

The Queen vs Kyle Horace

THE SUPREME COURT OF

THE NORTHERN TERRITORY

SCC 20425514

THE QUEEN

and

KYLE HORACE

(Sentence)

MARTIN CJ

**TRANSCRIPT OF PROCEEDINGS AT DARWIN ON THURSDAY 22
MARCH 2007**

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HIS HONOUR: Mr Horace, I am about to impose sentence, but I will first say something about what you did and about you. These remarks will be longer than usual because there are a number of matters that must be explained.

You have been found guilty by a jury of three crimes of unlawful sexual intercourse without consent. In other words, you have been found guilty of three crimes of rape. The crimes were committed on the same occasion against the same 13 year old female victim. I must sentence you on the basis of the facts consistent with the verdicts of the jury and which I am satisfied were proven beyond reasonable doubt.

Monday 5 May 2003 was a public holiday. You were then aged 15. You and the victim were unknown to each other.

The victim and her 13 year old female friends spent Sunday evening and Monday together. There was nothing unusual about their weekend. They were normal young teenage girls living in family circumstances spending the night and the day together in harmless activities.

That Monday afternoon the two girls waited at the bus stop for a bus to take the victim home. You came along and asked to borrow two dollars. According to the victim, she declined. The victim's friend said the victim gave you two dollars. The differences in their recollections are of no significance.

The essential facts proven are that you spoke with the girls and asked them, in particular the victim, a number of questions including questions of a personal nature. When it became apparent to you that the victim and her friend were about to leave the bus stop, you sought directions to a particular street. In an effort to get rid of you, the victim agreed to point you in the direction of the street. For that purpose the victim walked with you into the grounds of the Anula Primary School where she pointed in the general direction of the street. However, you were not interested in any street. Your request to be shown the location of the street was nothing but a ruse to get the victim alone in the school grounds where you intended to initiate a sexual encounter. You were only 15 and I have no doubt that in a very immature way you thought you saw an opportunity for sex. I am not satisfied that when you asked for directions you had in mind forcing the young victim to have sex with you. That decision was made when you were in the school grounds under the trees.

From an area under the trees in the school grounds the victim pointed in the general direction of the street you had named. You stopped in front of the victim, turned around and said you had heard that she liked to give blow jobs to guys. She told you that was not true. It was at this moment that you decided to force your sexual assault upon the victim regardless of her wishes. You grabbed the victim by the arm and placed your hand down her shorts. You then inserted your finger, and possibly two fingers, into the victim's vagina. Strictly speaking, your finger entered the external genitalia and did not penetrate into the vagina, but in common terms you inserted your finger into the victim's vagina.

In the process of inserting your finger and moving it around in the victim's

genitalia, you caused a one and a half centimetre tear which was very painful. You knew the victim was not consenting.

The act of inserting your finger into the victim's genitalia was your first crime of rape. The sentence will reflect the fact that by this crime you caused a physical injury.

The victim told you to stop. She grabbed your hand and pushed it away. When the victim started to move away you grabbed her again by putting both hands on her shoulders. You pushed her up against a wall and then onto the ground when you knelt between her legs and spread her legs with your knees. The victim kept saying 'no' or 'stop it' or 'just stop', but you paid no attention. You were determined to have sexual intercourse with the victim notwithstanding that it was plain to you that she did not want to have sexual intercourse. In a not uncommon reaction, the victim felt really weak and as if her body was frozen. She was very scared and unable to offer significant resistance.

After removing the victim's shorts and underwear, you forced your penis inside the victim's vagina and moved it in and out. Your penis became more fully erect. The victim thought you ejaculated.

During the act of intercourse you kept saying to the victim, 'you like it' and she kept replying no. In her naivety the victim did not understand what you were about.

That act of intercourse is the second crime of rape that you committed. The sentence will reflect the use of force.

When you had finished the act of penile intercourse, you got up and the victim moved to put her clothing on. As she was getting up you stood over her and forced your penis into her mouth saying, 'You like the taste, don't you?' You heard a sound and stopped. The act of forcing your penis into the victim's mouth was your third crime of rape.

As explained later in these reasons, you knew the difference between right and wrong, but in your immaturity I doubt that you then realised the enormity of what you had done. You followed the victim as she returned to her girlfriend at the bus stop, after which you walked away.

The victim was a young girl without any sexual experience whatsoever. She

was obviously a friendly child from a good family who lived a relatively sheltered life. This was not a young girl who had knocked around or, in the words of the prosecutor to the jury, was looking for some action. This was a young girl who liked reading, drawing, writing and going to the movies. She did not have a boyfriend. She was, very obviously, extremely naive.

I mention these things about the victim not to criticise her. There is nothing about the victim or her conduct to criticise. I mention these matters about the victim to explain that you did not take advantage of an experienced person. You took advantage of an obviously innocent and naive young girl.

The victim is no longer innocent or naive. You deprived her of those wonderful aspects of childhood. As the victim impact statement demonstrates, your crimes have had very significant effects upon the victim. Although you cannot be visited with all the wider effects upon the family of the victim, the fact remains that when people like you commit serious crimes, the impact is often widespread and longlasting. It is unnecessary for me to canvass the details of the effects upon the victim, but they have been very significant.

Mr Horace, the community understands that children sometimes engage in exploratory sexual behaviour. However, your conduct was not of that nature. It was a violent sexual attack upon a particularly vulnerable young girl which included not only physical violence and a forced act of penile intercourse, but a final act of forcing your penis into the mouth of the victim in a manner that speaks of you asserting dominance and degrading the victim. That conduct was violent and disturbing conduct. As the sentencing Judge I look for reasons why a 15 year old boy would engage in such conduct. The community also wants to know why. In a very helpful report to the Court a probation officer identified a clue and I subsequently heard evidence which provided a limited degree of insight into your mental state.

You were born in Wyndham in Western Australia when your mother was aged 18 years. You have never met your natural father. Your mother brought you to Darwin when you were aged six or seven months and later moved to Adelaide where she entered a relationship with a man you thought was your father. Unfortunately, both your mother and stepfather were alcoholics and it appears that you were raised in alcohol rehabilitation program environments until you were aged about 12. At a young age your stepfather told you he did not wish to be called 'dad' or to continue a relationship with you. It was with this dysfunctional background of rejection that at the age of 11 or 12 years

you came to Darwin to live with your mother's auntie who you regard as your grandmother.

I heard evidence from your grandmother. She is a very impressive person who has a great deal of love for you. Notwithstanding that your grandmother provided you with a good home and much love and support, you were a very troubled child and it appears that you harboured unresolved anger. At two schools in Darwin you exhibited significant behavioural problems which efforts by those schools were unsuccessful in rectifying. This led to a referral in 2002 to the Star Centre which was a withdrawal centre operated by the Education Department for students exhibiting challenging behaviours. I heard evidence from the Manager of the Centre, Mr Carter who had a direct involvement with you. He was an impressive witness. Mr Carter explained that the Star Centre would not accept problem students unless significant efforts had been made in the school which were unsuccessful. The features of your conduct that led Mr Carter to accept you into the Star Centre involved violence, disruption, opposition and unusual behavioural acts.

Between the schools and the Star Centre, you received a significant amount of counselling and assistance aimed at encouraging positive behaviour and trying to enable you to connect with others and establish better relationships. The courses and counselling were aimed at improving your self esteem and assisting you in what was then known as anger management, but is now identified as social emotional control. In particular, Mr Carter worked with you in a highly intensive program directed to self esteem, anger management and social values and attitudes. Every endeavour was made to help you come to understand the need for respect and cooperative behaviour including respect for women concerning sexual matters. Both the schools and Mr Carter consulted extensively with your grandmother.

You responded very positively to the Star Centre program and to Mr Carter personally. He liked you. He described you as fairly convivial and generous. You did not cause problems and you were cooperative. It appeared to him that you had a loving and caring relationship with your grandmother. He assessed you as slightly above average intelligence, but noted that your learning had not been good for reasons of non-attendance and lack of interest. You accepted responsibility for your actions and demonstrated a willingness to rehabilitate yourself. After about eight sessions, Mr Carter returned you to the school, but he was still concerned about matters such as self control, the need to assert yourself around peers and interacting with

others in an inappropriate manner.

It must be said that Mr Carter's reservations were well founded. Having left the Star program in December 2002, you committed the crimes with which I am concerned in May 2003.

There is another side to your character. First, it is to your credit that notwithstanding the behavioural problems, prior to committing the crimes of rape in May 2003, you had managed to stay out of trouble with the law until February 2002 when you committed minor offences of dishonesty which resulted in juvenile diversion. As I said to your counsel, you are not in fact a first offender because you have committed those offences in February 2002, but they were minor and of an entirely different character to the crimes of rape. In addition, at the time you were aged only 13 years. In these circumstances, I will treat you as a first offender.

In addition to staying out of trouble with the law, the other side of your character has come through in the evidence of your grandmother, a case worker who supervised your juvenile diversion and your partner. I also have references that speak highly of you. It is apparent that in the environment of your family and close friends, you are a respectful and loving young man. The respect you showed for Mr Carter was mirrored in your responsive and respectful behaviour when being supervised by the case worker. You have known your partner for approximately five years and the relationship became serious in 2005. She described you as providing love and respect. You are her best friend and you have never been violent. On 2 February 2007 your partner gave birth to your baby daughter.

Mr Horace, your counsel has described your conduct in raping the young victim as incongruous and out of character. In one sense he is right. Your conduct is not in keeping with the side of your character that you show to your family and have shown to Mr Carter and your case worker. On the other hand, it is not unusual for young people like you to show a good side in certain environments, but to revert to unacceptable behaviours when in unsupervised and uncontrolled circumstances.

At the time you committed these crimes, you were a young Aboriginal boy with a dysfunctional and sad history resulting in entrenched behavioural problems which, despite the best efforts of those who sought to assist you, would come to the fore from time to time. In unsupervised circumstances you

were unable to relate properly to others and I am satisfied that this inability, coupled with deepseated anger and other aspects of your mental state which it is almost impossible to identify, strongly contributed to your violent and dominating behaviour when you raped the victim.

What then of your future? Your grandmother told me that when you committed this offence you were trying to do things for yourself and find employment, but you became frustrated with knockbacks. She thought that you were starting to come good. Your counsel put to me that since you committed the crimes you have shown that you are maturing and becoming responsible. He told me that you had been attempting to get work, have become serious with your partner and want to resume a trade. You now have family responsibilities. All of this counsel suggested pointed to a step forward in your rehabilitation at a time when you are at a critical stage in your formative years. In this context counsel urged that you respond well to intensive supervision.

Significantly, you will have support when you are released. I accept the evidence of your partner that she will continue to support you while you are gaol and she will be a support for you when you are released. Undoubtedly, health willing, your grandmother will also be there to provide strong support for you.

The steps forward mentioned by your counsel need to be assessed with caution. There are also signs that are not so positive. After committing the offence and before you became aware in August 2005 that you were being charged with rape, you committed a number of offences. Leaving aside minor traffic matters, in October 2003 you committed two offences of unlawfully damaging property for which you were dealt with on 9 March 2004 and placed on supervision. In October 2004, the court found proved that on 13 April 2004 you trespassed within one year after a warning. You were placed on another bond. That conduct was in breach of the earlier bond. You repeated the conduct of trespassing within a year after warning in November 2004 for which you were dealt with in December 2004. You were again in breach of a bond. On 23 November 2004 you committed the offence of stealing property from a shop. You were dealt with for that offence on 21 June 2005 and ordered to perform 40 hours of community service. On 6 March 2005 you failed to cease loitering in a group and you were dealt with on 31 March 2005 and ordered to perform 16 hours of community service.

Mr Horace, you are not to be punished again for these offences committed

after May 2003. I mention them because they demonstrate that you did not manage to keep out of trouble and that your process of maturing was not all plain sailing. In addition, you informed the probation officer that you commenced drinking alcohol at the age of 16 years and that your preference was 'any spirits'. You described your consumption to the probation officer as drinking to have a good time with friends and sometimes to get drunk. You indicated you may have a problem with alcohol but you have not craved for it since your imprisonment.

You also told the probation officer that you commenced smoking cannabis at about the same time as you started consuming alcohol. You admitted you had a problem with cannabis. Your grandmother told the probation officer it was during this time she was concerned about your antisocial behaviour and had asked you to leave her residence while still maintaining her support.

The probation officer requested an assessment from the Drug and Alcohol Intensive Support Program for youth, DAISY. In a report to the court of 23 January 2007, a youth worker with the program advised that the assessment of your suitability was conducted at Darwin Prison on 10 January 2007. The author reported that you showed 'minimal motivation' to engage in employment or pre employment training. Concern was expressed that you might show similar motivation in regard to your involvement with the DAISY program. However, the program would be willing to work with you to assist you to address your substance misuse.

It may well be that your lack of motivation was caused by your reaction to the circumstances in which you now find yourself. As your counsel put it to me, once you had been charged in August 2005 you withdrew into yourself and your withdrawal is demonstrated by your minimal communication with the probation officer.

All of these matters indicate that while your intelligence and the good side of your character give some hope for your successful rehabilitation, there are other features which pull in the other direction and suggest that your prospects are not particularly good. At the best, you have a long way to go to overcome your behavioural problems and attitudes.

In addition, it is difficult to see progress being made while you continue with your current attitude to your offending. As the probation officer reports, you have not accepted responsibility for your actions. You continue to maintain that the sexual acts were consensual. You have not indicated any sign of

remorse. I agree with the probation officer that this state of mind is a significant risk factor in connection with possible re-offending.

As to the possibility of re-offending, I also bear in mind that prior to your offending you had been taught the difference between right and wrong and you well understood the need for respect for women with regard to sexual matters. You have been taught strategies to avoid behavioural disturbances and to control your anger. While these appeared to have been successful at the time, within a few months in unsupervised circumstances you engaged in these violent acts of rape.

Personal deterrence, that is deterring you from committing any further offences is a relevant factor in the exercise of the sentencing discretion.

General deterrence is also of importance, that is, deterring others who are minded to commit crimes like yours. The court must do what it can to protect women and children in our community against crimes of violence, including sexual violence, by imposing penalties that will, hopefully, deter others from committing these types of crimes.

Mr Horace, your type of case presents a difficult problem for a sentencing Court. You have committed very serious crimes which have had devastating effects upon the innocent young victim. On the other hand, you were only 15 when you committed the crimes and you are still a young person aged only 18. The Courts and community recognise that if possible, the Court should avoid sending young persons to gaol, particularly for a lengthy period. However, there are times when the crimes are so serious that the rehabilitation of the young offender must take second place to other sentencing considerations such as punishment and general deterrence. Young girls are vulnerable to attacks like yours and they are entitled to the full protection of the law.

There are two other matters that should be mentioned. First, notwithstanding police involvement on the day of the crimes, there was a long delay between the commission of the crime in May 2003 and the laying of charges in August 2005. The delay was not your fault. I take into account the impact of the delay on you, but it is not a matter of great significance in arriving at an appropriate sentence.

Secondly, you are not entitled to the benefit of a plea of guilty. You are not to be punished or penalised for pleading not guilty, but you are not entitled to

a reduction of the sentence which is given following a plea of guilty.

You are convicted of each of the three crimes of unlawful sexual intercourse without consent.

The sentences I am about to impose and the total period to be served will reflect, your very young age of 15 years at the time of the crimes and your absence of prior offending. In other words, the sentence in total would have been longer if you had been a mature adult or if you had previously offended in a significant manner. The total has been reached by considering the question of what is called totality. I have reached the total which I regard as appropriate and being proportionate to the seriousness of your total criminal conduct and not crushing.

On count 1, the offence of inserting your finger into the victim's genitalia, I impose a sentence of three years and six months imprisonment commencing 23 November 2006.

On count 2, the offence of involving the act of penile intercourse, I impose a sentence of six years and six months imprisonment commencing 23 November 2006. This sentence is to be served concurrently with the sentence on count 1.

On count 3, the act of inserting your penis into the victim's mouth, I impose a sentence of five years imprisonment. Of this sentence, six months is to be served cumulatively on the sentence imposed on count 2.

The total period of imprisonment is seven years commencing 23 November 2006. I have no power to suspend part of the sentence. In respect of that period of seven years the community, through Parliament and the Criminal Code, has directed the Court to impose a non-parole period of not less than 70 percent of that period. This is a reflection of the community's concern about these types of crimes and the need to protect the public. I fix a non-parole period of five years commencing on 23 November 2006. That means, Mr Horace, that you must serve a minimum of five years before you are eligible to apply for parole.