Dixon v Namatjira [2005] NTSC 31

PARTIES:	DIXON, Garnet Alan
	v
	NAMATJIRA, Floyd
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 7 of 2005 (20500012)
DELIVERED:	17 June 2005
HEARING DATES:	15 June 2005
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	C. Roberts
Respondent:	M. O'Reilly

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	ril0513
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Dixon v Namatjira [2005] NTSC 31
No JA 7 of 2005 (20500012)

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:

DIXON, Garnet Alan
Appellant

AND:

NAMATJIRA, Floyd
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 17 June 2005)

[1] This is a Crown appeal against sentence.

[2] On 6 January 2005 the respondent was sentenced in relation to an assault upon his wife committed on 31 December 2004 at the Hidden Valley Camp in Alice Springs. The circumstances of the offending were that the respondent saw his wife dancing with her female cousin and became jealous. He approached her and punched her several times in the face, causing a cut

to her bottom lip. Other people at the house attempted to stop the respondent from hitting the victim but were unsuccessful.

[3] The respondent then dragged his victim by the hair and body from the house towards the Alice Springs Town Centre. At one stage he forced her to pick up a large rock which he then took from her. He struck her with the rock to the left side of her face causing the skin to be ripped from her cheek. As he continued to drag her towards the town centre she pleaded with him to let her go. He grabbed her by the throat with his left hand and began to strangle her. He then took her right ear between his teeth and bit off the top part of the ear. The portion of the ear has not been found and she has, as a consequence, suffered permanent disfigurement. The respondent dragged his victim to the lawns near the Royal Flying Doctor Service where she managed to break free and flag down a passing police vehicle. The respondent fled but was subsequently apprehended.

[4] The learned sentencing magistrate was advised that the respondent and his victim had been married for six years and had one son. That child was in the care of the Department of Family and Community Services. The relationship between the respondent and his wife had been poor for some years and was marred by violence on both sides and by the excessive consumption of alcohol. Her Worship was informed that the victim had stabbed her husband some days before this incident.

[5] The respondent, who was at the time 21 years of age, had a criminal history which included offences of violence. In December 2002 he was sentenced to 12 months imprisonment for assault upon his wife occasioning bodily harm. In June 2003 he was convicted of assaulting a female whose identity is not known to me and imprisoned for six weeks. In September 2003 he was convicted of failing to comply with a restraining order and of again assaulting his wife who suffered bodily harm. He was sentenced to imprisonment for 18 months on that occasion and also had a sentence of imprisonment of six months restored for breaching an order suspending sentence. A new non-parole period of 14 months was set. The offence of assault on 31 December 2004, which was the third known serious assault upon his wife, amounted to a breach of the earlier suspended sentence and was dealt with by the learned magistrate at the same time. At the time of the offending the respondent was, by virtue of his parole order, supposed to be undertaking an alcohol rehabilitation course and also residing at CAAAPU. He had been released from prison on 10 November 2004 and had absconded from CAAAPU well before completing the obligations under his release upon parole.

[6] The learned sentencing magistrate ordered the reinstatement of the earlier sentence pursuant to the provisions of s 5(8) of the Parole of Prisoners Act and s 64 of the Sentencing Act. She ordered the respondent to be imprisoned for "that term not served at the time the defendant was released on parole". In relation to the offence of assaulting his wife, the learned

magistrate convicted the respondent and sentenced him to imprisonment for a period of four months backdated to the date upon which he had been arrested, being 1 January 2005.

[7] The sole ground of appeal was that the sentence imposed by the learned magistrate was manifestly inadequate in the circumstances of the offence and of 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] Counsel for the appellant submitted that this was a crime of violence which involved three separate and distinct circumstances of aggravation namely: that the assault was by a male upon a female, it caused bodily harm and involved the use of a weapon. It was noted that the respondent initiated the violence and there was no significant provocative behaviour on the part of the victim. However, as the respondent submitted, the relationship between the respondent and his victim was one of ongoing mutual violence. The appellant noted that the assault was continuing in nature and involved multiple blows over a period of time. As a consequence the victim suffered actual bodily harm. The assault continued until the victim managed to break free and alert police. The respondent had not desisted of his own accord. Of particular concern was the fact that this was not an isolated incident. The respondent had a history of violence upon the same victim and, indeed, the offence was committed whilst the respondent was on parole for a similar matter involving his wife. The previous assaults upon her were clearly serious, as demonstrated by the sentences of imprisonment imposed on those occasions. This was yet another serious assault upon her.

[11] The criminal history of the respondent was significant in that it served to illuminate the moral culpability of the respondent and indicated his dangerous propensity. This was not some uncharacteristic aberration but, rather, reflected a continuing attitude of disobedience of the law. The circumstances of the offending demonstrated a need to impose condign punishment to deter the respondent (in particular) and other offenders from committing offences of a like kind: *R v Mulholland* (1991) 1 NTLR 1. In this case the repeat offending occurred shortly after the respondent had been released from prison and occurred whilst he was on parole for similar offending. Issues of personal and general deterrence were to be accorded weight in assessing an appropriate sentence.

[12] In submissions before this Court the appellant conceded that the respondent was still a young offender. He was aged 21 years. However, in light of his criminal history and attempts that had been made at rehabilitation in the past, the degree of leniency available to the respondent was limited. The commission of the offence whilst on parole for a similar offence indicated that the parole mechanism, which was designed for rehabilitation, had failed to achieve its purpose. In those circumstances the Court "cannot proceed on the same expectation of rehabilitation that is open in other circumstances": *R v Cicekdag* [2004] NSWCCA 357.

[13] In further support of the submission that the sentence was manifestly inadequate, it was submitted that the learned sentencing magistrate provided

a discount of 50 per cent for the plea made by the respondent. Her Worship said:

> "But I also take into account your very early plea of guilty and you're going to get 50 per cent discount for that. That means that you are going to do half the time you would have if you had dragged this matter out and not finished it until the morning of a hearing or some similar time."

[14] It was submitted that this discount was excessive in all the circumstances. In my experience that is so. Whilst significant discounts of that order may be provided to offenders in special circumstances or who provide substantial co-operation to authorities, eg by undertaking to give evidence against co-offenders in circumstances where they place themselves in danger, such was not the case here. The allowance in the circumstances of this case goes well beyond the range of 10 to 25 per cent suggested for the utilitarian value of a plea referred to in *R v Thomson* (2000) 49 NSWLR 383.

[15] A complicating factor in determining an appropriate sentence in this matter was that, by virtue of the restoration of the suspended sentences, the respondent faced a further period of months in prison. Her Worship remarked on this and the fact that he was unlikely to be granted parole immediately upon becoming entitled to apply because of his earlier failures. The consequence was that the respondent would be likely to spend a period in prison well beyond any term to be imposed by her Worship. Issues of totality therefore arose for consideration. This was a matter for her Worship to take into account by operation of s 5(2)(p) of the Sentencing Act which

requires the court to have regard to sentences that the offender is liable to serve because of the revocation of orders flowing from the later offending. This consideration does not mean that a sentence which is disproportionate to the sentence which the circumstances of the offence and the offender require may be imposed. It is necessary to structure a sentence that takes those other sentences into account. That could readily have been achieved in this case.

[16] In my view the serious nature of the assault inflicted upon the victim, seen in light of the circumstances of the offender, including his history of serious assaults upon the victim, required a significantly greater sentence in this matter. The sentence imposed was, in my opinion, manifestly inadequate.

[17] The issue arises as to an appropriate disposition for the respondent in the circumstances that now prevail. The respondent has served the sentence of imprisonment for four months which was imposed upon him in January 2005. He is now in custody serving the sentence that was restored by her Worship pursuant to the provisions of the Parole of Prisoners Act and the Sentencing Act. He is presently entitled to apply for parole but, in the event that parole is not granted, his sentence will not be completed until 27 February 2006.

[18] In all of the circumstances an appropriate head sentence would have been in the order of 12 months with a non-parole period of eight months. This would have meant that the Parole Board was authorised to release the

appellant on parole at any time after he had served the eight months non-parole period: *Bara v R* [1999] NTSCCA 42; s 13 Parole of Prisoners Act. In view of the circumstances of the respondent, including the fact that he has already served the sentence imposed and that any further sentence of imprisonment now imposed by me would not extend the actual time that he is likely to serve in custody, I do not intend to interfere.

[19] Notwithstanding that I have found error occurred, I dismiss the appeal.
