Warloo v Weisenekker [2005] NTSC 42

PARTIES:	WARLOO, Kathy
	v
	WEISENEKKER. Peter
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No JA 90 of 2004
DELIVERED:	5 August 2005
HEARING DATES:	16 February 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

MAGISTRATES – Appeal from Magistrate
CRIMINAL LAW – Property offences

Appeal against sentence – whether sentence was manifestly excessive – whether magistrate erred in making an order under section 122 Liquor Act – whether proper consideration was given to other sentencing options – whether due consideration was given to appellant's circumstances and prospects of rehabilitation – weight given to prior criminal history – no striking disparity in sentencing – appeal dismissed

Liquor Act

R v Allison (1987) 49 NTR 38; *Sam Freedy v Hatzimalis* (unreported, Supreme Court NT, Gray A-J, 30 March 1998); *Gumbinyarra v Teague* (2003) 12 NTLR 226; *Marika v Manley* (1998) 144 FLR 404; *Veen v The*

Queen [No2] (1988) 164 CLR 465; *Williams v Marsh* (1985) 38 SASR 313, applied

Rory v Bell (1992) 64 A Crim R 134, referred to

REPRESENTATION:

Counsel:

Plaintiff:	S Musk
Defendant:	N Browne

Solicitors:

Plaintiff:	NAALAS
Defendant:	DPP

Judgment category classification:	B
Judgment ID Number:	Sou 0508
Number of pages:	19

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Warloo v Weisenekker [2005] NTSC 42
No. JA 90 of 2004

BETWEEN:

KATHY WARLOO
Plaintiff

AND:

PETER WEISENEKKER
Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 5 August 2005)

Introduction

[1] This is an appeal against a sentence pursuant to s 163 of the Justices Act (NT). On 12 August 2004 in the Court of Summary Jurisdiction the appellant pleaded guilty to three charges of damaging property contrary to s 251(1) of the Criminal Code. The maximum penalty for each offence is two years imprisonment.

[2] On 15 October 2004 Mr Gillies SM sentenced the appellant to six months and 23 days imprisonment to be suspended forthwith on conditions that for a period of six months the appellant accept directions from the Director of Correctional Services as to reporting, alcohol counselling and treatment and

that the appellant undergo breath tests and urine tests as directed by the Director of Correctional Services. Pursuant to s 40(6) of the Sentencing Act, he specified a period of 12 months from 15 October 2004 during which the appellant was not to commit another offence punishable by imprisonment. With the consent of the appellant the learned magistrate also made an order pursuant to s 122 of the Liquor Act forbidding all persons for a period of 12 months to sell or supply liquor to the appellant and forbidding them to permit her to be on or at premises in respect of which a licence was in force that permits consumption of liquor on those premises. In addition to the sentence handed down the appellant was ordered to pay compensation of $2028.79 in relation to count 1. On 9 December 2004 the compensation sum was amended and the appellant was ordered to pay $1848.79 within 18 months.

The issues

[3] The proposed grounds of appeal were contained in an amended notice of appeal dated 11 February 2005. However, during the course of argument counsel for the appellant stated that the only grounds relied upon by the appellant were the following:

1. The sentence imposed on the appellant was manifestly excessive.

2. The learned magistrate erred in:

    (a) failing to properly consider other sentencing options

(b) making an order pursuant to s 122 Liquor Act (NT)

3. The learned magistrate failed to properly consider the circumstances of the appellant and her prospects of rehabilitation.

4. The learned magistrate gave undue weight to the appellant's prior criminal history.

[4] The principal questions are was the sentence was manifestly excessive and did the learned magistrate err in making an order pursuant to s 122 Liquor Act (NT). In my opinion the sentence is not manifestly excessive and the learned magistrate did not err in making an order under s 122 of the Liquor Act. The appeal should be dismissed.

The factual background to the sentence imposed on the appellant

[5] At the time of the offence on 15 March 2004 the appellant was a 29 year old mother of four children ranging in ages from 10 months to 11years. She was born in Darwin and raised in the Daly River Community.

[6] The facts of the offending which were admitted by the appellant were as follows:

> "At 8.00am on 15 March 2004 the appellant was at "5 Mile" area, Daly River with several others drinking alcohol. The appellant became sick and started to vomit, before being pushed to the ground by her husband.
>
> The appellant became angry at being pushed over by her husband and she picked up a large rock in her right hand and approached three vehicles that were parked nearby. The appellant walked up to a beige coloured Toyota and she struck the back and sides of the

vehicle a number of times with the rock causing denting and scratches down to bare metal. The value of the damage to the vehicle was approximately $2,030.00.

The appellant then walked up to a red Toyota RAV 4 and she struck the vehicle several times on the bonnet and drivers side with the rock causing denting and scratches down to bare metal. The value of damage to the vehicle was approximately $1500.00.

The appellant then approached a white Toyota Land cruiser Troop carrier and struck the vehicle several times with the rock, smashing the windscreen and denting the bonnet and sides of the vehicle. The value of the damage to the vehicle was approximately $400.

After causing damage to the three vehicles the appellant threw the rock to the ground.

On Wednesday 5 May 2004 the Defendant participated in electronic record of interview by police. She told the police that she did not wish to talk about the matter.

At no time did the Defendant have permission to damage any of the vehicles. The total damage to the three vehicles was $3930.00"

[7] For the purposes of the pre-sentence report that was tendered in evidence in the Court of Summary Jurisdiction, the appellant said that as a result of her drinking she was feeling sick and vomited, her partner then approached her and pushed her causing her to fall over. As a result of her partner's action she became angry, picked up a big rock and vented her anger by damaging the motor vehicles.

[8] The offences were not premeditated but resulted from the appellant's state of intoxication and her inability to control her anger. The appellant acknowledged that her behaviour at the time of the incidents was inexcusable. She said that she was ashamed of her actions.

[9] The appellant completed her primary school at Daly River and then attended St John's College where she completed her year eight studies. She left school after this and took employment with the Community Development Employment Program (CDEP) working in various areas. At the time of her sentence she was working at the Community Aged Care Centre. She described her health as good. However, she has attempted suicide on several occasions, which has been exacerbated by her abuse of alcohol. The appellant's last suicide attempt was in April 2004 when she threw herself into the Daly River.

[10] The appellant has seen domestic violence between her parents. She and her siblings had to care for their parents due to her parents' alcohol abuse. The domestic violence between the appellant's parents ceased when her father stopped drinking six years ago due to his heart problem. Her father is now a reformed alcoholic. Until recently the appellant was a heavy drinker. She started consuming alcohol about 10 years ago. She has attended and completed the CAAPS alcohol residential program on about four or five occasions. However, she did not benefit from her participation in these programs.

[11] Due to the appellant's and her partner's history of alcohol abuse, one of their children was placed in the care of Family and Children Services (FACS) early in 2003. Since then FACS has been monitoring the welfare of the children at the community at least twice a month.

[12] The appellant's first contact with the criminal justice system was in 2000. On 8 November 2000 she was found guilty of unlawful damage to property on 16 December 1999. The Court of Summary Jurisdiction did not proceed to convict the appellant. She was released on a good behaviour bond. On 9 November 2000 the appellant was convicted of consume liquor in a restricted area. On 14 August 2003 the appellant was convicted of two offences. First, she was convicted of unlawful damage to property on 29 November 2002 for which she was ordered to pay a fine of $150 and to make restitution of $117.70. Secondly, the appellant was convicted of possess liquor in a restricted area on 30 May 2003. On 12 August 2004 the appellant was also convicted of the offences of trespass steeling and criminal damage. She went to somebody's house in the company of others. A co-offender broke the lock on a fridge with a screw-driver and the appellant stole alcohol and bacon which she consumed. The appellant's entire offending has involved the consumption of alcohol.

[13] Three weeks prior to 12 August 2004, the appellant was banned from the drinking paddock and the pub near the Daly River Community. The ban was organised by the appellant with her mother-in-law, Mrs Betty Daly. After discussing the appellant's problem with alcohol with the appellant, Mrs Daly approached the police and the community council and had them ban the appellant from drinking alcohol. At the time she was sentenced, the appellant had complied with the ban and had been sober for about three or four months.

[14] At the time she was sentenced, the appellant recognised that alcohol and anger were issues that she had to resolve to remain trouble free. When sentenced, she appeared repentant of her actions and was ashamed of her conduct. The appellant has taken steps to distance herself from licensed premises and is keeping her distance from people consuming alcohol.

[15] In the Court of Summary Jurisdiction counsels for the appellant (Ms Opie and Mr Espie) made the following statements:

1. At the time (of the offending) she (the appellant) was very drunk. She had been drinking all night.

2. She is a person that has problems with alcohol. It is very clear that she has had problems with alcohol for the last ten years and she still has those problems. She is an alcoholic.

3. Since they (the appellant and her husband) have been banned (from alcohol) they have been going out bush a lot. They have been going hunting. The children have come back to the family. They had been staying with the appellant's husband's family as a result of their (the appellant's and her husband's) alcohol abuse. The kids are now back. The family is a unit and things seem to be going well.

4. This is a situation where my client might be assisted by the Department of Correctional Services. I understand that there is no formal program that has been established at Daly River for

rehabilitation. However, a corrections officer is running a voluntary alcoholics anonymous course in the community. My client would benefit from that course.

5. She has really got to overcome this alcohol problem otherwise it is downhill for her and it is downhill for her children.

6. It is something (the alcohol ban) that they (the appellant and her husband) agreed to when discussing the matter with Ms Daly. It is not something that is happening against their will. It is something that they recognise is a good tool in keeping them away from alcohol.

7. She is a person in a remote area where she does not have the benefit of alcohol rehabilitation programs or other types of counselling. She has organised with her family to have this alcohol ban. It is perhaps the best way that she and her husband can deal with these problems.

[16] During the appellant's plea in the Court of Summary Jurisdiction the appellant's counsel also stated that the appellant consented to an order being made under s 122 of the Liquor Act. First, on 14 October 2004 there were the following exchanges between the learned magistrate and counsel for the appellant:

> *"HIS WORSHIP: Well if I don't gaol her, would she consent to a liquor prohibition order?*

MR ESPIE: That would be part of my submission sir. She's accepted – she tells me she'd accept any such order imposed by the court today. She does recognise that she has other emotional issues which, as I said are part of her problems."

HIS WORSHIP: Would your client consent to a liquor prohibition order?

MR ESPIE: Yes, your worship.

[17] Secondly, on 15 October 2004 there was the following exchange between the learned magistrate and counsel for the appellant:

"HIS WORSHIP: Now your client will consent to a liquor prohibition order?

MR ESPIE: Yes sir."

[18] A presentence report that was tendered in evidence in the Court of Summary Jurisdiction stated:

1. She (the appellant) has attempted suicide on several occasions, which has been exacerbated by the use of alcohol. This information was confirmed by the nursing staff at the local clinic.

2. Since the commission of these offences, (the appellant) has been banned from entering licensed premises and is willing to accept this condition on any order the court may impose. She has addressed her alcohol issues in the past, but this has not assisted her. Nevertheless she is again willing to address the issue should the court impose this condition.

3. The Court is advised that there are no counselling services available in the Daly River region to assist the offender to address the factors contributing to her offending. However, (the appellant) is willing to accept a ban from licensed premises, not to consume alcohol and be subjected to random breath testing. Furthermore, she is prepared to

undergo an alcohol counselling/treatment program should the Court impose these conditions.

[19] Prior to making the order pursuant to s 122 of the Liquor Act the learned magistrate found that he was satisfied that the appellant by excessive use of liquor is likely to injure her health and is likely to endanger the peace, welfare and happiness of her family.

Manifestly excessive

[20] In support of the case that the sentence was manifestly excessive, two arguments were made by counsel for the appellant. First, it was said that the learned magistrate made three errors of principle, namely, he failed to properly consider other sentencing options, he failed to properly consider the circumstances of the appellant and her prospects of rehabilitation and he gave undue weight to the appellant's prior criminal history. Secondly, it was said that the sentence of imprisonment significantly exceeded the established tariff.

[21] The first argument of counsel for the appellant cannot be sustained. The learned magistrate did properly consider all sentencing options. He specifically ordered a presentence report that included a home detention order assessment and a community work order assessment. He also requested that the presentence report annex a psychological report. The presentence report advised that the home detention program for the Daly River region was still in the developmental stage and while the appellant was assessed as suitable for a community work order and a suitable project

was available it cannot be said that the imposition of a suspended sentence was an error of principle. The learned magistrate was merely of the opinion that as the criminal damage charges were more serious than the other charges to which the appellant pleaded guilty on 12 August 2004, a community work order was an inadequate sentencing option. A suspended sentence was an appropriate sentencing alternative. The presentence report specifically stated that, "Should a period of imprisonment be imposed, the court may consider suspending all or part of the sentence and releasing the offender on a suspended sentence of imprisonment order on the condition that she accept the supervision of correctional services. A suspended sentence of imprisonment order may be a sufficient deterrent for (the appellant) to avoid further offending." The learned magistrate did not act on a wrong principle in this regard.

[22] The prospect of the appellant's rehabilitation was not an easy issue to consider as the appellant had a 10 year history of alcohol abuse, her previous attempts to overcome her problems with alcohol were unsuccessful and if anything her offending was escalating. Consideration of this issue was made more difficult by the appellant's reluctance to see a psychologist for the purpose of a psychological assessment. However, what was apparent was that a total ban on the appellant consuming alcohol was proving effective in overcoming the appellant's problems. The orders made by the learned magistrate were consistent with recognition of all of these issues. He specifically said, "She is not a first offender. She has damaged property

before and she has done it again. A message needs to be sent to people in the community to discourage them from damaging property. She has problems with alcohol. To her credit she has put herself in a situation where she is off the grog... She has ... invited a liquor ban and she has been on the ban now for three or four months. That is to her credit. It goes someway to forming a view that she is capable of rehabilitating herself." He further stated, "She has four children. There has been a difficulty with one of the children and FACS has been involved. She has had some sadness in her life having lost two siblings and being subject herself to emotional issues and having contemplated suicide. I think the appropriate course is to give her one last chance. She will get that one last chance and she will be allowed to stay in the community." The learned magistrate properly considered the circumstances of the appellant and her prospects of rehabilitation. It is not enough that a different course could have been taken.

[23] The appellant's criminal history was a proper matter to be taken into account in determining the sentence to be imposed. An offender's criminal history is relevant to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in her commission of the instant offences a continuing attitude of disobedience to the law. It is relevant to the issues of retribution, deterrence and protection of society. It is legitimate to take account of the criminal history when it illuminates the moral culpability of the appellant in the instant case, or shows her dangerous propensity or shows a need to impose condign punishment to deter the

appellant or other offenders from committing further offences of a like kind: *Veen v The Queen* [No2] (1988) 164 CLR 465 at 477 – 478. However, the appellant's criminal history cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offences.

[24] As to the appellant's criminal history, the learned magistrate said, "I take into account that the (appellant) has been in trouble before for unlawful damage. She has been in trouble twice before: on 8 November 2000 when she got a without conviction bond and on 14 August 2003 when she was fined $150 and ordered to pay $117.70 cents in restitution. She is not a first offender. She has damaged property before and she has done it again. A message needs to be sent to people in the community to discourage them from damaging property. She has problems with alcohol. To her credit she has put herself in a situation where she is off the grog… She has … invited a liquor ban and she has been on the ban now for three or four months. That is to her credit and it goes some way to forming a view that she is capable of rehabilitating herself." He then went on to say, "I think the appropriate course is to give her one last chance. She will get that one last chance and she will be able to stay in the community." Further, "So far as the charges of damaging the motor vehicles are concerned, there is really only one answer. There has to be a gaol term to let people know in the community that this wanton behaviour will not be tolerated. However, in her case it will be suspended to give her one last chance to stay out of trouble."

[25] The learned magistrate's remarks demonstrate that he recognised that the appellant's conduct was not an uncharacteristic aberration, the appellant had a propensity to engage in such conduct when affected by alcohol and that deterrence and protection of the public were issues for consideration in determining the sentence to be imposed. At the same time the sentencing remarks show that the learned magistrate recognized that the appellant's conduct since the imposition of the ban on alcohol showed that there was a reasonable prospect of the appellant being rehabilitated. Furthermore, the sentence imposed was not disproportionate to the gravity of the instant offences. The gravity of the appellant's criminal conduct must not be underestimated. She caused damage that totalled almost $4000 to three motor vehicles by striking them with a rock. She did so simply because she was angry with her husband for pushing her and causing her to fall over. The learned magistrate did not give undue weight to the appellant's criminal history. It has not been demonstrated that he acted on a wrong principle.

[26] The second argument of counsel for the appellant has more force. However, where the appellant relies upon statistical sentencing material, the appellant must show striking disparity before an appeal court may interfere: *Gumbinyarra v Teague* (2003) 12 NTLR 226 at 234. Significantly no sentencing statistics were tendered by the appellant. Instead the appellant relied on the following statement by Kearney J in *Rory v Bell* (1992) 64 A Crim R 134:

> "The penalties imposed ranged from compensation orders under s393 (1) (c) of the Code, release on good behaviour bonds pursuant to s5 (1) (a) of the Criminal Law (Conditional Release of Offenders) Act, fines ranging from $150 to $500 sometimes coupled with restitution orders, community service orders of 24 hours, through suspended sentences of imprisonment of 1 to 2 months, to sentences of immediate imprisonment ranging from 7 days to 3 months. This is clearly, a very wide range of penalties. In general, fines were imposed where there had been no history of prior offending. In the 5 cases where sentences of immediate imprisonment were imposed all the defendants had a record of prior offending. In the single case where a sentence of 3 months immediate imprisonment was imposed, a rock had been thrown through a shop window causing damage of $1000, the defendant had 2 similar priors, and admitted that he had smashed the window "to get the money". This was clearly a serious case, in terms of a charge under s251; it involved a circumstance of aggravation under s251 (2) (c), so the maximum punishment was 7 years imprisonment.
>
> In 11 of the cases windows or windscreens of vehicles had been smashed. Six of these cases involved first offenders; fines were imposed on 5 of them, and a suspended sentence of one month's imprisonment imposed on the other, where camping gear had been stolen from the vehicle. A fine was also imposed in one case where there had been prior offending. In 2 other cases, where the offences had been committed by the same offender on the same day, he received community service orders; he had "hot wired" one car and tried to "hot wire" the other, and had similar priors as a juvenile. The most severe sentence was 2 months immediate imprisonment. It was imposed in October 1991 on a defendant with priors who had smashed a car window and tried to "hot wire" the vehicle; 10 days earlier he had been given a suspended sentence of 2 months imprisonment for a similar offence. Mr Brown submitted that cases of smashing a window for the purpose of "hot wiring" the vehicle were treated more seriously than the present case, due to the need to deter the high incidence of unlawful use of vehicles."

[27] The statement of Kearney J in *Rory v Bell* (supra) was adopted by Mildren J in *Gumbinyarra v Teague* (2003) 12 NTLR 226 at 234 in circumstances where counsel for the respondent did not suggest that it was not a fair summary of the current position Territory-wide. However, that was not the case in this appeal and the cases referred to by Kearney J do not appear to

involve a situation where three motor vehicles were damaged and the total damage done was almost $4000. As Kearney J said in *R v Allison* (1987) 49 NTR 38 at 40, "A range of sentences in this sense is not fixed or immutable; both upper and lower limits are approximate and the range varies overtime. If there are exceptional or unusual features, either in the commission of the offence or in the personal circumstances of the offender, the case is outside the range and the sentencing discretion is not constrained thereby". It cannot be said that there is a striking disparity between the sentence that was imposed in this case and other cases. Although the sentence is towards the top of the range, the sentence was so out of line with sentencing standards as to be manifestly excessive.

Section 122 Liquor Act

[28] A magistrate sentencing an offender has the power to make an order pursuant to s 122 of the Liquor Act (NT): s 122(2)(a); *Marika v Manley* (1998) 144 FLR 404 at 407; *Sam Freedy v Hatzimalis* (unreported, Supreme Court NT, Gray A-J, 30 March 1998)

[29] Section 122 of the Liquor Act so far as is relevant provides that:

> "122. Prohibition orders
>
> (1) This section applies to –
>
> (a) a person who, by the habitual or excessive use of liquor, wastes his means, injures or is likely to injure his health, causes or is likely to cause physical injury to himself or to others or endangers or interrupts the peace, welfare or happiness of his or another's family; or

(b) a person who, on more than 3 occasions during the preceding 6 months, has been taken into custody in accordance with Division 4 of Part VII of the *Police (Administration) Act*.

(2) An order (a "prohibition order") may be made in respect of a person to whom this section applies –

(a) by a court in relation to a matter before it; or

(b) by the Local Court on application by the Director under this section.

(3) A prohibition order –

(a) shall remain in force for a period of 12 months commencing on the date of the order or such other period (shorter or longer) as may be specified in the order; and

(b) forbids all persons to sell or supply liquor to the person named in the order, or to permit that person to be on or at premises in respect of which a licence is in force which permits consumption of liquor on or at those premises."

[30] Before an order can be made pursuant to s 122 it is necessary that it be proven beyond reasonable doubt that the offender is a person who, by habitual or excessive use of liquor, wastes his or her means, injures or is likely to injure his or her health, causes or is likely to cause physical injury to himself or herself or to others or endangers or interrupts the peace welfare or happiness of his or her or another's family: *Marika v Manley* (supra) at 406. In this case the learned magistrate found that he was satisfied that the appellant by excessive use of liquor is likely to injure her health and is likely to endanger the peace, welfare and happiness of her family. There was sufficient evidence tendered in the Court of Summary Jurisdiction and there were sufficient admissions made by counsel for the appellant for such a finding to be made by the learned magistrate beyond

reasonable doubt. The matters referred to in par 5 to par 19 inclusive above establish that the appellant had been an alcoholic for ten years, that despite her efforts and her participation in rehabilitation programs she had failed to overcome her alcoholism, she attempted to commit suicide under the influence of alcohol, her one child had been placed in care for a period of time because of her abuse of alcohol and her other children had lived with her husband's parents because of her abuse of alcohol and her inability to care for them when she was affected by alcohol. The fact that the existing ban on alcohol was proving effective did not establish that the appellant had as yet overcome her problems. Indeed her counsel specifically stated that it is very clear that she has had problems with alcohol for the last ten years and she still has those problems.

[31] An order should not be made under s 122 of the Liquor Act unless there are reasonable grounds for believing that the order will be complied with and that it will assist with the offenders rehabilitation: *Marika v Manley* (supra) at 407. Ordinarily a magistrate should also seek a report from the Registrar of the Liquor Commission pursuant to s 104(1) of the Sentencing Act before such an order is made.

[32] In this case there were reasonable grounds for believing that the order would be complied with. The order recognised de jure what was occurring de facto. The appellant lives in a remote area and the licensees, the police, the community and the offender had already put in place a ban on the appellant consuming alcohol that had been effective for three or four months. The

order was consented to by the appellant and given the success of the de facto prohibition at the date of sentence, the evidence before the Court of Summary Jurisdiction which is referred to above and the other conditions imposed on the appellant (which require the appellant to undergo treatment and counselling when available and when directed by the Department of Correctional Services) it is more than likely that the order will assist with the appellant's rehabilitation. The usual alcohol rehabilitation courses that the appellant had undergone in the past had been unsuccessful.

[33] The order made pursuant to s 122 of the Liquor Act was appropriate to the circumstances of the offending and the appellant. The circumstances reasonably required such an order to be made. The order does not operate harshly or unreasonably. The need for the order is directly related to the offences which led to its imposition: *Williams v Marsh* (1985) 38 SASR 313 at 316. The learned magistrate exercised his discretion to make the order judicially and no error in the exercise of the discretion has been established.

Order

[34] No error has been demonstrated in the exercise of the learned magistrate's sentencing discretion. The sentence imposed on the appellant was not manifestly excessive. The appeal is dismissed.