

Kenny v R

3 November 2003

Angel ACJ, Riley J & Priestley AJ

Ex tempore judgment

On 17 March 2003, the appellant Kenny was found guilty by a Darwin jury of robbery and of assault with intent to steal, each accompanied by the circumstances of aggravation that (i) he was in company with another person (the co-offender Talbot), and (ii) that he caused bodily harm to the victim. He was acquitted on a charge of unlawfully entering a building at nighttime with intent to commit an offence therein. He was sentenced to imprisonment for two years and six months on each count to be served concurrently. A non-parole period of 15 months was fixed.

Both offenders went to a backpacker's hostel in Darwin at nighttime. Talbot demanded money from the night watchman N. When N replied that they didn't keep money there, Talbot knocked N to the ground continually demanding money. After N told Talbot that there was a safe in the office, Talbot pulled N to his feet and dragged him to the office. Along the way Talbot pushed N in the back causing him to fall through some louvred windows breaking the glass. Talbot kicked and punched N to the head and body when N said that he did not have the keys to the safe, and did not know the combination. Kenny then entered and, at Talbot's request, restrained N on the floor while Talbot looked for keys to the safe. He located a set of keys and tried unsuccessfully to open the safe with them. Talbot returned and again kicked and punched N. Talbot held some unidentified object to N's throat threatening to cut his throat. N was allowed to get up and told to remove the safe from the wall. He was unable to move it. He sat down and was again punched and kicked by Talbot to the head and shoulder area. N began to call out for help. A rag was placed in his mouth and Talbot struck him on the back of the head with a heavy metal torch. N suffered a deep laceration that later required nine stitches.

Guests at the hostel were awakened by the noise and disturbed both offenders who attempted to flee. There was an undercover police foot patrol in the area that had noted the offenders acting suspiciously. Talbot was apprehended almost immediately. Kenny surrendered to police a day later. The appellant participated in a record of interview, in which he denied being an accessory, although admitting that he was present inside the hostel when the robbery and assault took place.

The appellant then applied to the Court of Criminal Appeal for leave to appeal against both conviction and sentence. The applications were heard separately by differently constituted courts. The application for leave to appeal against conviction was heard and determined on 3 November 2003. That application was refused. It was also ordered that Kenny's application for leave to appeal against severity of sentence be heard together with the Crown's appeal against inadequacy of sentence in the case of the co-offender Talbot. The following case note deals with the appeal against sentence.

In Kenny's application for leave to appeal against conviction, it was argued that because the victim had made certain concessions in cross-examination, the verdict of the jury was unsafe and unsatisfactory. On 17 April 2003 a single judge of the Supreme Court refused leave to appeal against conviction. The appellant renewed his application for leave to appeal before the Court of Criminal Appeal pursuant to

s.429(2) of the *Criminal Code*. That application was heard by three judges on 3 November 2003. It was argued on the same basis as before.

In an *ex tempore* judgment the court unanimously refused to grant leave to appeal against conviction. The court found that on a consideration of the victim's evidence as a whole, in conjunction with the appellant's record of interview, there was sufficient evidence to justify the verdict of the jury. Accordingly there was no basis for concluding that the verdict was unsafe and unsatisfactory.

The court ordered that the application for leave to appeal against sentence be listed for hearing together with the Crown's appeal against the inadequacy of the sentence imposed upon the co-offender Talbot, and listed both hearings before the court on 12 December 2003. For the result of the application for leave to appeal against sentence see *R v Talbot; Kenny v R* [2003] NTCCA 13 noted later in this summary.