed in two respects from what appears on CCTV footage. The respondent accepts that the victim was not looking away from the applicant when the applicant punched him, and that the victim did not fall to the ground as a direct result of the punch.

[16] The sentencing judge confirmed in his sentencing remarks that he had viewed the CCTV footage. The members of this court have also viewed the footage.

[17] The applicant contended that this error infected the sentencing discretion because it "unfairly categorises the applicant's moral culpability insofar as it elevates the assault into the nature of a king hit upon an unsuspecting employee rather than a spontaneous blow by the applicant in response to the security officer who had been persistently reasonably physical towards him."

[18] We do not consider either of these factual differences to be significant enough to have altered the objective seriousness of the assault or the appropriate penalty. Not every error vitiates the exercise of a sentencing discretion.[1]

[19] The punch was sufficiently hard to break the victim's jaw in two places. Whether or not it caused the victim to fall is immaterial. Even if the victim was not looking away from the applicant when he was punched, the blow came suddenly and forcefully. The errors in the description of the incident had no material effect.

[20] We do not consider that some other sentence would have been "warranted in law and should have been passed".[2] In all the circumstances the sentence was unremarkable and no miscarriage of justice occurred.

[21] We do not consider that this ground would be made out if leave was given to pursue it.

Disposition

[22] We refuse leave to appeal as no arguable case of error has been identified. We refuse the application for an extension of time. The appeal is dismissed.

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[1] *R v Beary* (2004) 11 VR 151 at 155 [10] and 163 [39]. See too *McDonald v The Queen* [2013] VSCA 89.
[2] Cf s 411(4) *Criminal Code 1983* (NT). See *Damaso v The Queen* (2002) 130 A Crim 206 at 217 [53].