09/10; [2010] VSCA 15

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v MORGAN

Maxwell P and Buchanan JA

28 January, 19 February 2010 — (2010) 24 VR 230

CRIMINAL LAW – APPEAL AGAINST SENTENCE – ASSAULT (2), CAUSE INJURY INTENTIONALLY (8), THREAT TO KILL, FALSE IMPRISONMENT – KOORI COURT – WHETHER OFFENDER'S PARTICIPATION IN 'SENTENCING CONVERSATION' IN KOORI COURT A MITIGATING FACTOR – WHETHER SENTENCE MANIFESTLY EXCESSIVE – CROWN CONCESSIONS – RESENTENCED – CONSIDERATION OF FUNCTIONS OF KOORI COURT PROCEDURES: *COUNTY COURT ACT* 1958, SS4A–4G.

Where a relatively youthful Aboriginal offender had participated in a sentencing conversation in the Koori Court, the sentencing judge was in error in holding that the offender's participation in the sentencing conversation could not be treated as a mitigating factor. Whether and to what extent such participation will be a mitigating factor in a particular case will depend on the circumstances of the case.

Consideration of the sentencing procedures in the Koori Court and an analysis of how the issue of mitigation should be approached in this context. See paras 20-39.

MAXWELL P and BUCHANAN JA:

1. This is an appeal against sentence imposed in the Koori Court at Morwell on 3 July 2009. As will appear, the Crown conceded error in the sentencing decision. (The grounds of appeal raised some important issues, however, which we discuss below.) At the initiative of the Office of Public Prosecutions, the hearing of the appeal was brought on as a matter of urgency to enable this Court to resentence the appellant. In the light of the decision we reached,[1] this initiative is very much to be commended.

2. The appellant ('Morgan') pleaded guilty to a total of 12 counts – eight counts of causing injury intentionally; two counts of common law assault; one count of making a threat to kill; and one count of false imprisonment. The sentences imposed are set out in the table below.

COUNT	OFFENCE	MAXIMUM	SENTENCE	CUMULATION
1	Causing injury intentionally	10y	12m	3m
2	Common law assault	5y	6m	–
(Concurrently with sentences for counts 3, 5 and 8)				
3	Common law assault	5y	3m	–
(Concurrently with sentences for counts 2, 5 and 8)				
4	Causing injury intentionally	10y	6m	3m
5	Threat to kill	10y	6m	–
(Concurrently with sentences for counts 2, 3 and 8)				
6	Causing injury intentionally	10y	12m	3m
7	Causing injury intentionally	10y	12m	3m
8	Causing injury intentionally	10y	18m	BASE
9	Causing injury intentionally	10y	12m	3m
10	Causing injury intentionally	10y	12m	3m
11	False imprisonment	10y	12m	3m
12	Causing injury intentionally	10y	12m	3m

Total Effective Sentence: 3y 6m; Non-parole period: 1y 6m
6AAA Sentence: TES: 4y 6m; NPP: 2y 9m.

Factual background

3. The Crown opening summarised the facts of the case, as follows. In late December 2007, Morgan, who was then 24, commenced a relationship with TU, a 15 year old girl. The offending took place between 31 December 2007 and 16 March 2008.

4. The relationship was a sexual one. Shortly after its commencement, Morgan committed a series of violent offences against TU, as follows:

- In the first week of 2008, Morgan threw a heavy tool at TU's head, causing bleeding and a one centimetre scar (count 1 – cause injury intentionally).
- On the same day, Morgan punched TU with a clenched fist several times, then pulled her hair and forced her to bend over a fence and verbally abused her (count 2 – common assault).
- Between 25 January and 28 January 2008 Morgan struck TU and verbally abused her (count 3 – common assault).
- Some time after this incident TU made preparation to leave. In response Morgan hit her ankles with a pot (count 4 – causing injury intentionally) and afterwards threatened to kill her (count 5 – threat to kill).
- On a day between 10 and 22 February 2008, Morgan struck TU in the head and ribs with clenched fists, and smashed a full plastic water bottle over her head (count 6 – intentionally cause injury).
- On 22 February 2008, Morgan punched TU in the left eye (count 7 – intentionally causing injury).
- Later that day Morgan threw a knife at TU, which struck her on the left side of the neck and above the collar bone, causing a one centimetre wound over her left clavicle. Morgan took TU to hospital but left before she was treated, apparently because he was angry about having to wait (count 8 – intentionally cause injury).
- On a day between 22 February 2008 and 17 March, Morgan struck the victim repeatedly around the legs below her knees with a weapon he had constructed (consisting of a hose wrapped in tape at one end). This caused pain and then numbness at the time of the attack, and then bruising and pain in TU's legs for days after (count 9 – intentionally cause injury).
- On a day between 22 February and 17 March 2008 at around 6 pm, Morgan pinched TU's shoulder very hard and then bit her nose, causing a small cut which started to bleed (count 10 – intentionally cause injury).
- Between 22 February and 17 March 2008, TU was made to stay in the bedroom and was not allowed to leave without Morgan's permission (count 11 – false imprisonment).
- On 16 March 2008 TU contacted her parents by telephone and told them that she was being held against her will. Morgan ended the call and stabbed her in the forearm with a fork (count 12 – intentionally cause injury).

5. On Morgan's instruction TU phoned her parents again to say she was fine and that she would see them on the following Thursday. Morgan told TU he would not let her go. On 17 March 2008, TU's parents contacted the police. Police then attended TU and Morgan's address and took TU to the police station, where she made a statement. Morgan was arrested on 27 June 2008 and made a no comment record of interview.

6. There were three grounds of appeal, but we need refer only to the two grounds as to which the Crown has made concessions: manifest excess; and the significance of Morgan's participation in the Koori Court process. (The third ground was not pressed.)

Manifest excess

7. The Crown conceded that the sentence imposed could be viewed as falling outside the sentencing range applicable to this case. In our view, the concession was properly made. We adopt as our own the reasons set out in the Crown's submissions, which appear as paragraphs 8–15 below.

8. Morgan admitted prior convictions, including convictions for offences involving violence. However, and importantly, Morgan has never been detained in a youth justice centre or sentenced to imprisonment. He was able to comply with two wholly suspended sentence orders imposed in 2003 and 2005.

9. The impact of the offending upon the young victim was profound. Morgan's actions were cruel, particularly as the conduct involved the commission of domestic violence upon a vulnerable partner.

10. In mitigation of penalty, the sentencing judge took into account:

- early plea of guilty;
- genuine remorse;
- personal circumstances;
- history of drug and alcohol abuse;
- significant steps taken toward rehabilitation;
- placement at a residential rehabilitation facility;
- participation in rehabilitative programs;

- assuming a leadership role for other young persons;
- glowing personal references;
- participation in the Koori Division of the County Court;
- acceptance of personal responsibility for actions;
- apology to the victim, her family and the community; and
- re-connection with indigenous heritage.

11. The sentencing judge accepted that Morgan had made significant changes in his life, so much so that he now had 'very real prospects for rehabilitation'.[2] In fact, these prospects were later described by the sentencing judge as 'excellent'.[3] As a consequence, any sentence imposed had to be one that supported Morgan's rehabilitation efforts.[4]

12. The sentencing judge noted that Morgan was a relatively youthful offender.[5] As such, given that he now led a law-abiding life, rehabilitation was a very important component of any sentence. On the other hand, the sentencing judge was also obliged to take into account general deterrence. It remains important for courts to denounce all abusive relationships and domestic violence. In addition, specific deterrence had some role to play.[6]

13. This was a difficult sentencing exercise. What made the case unusual, however, was the extraordinary effort made by a troubled young Aboriginal offender to turn his life around. The evidence as to remorse and reformation was uniquely compelling, particularly for an offender who had suffered from an unfortunate disadvantaged background.

14. In short, each of the three propositions articulated by this Court in *R v Mills*[7] was enlivened. As Morgan had not been sent to prison previously, a shorter period of imprisonment was justified, particularly given that he was now beginning to appreciate the effect of his past criminality. On the facts of this case, the rehabilitation of the offender needed to prevail as the dominant sentencing consideration.

15. In addition, whilst mercy is a virtue in itself, there was compelling evidence as to the reformation of a youthful recidivist. As a consequence, it was open in all the circumstances to temper justice with mercy.

Whether participation in the Koori Court was a mitigating factor

16. The hearing of this matter was transferred into the Koori Court Division of the County Court. Section 4G of the *County Court Act* 1958 (Vic) deals with the sentencing procedure in the Koori Court Division.

17. In this matter, the sentencing procedure involved Morgan participating in a 'sentencing conversation'. Two elders sat with the sentencing judge during this process. In commenting on this participation by Morgan, the sentencing judge said

- it was to Morgan's credit that he participated in the process;
- Morgan had apologised to the elders of the Gunai/Kurnai community for his offending; and
- participation in the 'sentencing conversation' was not an easy process but rather was a 'very challenging' process.

18. Her Honour said, however, that participation in the 'sentencing conversation' was 'not a matter that can be used in mitigation of sentence', although it did provide information relevant to the proper exercise of the sentencing discretion.[8] Ground 3 contended that the judge erred in so holding.

19. In a written submission explaining why the Crown conceded error on this ground, Mr Sonnet provided an illuminating description of the sentencing procedure in the Koori Court, and a helpful analysis of how the issue of mitigation should be approached in this context. We set it out in full in paragraphs 20–39 below.

20. The Koori Court was established under the *County Court Amendment (Koori Court) Act* 2008 (Vic). The Act was assented to on 23 September 2008 and provides for the establishment of the Koori Court as a Division of the County Court.

21. The objective of the Koori Court is to ensure greater participation of the Aboriginal

community in the sentencing process of the County Court, through the role played in that process by the Aboriginal elders and 'respected persons'[9] and others such as the Koori Court officer.

22. The Koori Court can hear a proceeding if the following criteria are satisfied:

(a) the offender is an Aboriginal or a Torres Strait Islander; and
(b) the offence is within the jurisdiction of the County Court; and
(c) the offender pleads guilty; and
(d) the offender consents to the proceeding being dealt with by the Koori Court; and
(f) the judge considers the matter is appropriate to come before the Court.[10]

23. A Koori Court plea hearing is conducted in a three stage process. Stage 1 is a formal arraignment. Guilty pleas are entered at a case conference before the Listing Judge at the Latrobe Valley Law Courts. The matter will then be given a plea date in the Koori Court.

24. Stage 2 is the sentencing conversation. This procedure is different from the usual plea hearing conducted in the County Court. The sentencing conversation is carried out as a discussion around a table. The Judge sits at the table with an Aboriginal elder or respected person on either side of him or her. Also seated at the table are the offender, the Koori Court officer, the corrections officer, the offender's legal representative and prosecutor. Each participant has the opportunity to participate in the sentencing conversation.

25. The first part of the sentencing conversation concerns aspects of cultural significance and is repeated with every offender. The sentencing conversation begins with an acknowledgement of country. The Judge explains to the offender that the court respects Aboriginal people and culture and that the room has been smoked in keeping with tradition. The Judge introduces the participants or asks them to introduce themselves and explain to the offender their role in the process.

26. The second part of the conversation deals with the law. The prosecutor provides a summary of the offending, details the maximum penalty applicable and makes submissions on penalty. The defence lawyer will then outline the offender's situation, placing before the Court the plea material, and make submissions about penalty. The offender is asked to speak to the court about their offending and about themselves. Family members, support persons, or counsellors are also invited to contribute to the conversation.

27. The Aboriginal elders or respected persons may then speak to the offender. The elders or respected persons may provide information on the background of the offender and possible reasons for the offending behaviour. They may also explain relevant kinship connections and how a particular crime has affected the indigenous community, and may provide advice on cultural practices, protocols and perspectives relevant to sentencing. They may also speak to the offender about his or her behaviour and its effect upon the community.

28. The victim will be offered the opportunity to be heard. The victim can attend the conversation and speak or a Victim Impact Statement may be read aloud in court at their request. (In the present case that did not occur.)

29. During the sentencing conversation the Judge may ask the Koori Court officer about the availability of local services and programs appropriate to the offender. The corrections officer can also provide advice about indigenous programs offered by Corrections Victoria, either in custody or with the offender remaining in the community. The aim of this approach is to maximise the rehabilitation prospects of the offender.

30. The Judge may discuss community and family considerations openly with the Aboriginal elders or respected persons and other participants at the table.

31. Stage 3 is the sentence. The usual sentencing procedures are followed. The procedure is formal with the Judge sitting alone at the bench to deliver the sentence.

32. In this case, Mr Morgan did actively participate in the process, in that he:

- thanked the elders for accepting him;

- stated he wanted to express his remorse for his conduct before the elders;
- stated he wished to participate irrespective of the sentencing outcome;
- was spoken to by the elders about his conduct – it was described as 'shocking';
- was asked to discuss what benefits he got from the process;
- stated he was ashamed of his conduct;
- admitted he had brought shame onto his family and the Yorta Yorta people;
- thanked the Judge and the prosecution for the opportunity to undergo rehabilitation at Baroona;
- wished to convey his apologies to the victim;
- acknowledged the benefits he received from counselling and community support; and
- described how he would handle matters differently in the future.

33. Is this participation a mitigating factor? The answer to that question does not lie in the label to be automatically given to the relevant factor, but rather what influence the factor has upon the sentencing discretion in the particular circumstances. As Gleeson CJ observed in *R v Engert*:[11]

> It is ... erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.[12]

34. In this case, Morgan had voluntarily engaged in a process of personally apologising to the victim and the Elders in respect of his conduct. As a consequence, he was 'shamed' during the hearing. Furthermore, he was not permitted to 'hide behind counsel' during the plea hearing thereby forfeiting a forensic advantage.

35. As to the importance of 'shaming', the Australian Law Reform Commission referred to 'shaming' as a traditional punishment that continues to be used by Aboriginal people.[13] It is clear that this form of punishment is an important aspect of maintaining order in Aboriginal communities. It is considered to be an effective sanction where the punishment is administered by Aboriginal elders.[14]

36. The 'sentencing conversation' is designed to further the reformation of an Aboriginal offender through a unique blending of Aboriginal customary law and the English common law. Participation in the process is more burdensome than appearing at a traditional plea hearing, particularly in circumstances like the present where Mr Morgan had sought reconciliation with his indigenous heritage.

37. Mr Morgan chose to participate in this process in order to further his own reformation. His genuineness is exemplified by his travel from Moama to the Latrobe Valley to do so. Accordingly, his active participation in the process was a factor that mitigated punishment.

38. Such an approach is also consistent with legal principle.[15] For example, in *Neal v The R*,[16] Brennan J stated that while the same sentencing principles are to be applied in every case, irrespective of the identity of a particular offender or his membership of an ethnic or racial group, the sentencing court is bound to take into account facts which exist only by reason of his membership of such a group.[17]

39. In *Rogers and Murray v The Queen*,[18] Malcolm CJ observed in relation to the court's power to take into account mitigating factors arising from the offender's cultural background:

> Race itself is not a permissible ground of discrimination in the sentencing process. ... It is apparent, however, that there may well be particular matters which the court must take into account, in applying those principles, which are mitigating factors applicable to the particular offender. These include social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race.[19]

40. In our view, the Crown's concession was correctly made, for the reasons given by Mr Sonnet. Her Honour was in error in holding that Morgan's participation in the sentencing conversation could not be treated as a mitigating factor. Whether and to what extent such participation will be a mitigating factor in a particular case will, of course, depend on the circumstances of the case.

41. At the hearing, Morgan's counsel stressed that participation in the Koori Court procedure can itself be rehabilitative.[20] He submitted that this had occurred in the present case, and referred to a number of factors which indicated the level of rehabilitation Morgan had already undergone: his negative drug screen on arrival at the Ararat prison (in September 2009); his employment at Ararat prison as a maintenance worker, which demonstrated that Morgan was a 'trusted prisoner', and for which he was given permission to 'access all areas'; and his participation in drug treatment programs and a stress management workshop.

Resentencing

42. Morgan served pre-sentence detention of two months, and at the date of the hearing had served almost seven months since the date of sentence. We accepted the Crown's concessions, and the contention that rehabilitation must be treated as paramount in these circumstances. On that basis, we resentenced Mr Morgan as set out below:

Count	**Sentence**	**Cumulation**
1	7m	2m
2	3m	_
3	2m	_
4	3m	1m
5	3m	–
6	7m	2m
7	7m	2m
8	7m	BASE
9	7m	3m
10	7m	2m
11	7m	2m
12	7m	3m

TES: 2y.

The Court directed that that part of the sentence that remained to be served as at the date the orders were made (28 January 2010) be suspended for two years.

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[1] See [42] below.
[2] *R v Morgan* (Unreported, County Court of Victoria, Judge Lawson, 3 July 2009), [49].
[3] Ibid [51].
[4] Ibid [50].
[5] Ibid.
[6] Ibid [51].
[7] [1998] 4 VR 235.
[8] *R v Morgan* (Unreported, County Court of Victoria, Judge Lawson, 3 July 2009), [51].
[9] *County Court Act* 1958 (Vic) s4E.
[10] *County Court Act* 1958 (Vic) s4G(2).
[11] (1995) 84 A Crim R 67.
[12] Ibid 68.
[13] ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986), [500]–[501].
[14] LRC of WA, *Aboriginal Customary Laws*, Project 94 (Sep 2006), 91.
[15] See *Juli v R* (1990) 50 A Crim R 31; *R v Gibuma* (1991) 54 A Crim R 347; *R v Minor* (1992) 79 NTR 1; 105 FLR 180; (1992) 59 A Crim R 227; (1992) 2 NTLR 183; *R v Fernando* (1992) 76 A Crim R 58; *Munungurr v R* [1994] NTSC 14; (1994) 4 NTLR 63; *R v Wilson Jagamara Walker* [1994] NTSC 79; *R v Miyatatawuy* [1996] NTSC 84; (1996) 135 FLR 173; (1996) 6 NTLR 44; (1996) 87 A Crim R 574.
[16] [1982] HCA 55; (1982) 149 CLR 305; (1982) 42 ALR 609; (1982) 7 A Crim R 129; (1982) 56 ALJR 848.
[17] Ibid 326.
[18] (1989) 44 A Crim R 301.
[19] Ibid 307.
[20] See *R v Miyatatawuy* [1996] NTSC 84; (1996) 135 FLR 173; (1996) 6 NTLR 44; (1996) 87 A Crim R 574.

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