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AUTODOCS

THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION

415

JUDGE J B PHELAN

WOLLONGONG: FRIDAY 12 SEPTEMBER 2003

03/41/0035 - REGINA v MARK ANTHONY SCERRI

SENTENCE

HIS HONOUR: The offender, Mark Scerri, who was born on [REDACTED] pleaded guilty before the Wollongong Local Court on 26 February 2003 to a charge that on 12 May 2002 at Wollongong he had sexual intercourse with [REDACTED] without his consent knowing that he had not consented to the sexual intercourse.

When the matter came before this Court last Friday he adhered to his plea. He also asked me to take into account a charge on a Form 1 document of assault occasioning actual bodily harm to [REDACTED] I propose to accede to that request.

The charge of sexual intercourse without consent attracts a maximum term of imprisonment of fourteen years and the assault charge one of five years.

I propose now to deal with the facts of the matter which appear in the police brief.

At about 5am on Sunday 12 May 2002 the twenty-six year old male victim left licensed premises in the Wollongong CBD and walked alone along Crown Street with the intention of either catching a taxi or train to his home. Whilst walking in a westerly direction on the southern footpath and near the Jubilee Bridge on Crown Street the victim was grabbed from behind by the offender.

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who placed a strangle hold on the victim by placing his right arm around his throat. He forced the victim in a southerly direction along the laneway that leads to the eastern platform of Wollongong Railway Station. He was forced to the ground in an isolated grassed area.

With the weight of the offender sitting on his torso the offender undid the victim's jeans and pushed them down to his knees. Whilst continuing to struggle and yell for help the offender punched the victim to the face before sucking on his penis. Whilst performing this act the offender became angry saying "get it up, get it up" before punching him to the face again.

Whilst this assault was taking place the victim's mobile phone rang. The offender removed the phone from the victim's pocket and ended the call. The phone rang again which resulted in the offender throwing the mobile phone away.

The victim managed to reach for the offender's eyes which he gouged with both of his hands. The offender reacted to this by pulling hard on the victim's penis. The offender eventually let go of the victim and stood up holding his eyes. The victim ran away from the offender stumbling twice as he attempted to pull his pants up. He ran to the Wollongong Police Station where he reported the matter to a police officer. He was in a distressed state with an amount of blood on his clothing. Ambulance personnel were summoned and tended to his facial injuries.

As a result of the assault the victim was emotionally traumatised and suffered a broken nose, two black eyes,

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abrasions and tenderness about his body, was coughing up blood and had trouble swallowing as a result of the offender holding him by the throat. The victim's wallet, phone and one shoe were missing.

The incident was said to have occurred over a twenty to thirty minute period.

Subsequent to the incident occurring the offender was spoken to and asked for a photograph of himself to assist with the inquiry. Consent was not forthcoming and a court order was applied for and granted on 12 June 2002.

As a result of police inquiries an item of the victim's clothing, namely his boxer shorts was submitted to the Division of Analytical Laboratories at Lidcombe. DNA analysis was carried out on the item of victim's clothing and the buccal samples from the victim and the offender, in a report furnished from biologist Jennifer Burger the report stated:

"The DNA recovered from the boxer shorts originated from more than one individual. Assuming that the DNA mixture originated from only two individuals then it is greater than ten billion times more likely to obtain this result if the DNA originated from the offender and the victim than if it originated from the victim and an unknown, unrelated individual."

Based on that information police arrested the offender on 16 October 2002 from which date he has remained in custody.

An effort was made to interview the offender but he declined to be further interviewed. A senior police officer authorised the taking of a DNA sample from the offender which was subsequently done. He was charged and

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later when the matter came before the Court he pleaded guilty.

There is before the Court a Victim Impact Statement in which the victim states that since the assault the impact on his lifestyle and personality has been greater than he had realised. He said friends and family have noticed and commented on several changes in his personality and every day habits. Since the assault his social life has changed. He does not go out in town any more. He gets anxious going out alone anywhere at night. He feels uneasy staying at home alone and instead will visit friends or relatives for company and comfort. He is more jumpy and startles easier than before. Although his injuries have healed he still has some discomfort from his nose when knocked or bumped. His trust in people and willingness to help or chat to a passer-by has gone. The whole incident he says has left him feeling violated physically and emotionally and he no longer feels safe in the community.

I turn now to a consideration of the offender's criminal record.

He had no record as a juvenile. In 1987 he was dealt with for a middle range PCA offence and unlicensed drive. He was given a good behaviour bond by the Wollongong Local Court in 1989 in relation to two charges of assault. At the same time he was dealt with on several charges of obscene exposure, malicious injury and offensive behaviour and either given bonds or fines. In 1988 there had been a low PCA offence, disqualified drive and other related

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traffic offences. In 1989 he was dealt with for driving in a manner dangerous and being a disqualified driver and given a six months sentence. There was also a mid range PCA. However on appeal he was given periodic detention in relation to those matters.

On 19 February 1993 he was convicted and sentenced on five charges of sexual intercourse without consent, a charge of maliciously inflict actual bodily harm with intent to have sexual intercourse on two counts, two counts of grievous bodily harm, committing grievous bodily harm with intention to have sexual intercourse and he was also dealt with and convicted for stealing from the person on two charges. He was sentenced to an overall period of sixteen years to commence on 26 September 1989 and given a non parole of twelve years to expire on 25 September 2001. In fact he was released from custody on 16 October 2002. Since then his parole has been revoked and the new date for his release to parole will be 1 March 2006.

Those matters involved three male victims. Each of those offences was carried out in circumstances remarkably similar to the one before the Court. The victims were relatively young males. Each incident took place either on a Friday or Saturday night in the early hours of the following morning. Each of them involved threats and assault, the victim being punched around the head. On one occasion the victim suffered a fractured nose and had over forty stitches to his head. They each involved the offender sucking on the victim's penis and in each case followed by anal intercourse against the will of the

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victim.

In the present case probably only because of the stout resistance and the gouging of the eyes by the victim there was no anal intercourse.

I turn now to a consideration of subjective matters.

Oral evidence was given by Annette Sharp who has been the offenders partner, at least in recent times, since he secured his liberty. She has known him for about sixteen years and earlier had a romantic association which had faded but they had resumed contact and she is now romantically attached to him again. They have a four months old child who was born after the offender went back into custody. She records him as getting on terrifically with a son of a previous relationship and that he is a very caring loving person who would do anything for them.

The offender himself gave evidence in which he conceded that to drink alcohol would be disastrous for him in the future bearing in mind that he had been drinking on the subject occasion. It was, he said, the first time he had been drinking as according to Dr Carne's report he was on a six month prohibition following his release from custody which would not quite have expired on the particular occasion.

He expressed deep regret towards the victim and also recognises his deprivation in the role of father to this young child.

There is a significant report before the Court particularly from Professor David Greenburg who gives a lot of detail about the offender which, to some degree,

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may explain why he has now been before the Court on these very serious charges.

He reported that his father was a violent alcoholic. His father was dominating and emotionally distant towards him. He recalled that his father forced him to fight older children and had a great hatred of homosexual people.

His mother who is still alive has suffered from depression and has taken anti depressant medication for many years. She is reported to be a caring person. His mother had left his father when he was aged nine but later returned to her husband because of financial hardship. At age twelve the offender reported leaving home because he wanted to escape from his chaotic home atmosphere and a local paedophilic ring.

His education had not proceeded very smoothly. Indeed his father seemed to discourage any academic pursuits and he left school functionally illiterate but later attended a TAFE course where he taught himself to read and write. He attributes his poor scholastic background to his father's attitude to him attending school. He had started work as a gyprock fixer until aged sixteen or seventeen and then worked in landscaping and panel beating. He worked for the State Rail Authority for a year period doing construction and as an electrician of trains. He worked for a year for Transfield. He was self-employed as a panel beater before being incarcerated in 1989.

He reported using cannabis from the age of ten and by .12/09/03

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age fourteen until twenty-one he was using cannabis on a regular basis. He also reported alcohol usage between the years fourteen and twenty-four years. He reported abusing alcohol whilst in gaol. He denied any other illicit substance usage. He had fractured his vertebra and ruptured three disks in the year 2000 while lifting steel frames in prison. He now has chronic back ache and takes Tramal and Celebrex medication. Medical records show that he is hepatitis positive.

As regards sexual history this may be of some significance. He stated to the Professor that he was sexually abused during his childhood between the ages of seven and eight years. This abuse continued for almost four or five years. It involved fondling of his genitalia, masturbation, fellatio and anal penetration by adult male perpetrators. He stated that there was a paedophilic ring in Wollongong which was headed by an ex mayor of Wollongong and other prominent community members. He stated that his sexual abuse in his childhood started gradually and increased in frequency to twice a week and on weekends. He states that the perpetrators would entice him with visits to their farms, flights in private air planes and camping trips. He had never told his father about this because his father hated homosexuals and he feared that his father would hate him.

As a child and young person he felt confused about his sexual orientation. He felt he had homosexual tendencies. He stated he felt different from his male peers because they never had sex with men. He

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subsequently endeavoured to have heterosexual relationships with different women. He feels that he is not homosexual in his sexual orientation and regards himself as being bisexual but currently in a heterosexual relationship.

Reference is made to his fifteen year old son who was raised by his maternal grandmother. He referred to his relationship with Annette Sharpe.

He described to the Professor the nature of his attacks in relation to the prior proceedings which I have already in broad terms referred to. In particular he admitted to the Professor that if his victims did not obtain an erection he would humiliate them further and physically abuse them. This abuse sexually aroused him and he would rape the victim by anal penetration. He admitted to inducing suffering and humiliating the victim and subjecting them to physical assault which sexually aroused him. He stated that he would then remove their wallets and pretend that he had noted their address. He would threaten the victims that if they reported the incident he would come and get them.

Professor Greenburg goes on to report that he had read Dr Westmore's psychiatric report prepared for his earlier sentencing in which he states that Mr Scerri has "homosexual inclinations".

Dr Westmore stated that:

"In terms of understanding his violence towards the victims, it is also quite common for perpetrators of violence against homosexual people to have latent or active but unaccepted homosexual impulses themselves. They find this

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part of themselves repulsive and repugnant and are of course driven to such behaviours by strong sexual impulses."

Dr Westmore recommended that Mr Scerri continue with his counselling and education. The psychiatrist stated that:

"His propensity to reoffend is difficult to determine as a lot will rest with the amount of acceptance and acknowledgment he makes of his own homosexual needs before his release."

The report then goes on to detail the efforts by the offender to overcome his problems. He was involved in a number of programs within the Corrective Services Department in relation thereto.

The Professor noted that he completed the disclosure part of treatment satisfactorily. He admitted responsibility for the offences and did not blame the victims or other sexual offenders. It was noted that his behaviour with staff was acceptable throughout his treatment and he participated in all aspects of the treatment. He was a positive group member and completed all his assignments. Nevertheless it was seen that he remained as a threat having regard to prior sexual offences and other factors.

Following his release he was referred to the maintenance treatment program which he attended on a weekly basis. He attended AA groups likewise. At the time he was described as receiving a Newstart allowance and receiving weekly counselling from his parole officer. He was also being assisted with suitable vocational employment counselling.

The offender stated to Professor Greenburg that

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whilst on parole he had no money, felt depressed and felt he deserved to drink alcohol. He subsequently went with his girlfriend Annette for a pizza. The couple subsequently went to town to a club and he began drinking. By 3am he reports that he was intoxicated and subsequently went to the toilet. He stated that he became disruptive and was ejected from the club. He could not get back into the club so he walked to the station and found there were no trains leaving at that time. On his way back from the station his path crossed that of a young male stranger. He admits that he physically assaulted and humiliated the victim to subdue him. He admitted that he had become sexually aroused by the physical and psychological abuse of the victim, thus the offences took place.

Professor Greenburg provided an analysis or diagnosis of him in terms of psycho sexual disorder, paraphilia, sexual sadism, alcohol abuse dependence. He also diagnosed him as suffering from chronic depression and post traumatic stress disorder.

In his conclusions and recommendations the Professor said this:

"The writer is of the opinion that the obvious diagnosis in Mr Scerri has been overlooked. He clearly has a sexually sadistic disorder as defined in the diagnostic and statistical manual fourth edition DSM-IV. This is a paraphilic (sexually deviant) disorder where the individual derives sexual excitement from the psychological or physical suffering of the victim. This usually includes the humiliation of the non-consenting victim. Sexually sadistic fantasies usually involve complete control over the victim who is terrified of the impending sadistic act. Although sexual masochism is commonly associated with this disorder Mr Scerri denies any masochistic

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fantasy, sexual urges or sexual acts. His erotic sexual fantasies involve dominance over the victim."

He says that whilst he agrees with other assessments that Mr Scerri has homosexual tendencies and is probably bisexual in his orientation, his violence associated with his homosexual activity however is not part and parcel of his homosexual sexual orientation. The violence however is part and parcel of his sexual sadism disorder which has to date been overlooked as his diagnosis.

Thus the Professor reports that he has not received adequate treatment to address these tendencies. He also refers to his low grade depression which seems to be related to his relationship with his father who was described as a domineering violent alcoholic. He thinks he would benefit from antidepressant medication to address depression and symptoms of post traumatic stress disorder. He thinks he should further have psychological counselling to address his other symptoms. He should have further psychotherapy. He says that it is imperative that he remain abstinent from alcohol and other illicit substances for an indefinite period, that is, the remainder of his life. Alcohol is a disinhibitor which disinhibits his internal cognitive control of his sexual sadistic disorder. He says he should be regarded as falling in the high risk category group for sexual reoffence. However with more specific treatment to address his disorder and other difficulties it may be likely to reduce his level of risk in order that he successfully could re-enter into the community at a later time.

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The Professor concludes by strongly recommending that Mr Scerri undergo further sexual therapy at the Cubit program at the Malabar Special Program Centre. He is also advised to seek treatment from the resident psychiatrist at the centre. He says he appears to be motivated in seeking treatment and very concerned with his sexual problems. His prognosis is dependent on him being successfully treated for his sexual sadistic disorder and other related psychiatric disorders.

I do not propose to examine Dr Carne's report.

In his submissions Mr Pearsall for the accused concedes that he made no admissions to the police but pleaded guilty at the Local Court on 26 February. He says the Crown case was not weak. No doubt that is meant to indicate that the DNA evidence against him was very strong. He puts to the Court that apart from its utilitarian value the plea saved the victim the embarrassment of testifying. He refers specifically to Professor Greenburg's report and goes on to submit that the offender was sexually abused by a paedophilic ring at an early age and that the offender himself was abused may have contributed to the commission of these offences. Although not an excuse this factor may go some way to explain the commission of the offence and is available to be taken into account in mitigation and he refers to a number of authorities of the Court of Criminal Appeal. He refers to Professor Greenburg's opinion that with appropriate specific treatment he could be successfully returned to the community at a later time. He

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specifically refers to his motivation to change. He submits that there should be a finding of special circumstances and he refers to the various matters that have to be taken into account pursuant to s 21(A) of the **Crimes Sentencing Procedure Act 1999** which in my remarks I have implicitly referred to or will refer to.

The matters which render this particular charge serious refers specifically to the earlier charges of almost identical kind. The fact to that he has undergone substantial rehabilitation but despite the clear warnings particularly those related to alcohol, in the end result he ignored them to his own cost and that of the innocent victim.

The offence was committed whilst on parole after he had spent a very long period in gaol.

As I have remarked it will be some years yet before he finishes his former sentence. I have to cast a sentence to objectively demonstrate the seriousness of the present offence bearing in mind that I have to take into account the charge on the Form 1 document.

In those circumstances bearing in mind the plea of guilt I propose to sentence him to a term of imprisonment overall of eight years. That will commence today and expire on 11 September 2011. I am not prepared in the circumstances to find special circumstances. I appoint a non-parole period of six years and on 11 September 2009 he will become eligible for consideration for release to parole. I formally record a conviction and I confirm that I have taken into account the matter on the Form 1

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document. I recommend that the reports particularly of Professor Greenburg and Dr Carne be forwarded to the prison authorities to ensure that the psychiatric and other rehabilitative treatment recommended is put into effect, including assessment of his psychiatric depression and treatment if necessary.

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