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THE SUPREME COURT OF
THE NORTHERN TERRITORY

SCC 20825784

THE QUEEN

and

MB

(Sentence)

KELLY J

TRANSCRIPT OF PROCEEDINGS
AT DARWIN ON WEDNESDAY 7 OCTOBER 2009

Transcribed by:
Merrill Legal Solutions

HER HONOUR: You have been found guilty of having sexual intercourse with your 12 year old cousin without her consent. The maximum penalty for this offence is life imprisonment.

The victim was 12 years old at the time of the offence against her. The rape of a 12 year old child is a very serious offence. As the Crown has pointed out, and counsel for the defence accepts, there are a number of aggravating circumstances to the offending. Firstly, you were left with the care of the victim. You were in effect babysitting. You were her cousin and the offending involved a grave breach of trust. Secondly, you gave the victim alcohol. Thirdly, although the rape did not involve any additional violence over and above the act of forced intercourse. The victim described that fact as extremely painful as it was her first act of sexual intercourse. Fourthly, you persisted in the rape in spite of the victim screaming and asking you to stop. And fifthly, you told the victim not to tell and said that she would be in trouble if she did so and you attempted to bribe her with jewellery.

I do not have the benefit of a victim impact statement. However, the victim gave evidence at the trial and it is clear that the rape caused her to suffer great fear. She said she froze and a good deal of pain. By its very nature the offence is likely to have continuing psychological consequences upon her. And I note the evidence of both the victim and her aunt that she was extremely distressed when telling her aunt what had happened some 18 months or more later.

You do not have any prior convictions of a similar nature. However, you do not come before the Court as a person of previously entirely good character either.

Prior to the offending you had been dealt with by the Darwin Juvenile Court for stealing, entering a building at night with intent and property damage. You were convicted and released on a bond to be of good behaviour for 12 months. This was on 24 August 2005, approximately a month before the offence for which you are now being sentenced. So the offending in this case was a breach of that bond. On 26 February 2006 you were convicted of the unlawful use of a motor vehicle which was another breach of the good behaviour bond for which you were dealt with by the imposition of a further 12 month good behaviour bond. On 31 May 2007 you were dealt with for driving an unregistered, uninsured motor vehicle while unlicensed and dealt with at the same time for the further breach of your bond. On 15 November 2007 you were convicted of assault and placed on another bond to be of good behaviour for 12 months. As your counsel pointed out, you did not breach the bond imposed upon you on that occasion and have stayed out of trouble since then.

I have heard from your counsel that you had a difficult childhood. Your mother was a drug addict and from birth you were raised by your grandmother. When you were five years old, your mother took you from your grandmother without permission. And I am told you were exposed to your mother's life of drug and alcohol abuse and to inappropriate sexual behaviour.

You attended school to Year 10, but did not achieve a Year 10 standard because of prolonged absenteeism.

When you were 13, your aunt, that is the mother of the victim, noted you were being neglected and brought you to the Northern Territory to live with her, but you ran away after about a week. From the age of 14 you have done more or less as you pleased, staying at four different addresses for months or weeks at a time.

The Crown prosecutor submits that the subsequent convictions I have referred to, which are relevant to your prospects for rehabilitation, and in particular the breaches of court orders to be of good behaviour show that you have not demonstrated a commitment to rehabilitation. For that reason, the Crown submits that the delay between the offending and the trial should not be given great weight as a mitigating factor in sentencing.

Your counsel, on the other hand, has pointed out that you have stayed out of trouble for almost two years which is a not inconsiderable time in the life of a person as young as yourself. She also points to the fact that you are in a stable relationship, that your partner is expecting your first child and that you have a commitment to maintain that relationship after you have been released from prison.

I also note that your partner, several members and a family friend, Ms O with whom you boarded for a time, were all present in Court recently to support you. I was informed by your counsel that Ms O was prepared to give character evidence on your behalf and yesterday I received a written reference from her. She says that when you stayed with her you followed her house rules, you were respectful, protective towards her and helpful, lifting heavy weights and doing other jobs for her. She said that she would take you in again if you need a place to stay after you get out of gaol.

I accept that you have reasonable prospects for rehabilitation and I take into account as mitigating factors your youth, the delay in bringing the matter to trial, the fact that for the last two years of that time you appear to have made an effort to stay out of trouble. As I have said, I consider you have reasonable prospects for rehabilitation.

Although you made some admissions to police about some inappropriate sexual contact between you and the victim and pleaded guilty to the alternative count of indecent dealing with a person under the age of 16, you denied the act of sexual intercourse. Moreover, although you acknowledge some wrongdoing, the story you told police about the indecent dealing cast the blame on the victim, a 12 year old child, for instigating the sexual activity.

I consider that, taking all these matters together, you have shown very little genuine remorse for your conduct. Your attitude in the record of interview with police smacks of self-pity for your own predicament rather than remorse for the effect of your actions on the victim.

As you were a juvenile when the offence was committed, the principles and considerations to be applied in sentencing youth offenders are those set out in s 4 and 81 of the Youth Justice Act. Among those principles are:

1. that the court must have regard to general sentencing principles as well as the principles of youth justice set out in s 4 of the Act;
2. that a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community;
3. that the court must dispose of the matter in a way that is in proportion to the seriousness of the offence;
4. that the court must impose a sentence of detention or imprisonment on a youth only as a last resort and a sentence of imprisonment only if there is no appropriate alternative.

And I emphasise the word appropriate. In the case of P, a minor, and Hill (1992) 110 FLR 42, his Honour, Mildren J said:

The approach of the courts when dealing with juveniles must be cautious, patient and caring, with the interests of the juvenile foremost in mind. Of course there are some offences which warrant an immediate custodial sentence notwithstanding that the offender is a juvenile and notwithstanding even that the juvenile has no prior convictions. But these are for extremely serious crimes usually, but not always, crimes of violence where it is right that the need to punish and deter is given particular emphasis.

In R v Goodwin (2003) NTCCA 9, the Court of Criminal Appeal said:

It is well established that if a young offender commits a criminal offence like an adult, then that justifies sentencing him or her in a fashion more akin to an adult. Where crimes of considerable gravity are committed, the protective function of the criminal court would cease to operate unless denunciation, general deterrence and retribution are significant sentencing considerations even in the case of juveniles.

I am mindful of the fact that successful rehabilitation itself serves the purpose of community protection and also that young people do not have the same ability to form judgments and control their impulses as do adults so that the same behaviour from a youth may be less blameworthy than from an adult.

Taking into account all of the principles in s 4 and 81 of the Youth Justice Act and the cases I have referred to, I am convinced that this offending is so serious that it calls for a sentence of actual imprisonment. Counsel for the defence do not contend otherwise.

I also consider it appropriate in the circumstances that you should be sentenced pursuant to the Sentencing Act.

On the charge of sexual intercourse without consent, you will be convicted and sentenced to imprisonment for a period of four years deemed to have commenced on 21 September 2009. I fix a non-parole period of two years also commencing on 21 September 2009.

I set aside the conviction on count 2.
