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THE SUPREME COURT OF  
THE NORTHERN TERRITORY

SC 20818401

THE QUEEN

and

KENNETH ALAN COLE

(Sentence)

MARTIN, CJ

TRANSCRIPT OF PROCEEDINGS

AT ALICE SPRINGS ON THURSDAY 8 OCTOBER 2009

Certified a true transcript of a record.

Transcribed by:  
Merrill Legal Solutions

HIS HONOUR: Mr Cole, you have been found guilty by a jury of unlawfully causing grievous harm to a female victim. The jury found you not guilty of assaulting two other complainants. I must sentence you on the basis of facts consistent with the verdict of the jury that I find proved beyond reasonable doubt.

During the evening of 25 September 2005 you and a group of Aboriginal persons were gathered in front of flats on Gap Road. Alcohol was being consumed and I am satisfied that the victim of your crime was grossly affected by alcohol. There were also others in the group who were grossly affected.

The extent to which you were affected by alcohol is not clear. You maintained in evidence that you were not intoxicated, but at least in other respects the jury rejected your evidence. Nellie Impu told the jury that you were drunk, but her evidence, in other respects was rejected by the jury and there were features of her evidence that were quite unsatisfactory. Your behaviour suggests that you were affected by alcohol, so I am left in the position of not being able to find positively that you were grossly affected. Nor am I able to find positively that you were not affected at all. I am of the view that it is somewhere in between. You had been drinking and it is likely that you were, to some extent, affected by alcohol and that alcohol has played a role in lowering your inhibitions and leading to your criminal conduct.

During the evening you were seen to run across a nearby street without your shirt, and in doing so you ran across the path of a vehicle driven by a witness who was obliged to take evasive action. You ran to an Aboriginal woman who was sitting by the side of the road and attempted to lift her onto her feet. I reject your explanation as to how you came to be moving around without wearing a shirt. I do not know how or why you came to be without a shirt. I am satisfied that it was you who ran across the road. I am also satisfied it was you who was later seen by the same witness wielding the long-handled shovel.

The victim told the jury that she verbally tried to stop you from assaulting another person at the gathering, and that you turned on her, striking her with the blade of the long-handled shovel on three occasions. The first blow was toward the head, but the witness put her arms up in defence and you struck her arms with the blade of the shove. The second blow struck the victim in the region of the right eye and the third blow struck her legs. The jury must have been satisfied that you struck at least one blow, being a blow which impacted in the area of the victim's right eye. I am satisfied that you struck all three blows described by the victim, and that these were witnessed from a distance by the witness who saw you raise the shovel above your head and bring it down, on her evidence, three or four times. The witness was unable to see what the shovel struck, but each time you brought it down she heard a loud scream. I am satisfied these were the blows that were described by the victim and that on each occasion you raised the shovel above your head, with two hands around the handle, and brought it down with force onto the body of the victim.

Apart from the evidence of the victim that she verbally tried to stop you from hitting another person at the gathering, there is no rational explanation for your conduct

other than that, to some extent affected by alcohol, you got angry and lost self-control.

The victim was extremely drunk and utterly defenceless. I am told that she was in her mid 30's at the time of the trial, which means that she would have been in her early 30's at the time of this incident. She was a woman who was blind in her left eye and had poor sight in her right eye. No doubt she was, in her drunken state, loud and you may well have felt harassed by her loud, verbal attempt to prevent you from striking someone else. But in reality, as I said, she was an utterly defenceless woman who did nothing to provoke you, except to be loud in the verbal way I have described.

In response, you stood in front of the victim and used a long-handled shovel with a heavy steel blade. As I said, you raised it above your head, and held the handle with both hands, and then brought it down upon the victim on three occasions. When the blade struck the victim in the area of the bridge of her nose and her right eye, it split her eyeball and destroyed what little sight remained in that right eye. As the victim was already blind in her left eye, the result of your blow with the long-handled shovel, was to cause total blindness. As I am sure you appreciate, the consequences are quite devastating.

I mentioned earlier that the jury acquitted you of two additional charges, being charges of assaulting two other persons at the gathering. Notwithstanding that acquittal, I am satisfied that the victim thought that you were about to hit someone or had hit someone, and she spoke up in a loud, verbal fashion about that.

As to the acquittals, it is not surprising that the jury found you guilty of unlawfully causing grievous harm, but acquitted you of the other charges. In respect of the charge of unlawfully causing grievous harm, the evidence of the victim was strongly supported by the independent witness who saw you bring the shovel down three or four times and heard the loud screams on each occasion that it was brought down. As I said, I am satisfied she was observing you striking the victim, although she could not see who was being struck. The other charges relied solely on the evidence of witnesses who were exceedingly drunk, and the female complainant was an unimpressive witness who gave inconsistent statements and changed her evidence during cross-examination. It is not surprising that the jury had a doubt about the second and third charges.

In your evidence, you denied striking the victim and denied raising the shovel above your head at any time. The jury rejected your evidence and I am satisfied that your evidence, in that respect, was false. You also told the jury that you were being hassled by up to five young persons and that you took up the shovel in self-defence. In essence, you told the jury that you swung the shovel around at a low level, and on your case, any impact with the victim was accidental.

The jury rejected that version. The jury was satisfied that you intentionally struck the victim with the shovel, and that the impact of that intentional blow was in the area of the right eye. I have arrived at the view that you were probably hassled for alcohol

and cigarettes by others at the gathering, but I reject your evidence that there was any occasion for you to take up the shovel in self-defence. In my view, you got angry and lost self-control. You went to the rear of the premises and took the long-handled shovel out of the tray of a utility, after which you walked around with the shovel waving it around in an aggressive fashion. You may well have been trying to stop people from hassling you, but you were not acting in self-defence. I am satisfied that while you were moving around and waving the shovel in your angry state, and to some extent affected by alcohol, you reacted to the victim's words and deliberately struck her.

As to your intention at the time you struck the blow, the reasoning of the jury is unknown. The jury might have been of the view that you intended to cause grievous harm, or they might have had a doubt about that intention, but have found that you foresaw the causing of such harm as a possible consequence. Some members of the jury might have been satisfied of the specific intention, while others were only satisfied of the necessary foresight.

If you had swung a single, around arm-type blow at the body of the victim, and then desisted, bearing in mind the likely effect of alcohol and your general behaviour, I would not have been satisfied that you possessed the specific intention to cause grievous harm. However, I am satisfied beyond reasonable doubt, that you stood in front of the victim, and on three occasions, raised the shovel in front of you and above your head and brought it down with the intention of striking the victim with the blade. I am satisfied that the first blow was aimed in the general area of the head, but was deflected when the victim put her arms up in a defensive fashion. Further, I am satisfied that when you struck the second blow, which impacted in the area of the bridge of the nose and the right eye, you struck that second critical blow with an intention to cause grievous harm. In your angry state you were not satisfied with the first blow which had struck the arms, and you raised the shovel a second time and brought it down the second time with the specific intention of causing grievous harm.

Every crime of causing grievous harm or serious harm is a serious crime but, as with other offences, there is a scale of seriousness. Your offending, Mr Cole, is in the more serious category. Although the victim spoke to you, in reality she did nothing to provoke you. She was loud and drunk, but she was no threat to you whatsoever. She was utterly defenceless. You used a heavy and dangerous implement and you caused a catastrophic injury. As I have said, the effect of your conduct was to leave the victim totally blind.

As to personal matters, you were 30 at the time of this crime. You were born and raised in Alice Springs in a good family and your father is still a great support to you. You completed year 10 and from that time you have had a very strong working history as a labourer, contractor, and this work includes supervising contractors all over the Territory. Recently you have spent significant time working on an outstation south of Alice Springs. Because you have a traditional connection with the land through your maternal grandfather, you have worked assisting the outstation in creating a market garden and infrastructure for the small community. I have a reference from a contractor with whom you worked for approximately three years

between 2005 and 2008, and he found you to be a reliable and loyal employee. He also knows you to be honest and respectful.

I am told that you speak four Aboriginal languages and that you have been taught the traditional stories and songs. You are a father of two children aged 10 and 6 and it is most unfortunate indeed that they are going to be without you for a significant period of time. Together with your father, you care for both of the children and they will remain with your father while you are in prison.

Your Counsel has told me that these days you are not a heavy drinker. You consume alcohol, but you say that you do not consume it excessively and it is not a problem for you. Obviously, in the past you have consumed alcohol and not worried about driving while affected by alcohol, as you have a number of prior convictions for traffic offences involving alcohol. They also involve driving while disqualified or unlicensed.

The only conviction of particular relevance to the current matter is a conviction on 27 August 1998 for assault causing harm, which was sufficiently serious to result in a sentence of imprisonment for six months. That sentence was suspended. I have not been given any information about the circumstances of that crime.

I am told that over the years you have been very active in sport and sporting club work. You have worked as a volunteer coach for young sporting players.

Mr Cole, it is apparent that there are good features within your life and in your work within the community. I accept that you are a good family man and a reliable worker. These things give hope for your rehabilitation in the future and they place the Sentencing Court in a particularly difficult position. No Court wants to send a man of your age, who has been a useful contributing member of the community and a good family man, to gaol for a significant period. However, at times crimes that are committed are so serious that the Court is left with no option and matters personal to you and matters of personal mitigation must take second place to the issues of general deterrence, punishment and marking the condemnation of the community.

General deterrence, that is, deterring others who are minded to be violent, particularly those minded to use dangerous weapons, is important. Crimes of violence, like yours, are far too common in our community. In particular, crimes of violence directed against vulnerable women are far too common. These types of crimes cause grave disquiet throughout our whole community. All women, regardless of their age and ethnic background, are entitled to equal and full protection of the law.

In arriving at sentence, I point out that you are not entitled to a reduction of the sentence which is usually given following a plea of guilty. You are not to be penalised by an additional penalty for pleading not guilty, but you are not entitled to that reduction. I accept that, in a general way, you are sorry for what you have done. It would be very difficult for anyone not to be sorry for the fact that their actions

blinded the victim. I note that after your arrest, you told your employer that you were sorry for the result of your actions.

I have already recorded the conviction.

I find myself, Mr Cole, in the position that you have committed a crime of particular seriousness with catastrophic consequences. General deterrence and those other factors must prevail.

I impose a sentence of seven years imprisonment commencing on 5 October 2008. In view of your education and good work record and what I have assessed as good prospects for rehabilitation, I will fix a non-parole period that is shorter than would normally be the case for a crime of this gravity. I fix a non-parole period of three years and six months. The sentence and the non-parole period will commence on 5 October 2009.

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