Winzar v Wayne [2005] NTSC 27

PARTIES:	WINZAR, Kevin David
	v
	WAYNE, Christopher
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 5 of 2005 (20406196)
DELIVERED:	15 June 2005
HEARING DATES:	10 June 2005
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	C. Roberts
Respondent:	K. Banbury

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	B
Judgment ID Number:	ril0511
Number of pages:	9

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Winzar v Wayne [2005] NTSC 27
No JA 5 of 2005 (20406196)

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 Alice Springs

BETWEEN:

WINZAR, Kevin David
Appellant

AND:

WAYNE, Christopher
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 15 June 2005)

[1] This is a Crown appeal against sentence. On 16 December 2004 the respondent pleaded guilty to a charge of aggravated assault. The assault occurred at about 4.30 am on 15 April 2003 in Gap Road in Alice Springs. The victim of the assault had been sharing a cigarette with a friend but was alone at the time of the assault. The respondent, who was not known to her, approached and called out to her as she walked towards her home. She

stopped. There was a short conversation and then the victim continued walking along Gap Road. At some point she stopped and sat on a rock because she did not want to lead the respondent to her home. The respondent sat behind her. There was some further conversation in which the victim intimated to the respondent that she did not want to talk to him and that she wanted him to leave her alone. She got up and walked away. The respondent then grabbed her by the hair with one hand and pulled her forward with his other hand on her shoulder. She tried to escape but was unsuccessful. She was pushed against a wall and again grabbed by the hair and punched to the left-hand side of her face with a closed fist. She fell to the ground from the force of the punch. The respondent then fell on top of her and there was a struggle. The victim again tried to run away but was punched twice to the head. She was then held by her trousers in the thigh area so that she could not run away. The respondent began to remove her trousers. The victim then took her trousers off completely so that she could try to escape. She threw the trousers at the respondent, who got up from the ground and pushed her into a brick wall. The respondent then tried to remove her underpants. The victim threw her underpants at him and then escaped and ran to her house from where she called the police.

[2] The victim feared the respondent was about to commit a more serious sexual assault upon her. The submission made on behalf of the respondent was that his conduct in removing her clothing was because he was angry and wanted to "insult" her or, as it was put to me, "shame her". The learned magistrate

(perhaps generously) accepted the submission on behalf of the respondent. She said: "I don't see the incident was heading the way that she (the victim) might have thought it was heading". Such a finding was open to her Worship and is not now challenged.

[3] As a result of the assault the victim received bruises to her head and lost some of her hair. She had a lump and a bruise on her cheek from a punch to her face. In her victim impact statement she emphasised that she was very frightened on the night and was "scared for my life".

[4] The respondent was subsequently arrested but denied any involvement in the incident. After a time he was clearly implicated by virtue of DNA testing. In a subsequent record of interview the respondent said:

> "I was walking on Gap Road. I asked her for a smoke and she told me to piss off. That made me angry so I punched her to the left side of her face, pushed her on to the ground. I was going to kick her but she screamed and I ran away."

[5] In sentencing the respondent the learned sentencing magistrate referred to the respondent's "long, long history ... for a whole range of offences, including offences of violence". Reference to that history reveals some 82 entries dating back to 1994 when the respondent was a juvenile. The list of convictions includes many dishonesty offences. Of relevance for present purposes are offences of being armed with an offensive weapon, assault police (in 1997, January 1998 and February 1998), aggravated assault with a weapon in January 2000 (for which he was imprisoned for 12 months) and

unlawfully cause grievous harm in December 2000 for which he was sentenced to imprisonment for two years. On 27 February 2001 the respondent was found to have breached his suspended sentence and seven months of his term of imprisonment was restored. On 5 October 2001 he was found to have breached his parole and the balance of his sentence was restored. Her Worship noted that: "It would not have been a very long period between you getting out of custody and this incident happening".

[6] In sentencing the respondent in December 2004 the learned magistrate took as positive a view of his situation as was available. At that time he had been out of trouble for some 18 months. She said: "There is some possibility that you may change your ways and not be involved in incidents like this". Her Worship indicated that her starting point was imprisonment for "around about six and a half months", but she reduced that for the plea of guilty. She observed that the plea came in circumstances where other more serious charges that had been preferred against the respondent were not pursued. Her Worship accorded "quite significant credit for the fact that it is now resolved by way of a plea". She then sentenced the respondent to imprisonment for a period of four months, suspended after a period of two months. She directed an operational period of 18 months for the purposes of s 40 of the Sentencing Act.

[7] The Crown appeals against the sentence on the sole ground that it is manifestly inadequate in the circumstances of the offence and the offender.

[8] The principles that apply to a Crown appeal are well understood and have been addressed in many decisions of the Supreme Court of the Northern Territory. It is not necessary to refer to those principles in detail. The court will only interfere if it be shown that the sentencing magistrate 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 magistrate said in the proceedings, or the sentence itself may be so inadequate as to manifest such error: *R v Tait & Bartley* (1979) 24 ALR 473. In order to establish the existence of an unidentified error the Crown must show that the sentence was not just arguably inadequate but so very obviously inadequate that it was unreasonable or plainly unjust: *Raggett, Douglas & Miller* (1990) 50 A Crim R 41. The sentence must be so disproportionate to the sentence which the circumstances required as to indicate an error in principle: *R v Anzac* (1987) 50 NTR 6 at 12.

[9] In the event that error is found, it is then necessary for the appellate court to consider the principle of "double jeopardy" in determining whether some other sentence ought be imposed. The respondent to a successful appeal is placed in jeopardy for a second time and this has, in many cases, led to the court imposing a sentence that is somewhat less than would be appropriate were it not a Crown appeal: *R v Wurramara* (1999) 105 A Crim R 512 at 525; *R v Tait & Bartley* (supra); *DPP (Commonwealth) v El Karhani* (1990) 21 NSWLR 370 at 385.

[10] In support of the submission that the sentence was manifestly inadequate, counsel for the Crown pointed to the objective circumstances surrounding the offence. It was an aggravated assault involving three separate and distinct circumstances of aggravation, namely an assault by a male upon a female, the occasioning of bodily harm and the fact that the victim was indecently assaulted. The offence occurred in the early hours of the morning on a deserted street in circumstances where the offender was not known to the victim. He initiated contact with her and, in the absence of any suggestion of provocative behaviour on her part, committed violence upon her. She had made it clear his attentions were unwelcome. The assault consisted of multiple blows and the removal of her trousers and underpants. It only came to an end when the victim managed to escape. The respondent did not desist of his own accord.

[11] The respondent initially denied involvement but was subsequently implicated by DNA evidence. Although he pleaded guilty to the offending, his plea was not made at the earliest possible opportunity. However it was conceded by the appellant that the plea was made at a time when more serious charges had been abandoned by the Crown. The victim did not have to give evidence at any stage. The discount provided for the plea of guilty by the learned sentencing magistrate was in the order of 40 per cent which, it was submitted, was excessive in the circumstances.

[12] In my view the circumstances of the offending make it a serious example of offences of that kind. Further, the criminal history of the respondent served

to illuminate his moral culpability and demonstrated a dangerous propensity on his part. In the circumstances, it was clear that personal deterrence and general deterrence were matters of importance in determining an appropriate sentence. The respondent had, at the time of sentencing, demonstrated a continuing attitude of disobedience of the law. See generally *R v Mulholland* (1991) 1 NTLR 1.

[13] The history revealed that the respondent had previously had a variety of sanctions imposed upon him by the courts. The sanctions included juvenile detention, good behaviour bonds, supervised release, community service and escalating periods of detention and imprisonment. Those sanctions had proved ineffective in preventing ongoing criminal behaviour. The history suggested that prospects for rehabilitation of the respondent were limited and the deterrent effect of the earlier sentences had been negligible. Protection of society was a matter to be considered by the sentencing magistrate.

[14] On behalf of the respondent it was submitted that her Worship had discounted the sexual nature of the indecent assault in the manner I have described and it followed that this aspect of the offending was not as serious as may have first appeared. I accept that to be so. However, it was still an assault that led to the removal of clothing leaving the victim naked from the waist down and, understandably, fearing worse was to come. It was also submitted that the respondent had remained out of trouble for a substantial period of time and her Worship was correct to take a positive attitude to his

prospects for rehabilitation. In my opinion the approach her Worship adopted is more appropriately described as cautious. It was submitted that the sentence imposed by her Worship was not out of the range of appropriate sentences in all of the circumstances.

[15] In my view, the sentence imposed reveals such a manifest inadequacy as to constitute error in principle. The sentence imposed is so disproportionate to the sentence which the circumstances required as to indicate an error in principle. In light of the nature of the offending and the circumstances of the offender, a significantly greater head sentence was called for. The appeal should be allowed. The sentences imposed by her Worship must be quashed.

[16] Difficulty arises in relation to this matter because of the delay between the date of sentence and the time that it has come before this Court on appeal. In that time the respondent has served the sentence imposed upon him and has been released back into the community. He has since progressed some four months through the operative period of the suspended portion of the custodial sentence. The principle of double jeopardy assumes significance in the re-sentencing process. In my view it would be counterproductive to now require the respondent to return to prison to serve a further sentence. That would be a bewildering experience for him and one which would be likely to lead to a sense of grievance on his part. I propose to fashion a sentence that permits him to remain at large.

[17] Had I been dealing with the matter at first instance, on the material before her Worship, including the mitigatory factors detailed in the submissions made at that time, I would have imposed a head sentence of imprisonment in the region of 15 months. Because of the principle of double jeopardy, I sentence the respondent to imprisonment for a period of 12 months but order that the sentence be suspended after a period of two months. The operational period for the purposes of s 40(6) of the Sentencing Act is 18 months from the date of the respondent's release from prison. The sentence will be backdated to 3 December 2004 to reflect time in custody.
