

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: DPP v Sarmiento

Citation: [2023] ACTSC 92

Hearing Date: 24 April 2023

Decision Date: 24 April 2023

Before: Berman AJ

Decision: See [37]

Catchwords: **CRIMINAL LAW** – JURISDICTION, PRACTICE AND PROCEDURE – Judgment and Punishment – Sentence – Attempted sexual intercourse without consent – Sentencing Principles – Moral Culpability – Subjective Circumstances – Remorse – Mental Health Conditions – Interests of Justice – Intensive Corrections Order

Legislation Cited: *Crimes Act 1900* (ACT) s 54
Crimes (Sentencing) Act 2005 (ACT) s 10

Cases Cited: *R v Atai (No 2)* [2021] ACTSC 272
R v Bourke [2018] ACTSC 5
R v KD [2019] ACTSC 62
R v Miller [2019] ACTCA 25
Wyper v The Queen; R v Wyper [2017] ACTCA 59

Parties: ACT Director of Public Prosecutions
Stephen Sarmiento (Offender)

Representation: **Counsel**
D Swan (DPP)
J Sabharwal (Offender)

Solicitors
Director of Public Prosecutions
Fraser Criminal Law (Offender)

File Number: SCC 308 of 2019

Berman AJ:

The facts

1. Late in the evening of Saturday, 12 February 2022, a young woman went with some of her friends to a nightclub in Canberra City. Because of what later occurred to her, I will not use her real name but instead give her the pseudonym "Linda Cutler".
2. Ms Culter had three alcoholic drinks before one of her friends introduced her to the offender in this matter, Stephen Sarmiento. Ms Cutler and Mr Sarmiento danced together. He gave her two more alcoholic drinks. She described herself as being "tipsy" at that stage.
3. The offender asked Ms Cutler whether she wanted to hang out afterwards. She told him that she was happy to under the condition that nothing sexual happed. She said this to him four times. When he said, "we can talk or cuddle or something like that", Ms Cutler agreed.
4. At about 2:40 am on 13 February 2022, Ms Cutler and the offender went to his car which was parked nearby. The offender drove them to his apartment, stopping to get some McDonald's on the way. They arrived at his apartment block at about 3:17 am. They entered his apartment where they cuddled on the couch for a short time before Ms Cutler fell asleep.
5. Later, the offender woke Ms Cutler up and she agreed to go to his bedroom. There they fell asleep on the mattress under a blanket. Ms Cutler was wearing a mid-thigh dress as well as underpants.
6. At about 6:00 am, Ms Cutler woke up to find that her underpants had been pulled down to her upper thigh and her dress had been pulled up to her waist area. The offender, who was lying behind her in a spooning position, tried to push his penis inside Ms Cutler's vagina, but his penis was not near her vaginal opening, so he was unsuccessful.
7. Ms Cutler felt the offender's hand moving up and down for a few seconds and then felt him try to push his penis inside her vagina again, but he was again unable to do so. This happened about three times while Ms Cutler, although awake, pretended to be asleep. She later explained that the reason she pretended to be asleep was because she was afraid. Eventually, she plucked up enough courage and told the offender to stop. He did stop, but not immediately, continuing for about another 10 seconds to try to penetrate her vagina with his penis.
8. Ms Cutler got out of bed and went to the lounge room where she sent a text message to the friend who had introduced the offender to her complaining, "I woke up to him trying to fucking rape me". Before she left, the offender apologised, but it was not the sort of apology which would bring much comfort to anyone, with him simply saying "sorry, I couldn't help it".
9. Over the next few hours, Ms Cutler's friend had various conversations with the offender, one of which was recorded, in which he admitted touching Ms Cutler while she was asleep.
10. The offender has now pleaded guilty to an offence of attempting sexual intercourse without consent pursuant to s 54 of the *Crimes Act 1900* (ACT). The maximum penalty

for that offence is 12 years imprisonment. His plea of guilty came at an early opportunity and so the sentence I will impose upon him is about 25% less than it would otherwise have been in order to reflect the utilitarian value of his plea.

11. This is a serious example of the offence for which the offender is to be sentenced. That Ms Culter was not consenting to what he was doing was made crystal clear to him, firstly, by her agreement to the offender's suggestion that they could "talk or cuddle or something like that" but perhaps more importantly by the fact that she was asleep at the time he tried to have sex with her. It is fortunate for Ms Cutler, and indeed for the offender himself, that he was not successful, but this was not because he had a change of mind. What brought this offence to an end was Ms Cutler waking up and telling him to stop what he was doing, and even then, he did not stop immediately as he clearly should have done.
12. The significant breach of trust that this offence involves is obvious. Being asleep, she was vulnerable in the extreme. She was in unfamiliar surroundings at the offender's initiation and had no real idea of how the offender would react to her telling him to stop.
13. Not surprisingly the offender has caused significant harm to Ms Cutler. Her victim impact statement was an eloquent description of the consequences for her of what the offender did. She continues to have issues trusting men and is now uncomfortable around men even including those in her own family. She has had to move away from Canberra in order to get a fresh start and to avoid bumping into the offender as she had done occasionally.

The offender

14. The offender is 30 years of age and was 29 at the time of his offence, so he can scarcely claim that his decision to try to have sex with Ms Cutler was in some way contributed to by immaturity. He was born in the Philippines and moved with his family to Australia in 2011. He lives with his parents, having returned to live at home after this offence was committed. He has partially completed a degree in Information Technology at the University of Canberra although his studies are paused because of these Court proceedings. He has a consistent employment history and is currently working causally in IT support.
15. The offender is not in a relationship, his last relationship ending due to his offending. He drinks alcohol, although not much and whilst he has used drugs in the past, he has not used any since a close friend died from drug use in March last year.
16. The pre-sentence report records that he reported a decline in his mental health as a result of the present proceedings. He has been diagnosed with anxiety and depression and has been engaged in counselling since October 2022.
17. A psychological report, prepared by Ms Dhillon, tendered on his behalf noted that his depression is in the extremely severe range with suicidal ideation. Indeed, the psychologist says that he is "a high risk for suicide given his persistent ideation and self-deprecating dialogue in sessions and it is my clinical opinion that imprisonment would have significant adverse effect on his mental health".
18. That opinion was explored during cross-examination by the prosecution. Ms Dhillon accepted that the offender could receive psychological support in a custodial setting but regarded the fact that that would mean a change in clinician as important. She explained that it took a while before she and the offender were able to build up a good

therapeutic rapport and said that it could take months before a new psychologist could engender the same level of trust as she had been able to develop with the offender.

19. Further, she explained that she had given her mobile number to the offender and he had agreed with her that should he feel he was at risk of suicide, he was to call or SMS her at any time. In the event that the offender was not in gaol, his mental health could also be monitored by his family, something of significance in this case because it was his mother who arranged for the offender to see Ms Dhillon in the first place.
20. The report also suggests that his history of depression and anxiety “may reduce his moral culpability/intent”. In oral evidence, Ms Dhillon explained that his severe depression may have affected his judgment on the night. However, the version of events given to Ms Dhillon by the offender was in significant ways different to the version of events on which he asks that I sentence him. That reduces the weight that I can give to her opinion as to his moral culpability. Indeed, although it was not clear, Ms Dhillon may have even eventually disavowed the opinion expressed in her report.
21. I will give three examples of the differences in versions in order to explain why the psychological report is of less assistance than it would otherwise have been.
22. Firstly, the offender told the psychologist that Ms Cutler had told him that as far as sex with him went, she was “up for anything”, that being the version of events the psychologist based her opinions on. Yet, the version on which the offender asks me to sentence him is as I have already explained; Ms Cutler made it clear that she did not want to have sex with him and never said anything to the contrary.
23. Secondly, the agreed facts (and I emphasise the word “agreed”) notes that the offender persisted with his attempts to penetrate her with his penis for 10 seconds after she told him to stop. However, the offender told Ms Dhillon, and she accepted, that he stopped immediately when Ms Cutler told him to.
24. Thirdly, the version of events given by the offender to Ms Dhillon is inconsistent with his plea of guilty. His version said nothing about him trying to penetrate Ms Cutler’s genitalia with his penis.
25. As to whether he is remorseful for what he has done, when interviewed by the Community Corrections Officer, it appeared that his primary concern was not for the harm he had caused but was for his own future, although he did apparently accept responsibility for his actions. He blamed alcohol, saying that the offence would not have occurred had he not been drinking as he would not have invited anyone to his residence.
26. The psychological report notes that the offender “has expressed considerable remorse for the incident that occurred”. Once again however, the considerable difference between what the offender told her he did and what he actually did means that I do not accept that he has fully accepted responsibility for his criminal behaviour. He was very much minimising his criminality when he was being treated by the psychologist.
27. The offender relies on four references, two from friends, one from his employer, and one from his former partner. They suggest that this offending is out of character, that he has been honest with them and accepted responsibility for his wrongdoing. However, there is nothing in the references to satisfy me which version of events they were told by the offender. I am left to speculate whether he told them the truth and, if

he did not, I do not know whether their opinions would have changed had they been aware of the agreed facts on which I am to sentence him.

28. It is noteworthy that the offender has no prior criminal history and so the sentiments expressed by the referees as to this being an isolated incident are likely to be accurate. The prosecution suggested less weight should be given to the offender's prior good character because it "to a large extent, enabled the offending to occur". There is nothing in the evidence before me to suggest that either Ms Cutler or her friends knew anything about the offender's prior convictions or lack of them.

Consideration

29. The prosecution relied on a number of comparable cases, *R v KD* [2019] ACTSC 62, *R v Bourke* [2018] ACTSC 5 and *R v Atai (No 2)* [2021] ACTSC 272, but each of those cases involved offending much more serious than in the matter before me. In *R v KD* the offender pinned his victim down, repeatedly placed a pillow over her face, and pulled her pants and underwear down before attempting to have sexual intercourse with her. In *R v Bourke* the offender committed a number of other offences at the same time including, assault occasioning actual bodily harm and recklessly inflicting grievous bodily harm. In *R v Atai (No 2)* the attempt to have sexual intercourse without consent was but one of a number of sexual offences committed against the same victim for which the offender was found guilty by a jury after a trial.
30. It is easily accepted that the most important sentencing considerations for sexual offending are punishment, deterrence, denunciation and recognition of the harm done to the victim as well as general deterrence, with rehabilitation of the offender ordinarily given lesser weight (see *R v Miller* [2019] ACTCA 25 at [44]). For that reason, it is not surprising that a period of full-time imprisonment is ordinarily imposed in sexual offences.
31. But that is not to say that there are circumstances in which sentences of other than full-time imprisonment may be appropriate. The Court in *Wyper v The Queen; R v Wyper* [2017] ACTCA 59 observed at [129] that:
- There can be no general rule that, where general deterrence is an important sentencing purpose, such as in sexual offending in a family violence context, it is never appropriate for a court to make an ICO. In relation to any category of offence, a sentencing court has a broad discretion which must taken into account many considerations, not just general deterrence. In an event, the legislature envisaged that an ICO could reflect sentencing purposes such as general deterrence.
32. It is conceded by the offender that the s 10 of the *Crimes (Sentencing) Act 2005* (ACT) threshold has been crossed, but he submits that the interests of justice would be met by the sentence of imprisonment being served by an Intensive Corrections Order.
33. The offender is entitled to call in aid his prior good character and the unlikelihood that he will commit any further offence in the future. He has stable employment and the support of his family. Because of his mental health condition, a sentence of imprisonment would weigh more heavily upon the offender than would otherwise be the case. In combination, these factors satisfy me that although a sentence of imprisonment is required, it does not need to be one of full-time imprisonment.
34. While I have been critical of the usefulness of the opinions advanced by the psychologist, that is not meant to be a criticism of her in any way. She was entitled to

prepare her reports on the basis of what the offender told her. I do accept what she said about the risks to the offender should the beneficial therapeutic relationship she has with the offender be terminated. It was not suggested to her in cross-examination that the accused was exaggerating his suicidal ideation and as I understand Ms Dhillon's expertise, she is well qualified to assess the likelihood of harm to the offender should he be denied her assistance.

35. I accept the submission that the interests of justice would be met by the sentence of imprisonment I have decided to impose being served by way of an Intensive Corrections Order and that it is appropriate to do so. As the Court explained in *Wyper v The Queen; R v Wyper* at [127]:

... the legislature envisaged that an ICO would be an onerous sentence of imprisonment, albeit one that was served in the community, and would reflect purposes including punishment, accountability, denunciation and general deterrence ...

36. In order to ensure that the offender is adequately punished, I will make it a condition of that Order that he serve a substantial number of hours of community service.

Orders

37. The orders are as follows:

1. On the charge of attempted sexual intercourse without consent (CAN5336/2022) the offender is convicted and sentenced to imprisonment for 2 years to commence 24 April 2023.
2. That sentence of imprisonment is to be served by way of an Intensive Correction Order for the period commencing on 24 April 2023 and ending on 23 April 2025.
3. The conditions of the Intensive Correction Order will be:
 - a. The core conditions in s 42 of the *Crimes (Sentence Administration) Act 2005* (ACT); and
 - b. A community service condition requiring you to complete 400 hours of service within 2 years of today.

I certify that the preceding thirty-seven [37] numbered paragraphs are a true copy of the Reasons for Sentence of his Honour Acting Justice Berman.

Associate:

Date: