

Campbell (A) v R

**7 December 2004
(BR) Martin CJ, Angel & Thomas JJ
Extempore**

This was an application for leave to appeal against a sentence of 8 years and 6 months and a non-parole period of 6 years after the applicant was found guilty by a Darwin Supreme Court jury of the offence of having sexual intercourse with another person without consent (rape). The applicant was aged 17 years and 3 days at the time of the offence and 20 years at the time of trial and sentence.

The applicant who was a boarder at a college in Darwin was introduced to the complainant, aged 16 years, in a social setting. That night the complainant and her older female companion accompanied the applicant and some of his friends on a walk to the casino at Mindil Beach. After they had been refused entry, the older woman walked into town. The complainant had showed some interest in one of the applicant's companions. They walked on to Mindil Beach where they kissed and cuddled. The young man wished to proceed further, but properly acceded to the wishes of the complainant that he not do so. The young man then left the complainant on the beach and went to the toilet. Shortly after he left the complainant, she walked

up a walkway where the applicant and two or three other men were standing. One of the group grabbed the complainant by the arm. She pulled away saying words to the effect of "get lost". The applicant grabbed the complainant by the other arm. The complainant was pushed to the ground. She was threatened with violence. The applicant tore her underpants off and had intercourse with her while one other held her legs. The evidence disclosed that two others then had intercourse with the complainant without her consent. The applicant and the other men left the complainant on the beach.

Leave to appeal was refused by a single judge upon the papers on 7 May 2002. After the application for an extension of time had been refused, the applicant filed a Notice of Application for Rehearing by the Court of Criminal Appeal pursuant to s.429(2) of the *Criminal Code*.

When the appeal was called on for hearing on 12 May 2003, the court raised the issue whether the applicant had been properly sentenced in accordance with the provisions of the *Juvenile Justice Act* as amended by the *Sentencing of Juveniles (Miscellaneous Provisions) Act 2000* (the amending Act). The effect of the amending Act was to increase the age of a juvenile from 17 years to 18 years. The amending provisions sought to deal with the transition of a person, from adult to juvenile, whose proceedings had not been finalised at the time the amending provisions commenced operation. The applicant was caught by the transitional provisions of the amending Act. This issue was not raised before the trial judge. As a result, the Court of Criminal Appeal adjourned proceedings to allow the applicant to make application to the sentencing court pursuant to s.112 of the *Sentencing Act* to re-open the sentencing proceedings to correct any sentencing error.

On 14 October 2004, the sentencing judge refused to reopen the sentencing proceedings holding that the transitional provisions of the amending Act did not require him to sentence the applicant solely in accordance with the *Juvenile Justice*

Act. Further, the judge held that the amending Act did not restrict the operation of those provisions of the *Juvenile Justice Act* which allowed him to sentence the applicant as an adult. See *Campbell v R* 187 FLR 139. On the applicant's argument the maximum penalty the court could have imposed in the present case, where the maximum penalty for the offence was imprisonment for life, was imprisonment or detention for 12 months.

The applicant subsequently renewed his application for leave to appeal in the Court of Criminal Appeal.

The Court unanimously dismissed the application holding that -

- although the amending provisions might appear on a literal reading to require all matters to be dealt with by the Juvenile Court, those provisions had to be read subject to the jurisdictional limit of the Juvenile Court which prevented that court from hearing and determining in a summary way, any offence punishable by imprisonment for life.
- the sentence, although severe for a young person with no prior convictions, was not manifestly excessive as the applicant had committed a particularly serious crime for which he had neither accepted responsibility nor shown remorse.

The court again endorsed the principle that *"in the case of serious offending, the youth of the offender is not the prevailing consideration in sentencing. 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 respect of juveniles".

At the hearing of the application, the respondent was not called upon to make any submissions.