Brumul v Meredith [2005] NTSC 20

PARTIES:	DANIEL BRUMUL v ANDREW JOHN MEREDITH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 84 of 2004 (20413634)
DELIVERED:	8 April 2005
HEARING DATES:	8 April 2005
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	P. O'Brien
Respondent:	J.Adams

Solicitors:

Appellant:	Katherine Regional Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	ril0504
Number of pages:	8

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

Brumul v Meredith [2005] NTSC 20
No JA 84 of 2004 (20413634)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Katherine

BETWEEN:

DANIEL BRUMUL
Appellant

AND:

ANDREW JOHN MEREDITH
Respondent

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 8 April 2005)

[1] On 9 September 2004 the appellant was convicted of three offences in the Court of Summary Jurisdiction at Katherine. The first of those offences was that he assaulted Michael Stevens with circumstances of aggravation in that Mr Stevens was threatened with an offensive weapon, namely an axe. The

remaining offences were that he possessed an offensive weapon, namely a garden fork and a spear on the same day.

[2] The appellant had pleaded not guilty to each of the three counts but was found guilty following a trial which concluded on 29 July 2004. A pre-sentence report was ordered and the appellant then came before the Court for sentencing on 9 September 2004. In relation to the aggravated unlawful assault he was convicted and sentenced to imprisonment for two years. In relation to the offence of possessing an offensive weapon, namely a garden fork, he was convicted and sentenced to imprisonment for six months. He was sentenced to imprisonment for four months on the remaining count. It was directed that the sentences in relation to the possession of offensive weapons be served concurrently with the sentence for the aggravated unlawful assault. A non-parole period of 15 months was set.

[3] The appellant appeals against the sentence in relation to the aggravated unlawful assault on the sole ground that it was manifestly excessive in all the circumstances. There is no challenge to the other sentences. There is no challenge to the findings of the learned magistrate.

[4] The principles in relation to an appeal against sentence on the ground that the sentence was manifestly excessive are well known. The exercise of the sentencing discretion will not be disturbed on appeal unless error in the exercise is shown. There is a presumption that there is no error. An

appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. The onus upon the appellant is to show that the sentence was clearly and obviously, and not just arguably, excessive.

[5] In his sentencing remarks the learned sentencing magistrate included the following observations:

> "The defendant has lied deliberately on his oath in relation to the matter. He has told me untruths. He has been prepared to call other people liars when in fact it was he who is the liar. He has shown no contrition, no remorse, no acceptance of wrongdoing. That does not bode well for his prospects of rehabilitation.
>
> The most serious charge is the one with the axe. He has angrily picked up that axe, swung it at the victim in a baseball-type swing with both hands narrowly missing the stomach of the victim by about five centimetres. It could have had disastrous consequences. It is a very serious assault. That assault only stopped because the victim wrestled the defendant and got the axe off him. But that was not enough. The defendant then went and got a pitchfork ... it was a large garden pitchfork. He raised that above his head in a throwing action at the first victim, Mr Dalywater, and he, in doing that, he got within four metres of them.
>
> He pretended to be throwing it at them. He intended to cause fear and he did cause fear. He was saying that he would kill them whilst he was doing this. They threw a stone at him and he went away. But he came back later with a spear, about some 15 minutes later. He reappeared walking down the road in the direction of the house. In his evidence he just said he wanted to take that spear for a walk.

> That is untrue. It was another lie. He eventually did agree in his evidence that if Mr Dalywater had said something to him he might have thrown that spear at him. That's why he had the spear. He had it with the intention to cause fear and the intention that he might use it. He was angry. He was not acting rationally at all. They were serious matters. There (was) no plea, no contrition and absolutely no discount that I will give him in relation to those matters."

[6] The learned magistrate then referred to the criminal history of the appellant which included prior offences for an assault with a weapon in February 1999 and for being armed with an offensive weapon and for assault (threaten with a weapon) in 2003. He had been sentenced to two months imprisonment in relation to the offending in 2003. The appellant was released towards the end of January 2004 and he committed the offending for which he was before the court in June 2004.

[7] His Worship observed that the appellant was a person who had been petrol sniffing since the age of 12. He noted that the appellant was "unwilling to address his petrol, cannabis or alcohol intake". The appellant is no longer welcome in the community from whence he came. He was described in the pre-sentence report obtained by the learned magistrate as having an anger management problem, especially under the influence of inhalants.

[8] The learned magistrate went on to observe that the matters were serious and the circumstances of the offence of aggravated unlawful assault called for a substantial period of imprisonment. His Worship observed that the appellant was "currently a danger to others" and concluded that if he were released in the near future he would return to petrol sniffing and present "an ongoing

serious danger". His Worship convicted the appellant and imposed a penalty of imprisonment for two years in relation to the offence of aggravated unlawful assault.

[9] The maximum penalty for that offence is imprisonment for five years. The penalty imposed by his Worship as a head sentence was less than half of that maximum.

[10] The appellant complains that the learned magistrate placed too much emphasis upon the potential harm to the victim when his Worship made the following remarks in the course of submissions:

> "He picked up an axe. He swung it with full force and at the stomach of his victim missing him by five centimetres. He could have killed him or caused grievous harm if he had made any contact. It was a very, very serious assault."

[11] It was submitted that his Worship allowed the unrealised, but potential, consequences of the actions to overshadow the actual consequences of the offence which were described as being "fortunately very minimal and no actual physical injury was occasioned". It was submitted that in all the circumstances the sentence was manifestly excessive.

[12] His Worship was clearly correct in describing this as a serious assault. His Worship was also correct in drawing attention to the fact that death or grievous harm may have resulted had contact been made. That was clearly the case. Given the closeness within which the axe came to the body of the

victim it seems only happenstance prevented serious injury being suffered by Mr Stevens.

[13] I have not been provided with any materials that suggest that there is a tariff in relation to offences of this kind nor that the sentence imposed is different from penalties imposed on other persons dealt with for similar offending in similar circumstances. In the course of his submissions counsel for the appellant sought to rely upon documents which he said contained "comparative sentences". In so doing he referred to the judgment of Kearney J in *Mason v Pryce* (1988) 53 NTR 1 at 5. I received the documents but unfortunately find them to be of no assistance.

[14] The main document referred to included matters relating to offences against s 188(2) of the Criminal Code which of course is the section under which the appellant was charged and convicted. However its usefulness is governed by the paucity of information revealed. It covered only eight sentences delivered in the Katherine Court of Summary Jurisdiction over the last five years. No information was obtained from other courts. It seems no effort was made to obtain the results of a sufficiently broad range of similar matters from courts throughout the Northern Territory. Eight matters out of the many that may have been expected to be found cannot provide a tariff. Further, the matters differed significantly from this case. They each involved pleas of guilty to assaults with a range of weapons. Those weapons included a window louvre, a ball-hammer, a knife, a nulla nulla and so on. None involved the use of an axe which was the weapon used by the

appellant. None were sentences following a trial. The personal circumstances of the prisoners concerned were not revealed.

[15] I sympathise with the legal representatives for appellants in such circumstances. It is clearly difficult to obtain useful statistics. However that does not permit me to make use of statistics that do not fulfil the purpose for which they are relied upon on appeal. For present purposes I have no regard to the document to which I have referred.

[16] Another document containing "comparatives" for offences against s 181 of the Criminal Code was provided. For reasons discussed with counsel I did not feel that this document was of any assistance and I have ignored it.

[17] The sentence, the subject of the appeal before me, was imposed in circumstances where the appellant had been found guilty of a serious assault. He was not entitled to the leniency that may be extended to a person who has pleaded guilty. He had not demonstrated any remorse. He had a poor record for offending, including two prior convictions for assault. He had previously been gaoled for an offence of violence. He had been released from prison only five months before committing the offences for which he was then before the court.

[18] I note in passing that the appellant had previously been given the benefit of fines, community service orders and supervised release. He breached the order for supervised release. He breached his community service order. He has been assessed as not suitable for further community service orders. He

has not taken advantage of the opportunities provided to him to address his problems. He has resisted entering rehabilitation programs.

[19] It is said in the pre-sentence report that he admitted his actions in relation to the offences with which I am concerned, but believed he was not guilty because he was reported to the police by a person who did not like him. Those comments suggest he has little insight into the seriousness of his offending or concern with the danger created by his actions.

[20] His prospects for rehabilitation were assessed by the learned magistrate as not good, particularly as he was not willing to address his problems with petrol-sniffing and the use of cannabis and alcohol. His Worship concluded, in light of the material before him, that the appellant was a danger to others, a conclusion which is not challenged on appeal. The penalty imposed by his Worship reflected the seriousness of the offending and the dearth of mitigatory material. Concern for the safety of the public was appropriately highlighted. This is a serious example of offending of its kind.

[21] In all the circumstances the appellant has failed to demonstrate that error occurred. Whilst this may be characterised as a stern sentence, the appellant has failed to demonstrate that the sentence was manifestly excessive. The appeal is dismissed.
