CASE SUMMARY

Palmer v The State of Western Australia [2018] WASCA 225

In January 2018 the appellant was convicted in the District Court of Western Australia of one count of doing grievous bodily harm, contrary to s 297(1) of the Western Australian *Criminal Code*. At the time, the maximum penalty for the offence was 10 years. The appellant was sentenced to six years' imprisonment with eligibility for parole.

An appeal was brought by the appellant to the Court of Appeal of Western Australia, arguing that the sentence was manifestly excessive. An additional issue was whether the National Association of People Living with HIV Australia (Inc.) ('NAPWHA') could assist the Court of Appeal by appearing as *amicus curiae*.[1]

Facts

The appellant is a birth-assigned male who has identified as female for her adult life. She commenced taking female hormones in her early twenties. Prior to the commission of the offence, the appellant had no relevant criminal record and for some time had worked as a sex worker.

In September 2014 the appellant was informed that she had tested positive to HIV. Despite this result she continued to engage in sex work, including unprotected anal sex.

The victim saw an online advertisement of the appellant's and contacted her on 5 November 2014. In the advertisement the appellant represented that she was 'clean'. This representation was confirmed by the appellant when she and the victim subsequently met. Over a period of approximately 8 months from January 2015 to August 2015, on several occasions the appellant and victim engaged in unprotected anal sex.

In September 2015 the victim became ill and tested positive to HIV, having contracted the virus from the appellant. The victim and appellant then exchanged text messages, during which the appellant, in effect, feigned ignorance of her HIV status. The appellant moved to Sydney and continued to advertise as a sex worker. In February 2016 she was arrested and extradited to Western Australia.

The appellant was detained in the Crisis Care Unit ('CCU') of a maximum security male prison. As a result, she had limited access to recreational, educational and work programs. Expert evidence recommended that the appellant should be held in women's prison, be given hormone treatment and be provided with basic amenities available to female inmates. By the time of her trial the appellant had accepted her diagnosis and was taking effective treatment.

Due to the victim's cultural background, he felt that he had to hide his HIV status or risk being ostracized by his family and friends. He also believed that marriage was no longer an option for him. He was unable to participate in sport, particularly boxing, and on account of his positive HIV status

[1] 'friend of the court' who does not become a party to the proceeding, but offers the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted.

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reported feeling depressed and worthless. By the time of the trial the victim had an undetectable viral load.

At trial the court received evidence from a clinical immunologist who provided both background information and specific evidence regarding the appellant and victim. In overview, the evidence noted that on account of advances in medicine a person living with HIV who receives treatment has a similar life expectancy as an individual who does not have the virus.

Sentencing by trial judge

The appellant was convicted and the trial judge sentenced her to six years imprisonment. His Honour recognised mitigating circumstances including: the additional hardship associated with the appellant's time in custody; the appellant's appreciation of the impact of her offending; that she did not pose a risk to the public if she continued treatment; and the rehabilitative steps that she had taken. However, aggravating factors identified by the trial judge were the appellant's dishonesty and the length of time in which she engaged in sexual activity with the victim. The appellant's criminality was said to be 'at the upper end of the range of seriousness'.[2]

The trial judge accepted that over time the stigma associated with those who are HIV positive will reduce, and that the victim will be able to move forward with his life. His Honour also recognised, however, that there was an element of seriousness to the offence on account of the potency of the virus and the potential damage that it can cause if left untreated.

Appeal

The Court of Appeal rejected the application by NAPWHA on two bases. First, the trial judge had the benefit of expert evidence and there was an application to similarly adduce such evidence in the Court of Appeal. Consequently, the Court of Appeal would not have been significantly assisted by the submissions of NAPWHA. Second, it would not be appropriate for NAPWHA to advance a case that differed from that of the State in criminal proceedings between the State and appellant.

On the question of whether the sentence was manifestly excessive the Court of Appeal emphasised that it was necessary to examine, from the perspective of the maximum penalty, the standards of sentencing customarily observed for the offence, the place which the conduct occupies on the scale of seriousness of offences of the kind in question, and the personal circumstances of the offender.

In reviewing comparable cases, the Court of Appeal referred to *Houghton v The State of Western Australia*,[3] an earlier case of grievous bodily harm due to HIV transmission. There, the court recognised a probability that the disease would progress to AIDS which in turn, was likely to result in death. The Court of Appeal, however, considered *Houghton* to be of limited assistance as it did not establish a 'range of sentences', and because advances in medicine meant that provided a person with HIV is treated, the virus is highly unlikely to result in death. Instead, in relation to the range of sentences customarily imposed, the Court of Appeal considered the review of cases undertaken in *Lee v The State of Western Australia*.[4] There, cases were cited which identified a range of 3 to 5 years for offences toward the upper end of the scale.

[2] As quoted in *Palmer v Western Australia* [2018] WASCA 225 [27].
[3] [2006] WASCA 143; (2006) 32 WAR 260 ('*Houghton*').
[4] [2018] WASCA 156.

The Court of Appeal noted that despite advances in medicine, the fact remained that the victim had been infected with a lifelong and potentially deadly virus. Additionally, the appellant had been deliberately deceptive. While it was accepted that the social stigma associated with HIV was diminishing, the Court of Appeal noted that that was not the victim's experience. The victim's HIV status had been a great burden, adversely and significantly affecting his enjoyment of life.

However, the Court of Appeal determined that the sentence imposed by the trial judge was severe in the context of the range of sentences customarily imposed and further, that there were substantial mitigating factors. Two such factors were said to stand out: first, the hardship that the appellant would experience in a male prison under protection, beyond that experienced by mainstream prisoners; and second, by reason of the steps taken by the appellant, the reduced need to provide personal deterrence and public protection. In all the circumstances, the sentence of six years was considered manifestly excessive.

The Court of Appeal resentenced the appellant to four years imprisonment. A relevant consideration in resentencing was that the appellant had been moved from the CCU to less restrictive conditions and was able to access gender neutral toiletry products. However, it was also recognised that she still required a high degree of protection and was to complete her sentence in a male prison.