Taylor v Burgoyne [2005] NTSC 68

PARTIES:	TAYLOR, Adam John
	v
	BURGOYNE, Robert Roland
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No JA 34 of 2005 (20506112)
DELIVERED:	21 October 2005
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JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

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CRIMINAL LAW – Assault police

Appeal against sentence, statutory interpretation mandatory sentencing s 78BA Sentencing Act, manifestly excessive

Criminal Code; Juvenile Justices Act

Curtis v Burgoyne [2005] NTSC 15; *Kumantjara v Harris* (1992) 109 FLR 400; *R v Piercey* [1971] VR 647;*Robertson v Flood* (1992) 111 FLR 177; *White v Brown* [2003] NTSC 51, applied

REPRESENTATION:

Counsel:

Appellant:	T Aickin
Respondent:	C W Roberts

Solicitors:

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

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

Taylor v Burgoyne [2005] NTSC 68
No. JA 34 of 2005 (20506112)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against the sentence of the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

ADAM JOHN TAYLOR
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 21 October 2005)

INTRODUCTION

[1] The appellant appeals against the sentence of imprisonment that was imposed on him by the Court of Summary Jurisdiction on 19 August 2005. After the appellant was convicted of unlawfully assaulting a police officer contrary to s 189A Criminal Code, the Court of Summary Jurisdiction sentenced the appellant to a term of imprisonment of two months from 19 August 2005 to be suspended after 7 days from 19 August 2005. The

appellant has been on bail since 19 August 2005 pending the outcome of the appeal.

[2] The appeal is made pursuant to s 163 Justices Act. It was commenced by notice of appeal dated 19 August 2005. An amended notice of appeal was filed on 30 September 2005. There are two grounds of appeal. First, the Court of Summary Jurisdiction erred in its interpretation and application of s 78BA of the Sentencing Act (the Act). Secondly, the sentence of imprisonment that was imposed on the appellant by the Court of Summary Jurisdiction was manifestly excessive.

THE ISSUES

[3] The principal question in the appeal is do the words, "the offender has one or more times before (whether prior to or after this section commencing) been found guilty of a violent offence", in s 78BA(1) of the Act include a finding of guilt for a violent offence that was committed by an offender when he was under 18 years of age? That is, does s 78BA of the Act require a court to impose an actual term of imprisonment for a second violent offence committed by an adult offender if the only relevant prior violent offence for which the offender has been found guilty was committed when the offender was under the age of 18 years?

[4] In my opinion the appeal should be dismissed. Neither the first nor the second ground of appeal is sustainable. The ordinary and unambiguous meaning of S 78BA of the Act is that a court is required to impose an actual

term of imprisonment on an adult offender who is found guilty of committing a second violent offence even if the first violent offence for which the adult offender was found guilty was committed when he or she was under 18 years of age. Further, the sentence of imprisonment that was imposed on the appellant by the Court of Summary Jurisdiction is not manifestly excessive. No error in sentencing the offender is disclosed.

SECTION 78BA

[5] S 78BA(1) of the Act provides as follows:

> "(1) Where a court finds an offender guilty of a violent offence and the offender has one or more times before (whether prior to or after this section commencing) been found guilty of a violent offence, the court must record a conviction and must order that the offender serve –
>
> (a) a term of actual imprisonment; or
>
> (b) a term of imprisonment that is suspended by it partly but not wholly."

[6] Steyn LJ has written the following about the construction of legal texts. In construing any provision of a statute the primacy of the text is the first rule of interpretation. Extrinsic materials are subordinate to the text itself. Of course contextual materials must not be downgraded. The Court must consider all relevant contextual material in order to decide (a) what different meanings the text is capable of letting in and (b) what is the best interpretation amongst competing solutions. Language can never be

understood divorced from its context. The true purpose of interpretation is to find the contextual meaning of the language of the text. But the task is interpretation not interpolation. Interpretation of legal texts is an exercise involving the making of choices between feasible interpretations. Structural arguments must be considered. The purpose of the legislation must be considered. Competing consequentialist arguments must be taken into account. Broader policy considerations may also be relevant. However, what falls beyond the range of possible contextual meanings of the text will not be a result attainable by interpretation: Steyn LJ, "*The Intractable Problem of the Interpretation of Legal Texts"*, [2003] SydLRev 1. I agree with these broad statements of principle. I believe they are consistent with the principles of statutory interpretation applicable in Australia.

[7] The first question to be determined by the Court in this case is: are the words, "the offender has one or more times before (whether prior to or after this section commencing) been found guilty of a violent offence," in s 78BA of the Act when considered in context, capable of being interpreted as if the words, "that was committed by the offender when he was 18 years of age or older", were inserted after the words, "violent offence"? In my opinion the answer is no.

[8] As I have already stated the ordinary meaning of S 78BA(1) is that a court is required to impose an actual term of imprisonment on an adult offender who is found guilty of committing a second violent offence even if the first violent offence for which the adult offender was found guilty was committed when he or she was under 18 years of age. The application of s 78BA is

unqualified by the age of an offender at the time that the first violent offence is committed by the offender. The words, “whether prior to or after this section commencing” suggest that the only precondition to the application of the provisions of section 78BA of the Act is that the offender has been found guilty of a prior violent offence at any time regardless of whether the offender was an adult or a juvenile. Such an interpretation is consistent with other provisions of the Act. S 5 Sentencing Act provides that a court shall have regard to the offender's character, age and intellectual capacity. S 6 Sentencing Act states that in determining the character of an offender, a court may consider, among other things – the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender. There is nothing to suggest that such convictions are confined to offences that an offender committed as an adult. Ordinarily, while crimes committed as a juvenile may be accorded less weight by a court when sentencing an adult offender, they are still a factor to be considered in the sentencing process applicable to an adult offender: *R v Piercey* [1971] VR 647 at 648.

[9] There is nothing in the Act which expressly precludes an adult offender’s criminal history as a juvenile being taken into account when he or she is being sentenced for offences he or she committed as an adult. Nor apart from s 90 Juvenile Justices Act is there any provision in any other Act that expressly prevents a court that is sentencing an adult offender from having regard to the offender’s criminal history while he or she was a juvenile.

S 90 of the Juvenile Justices Act merely provides that where a juvenile has been found by a court to have committed an offence but no conviction was recorded by the court, no evidence or mention of that offence may be made to, or the offence be taken into account by, a court other than the Juvenile Court.

[10] The circumstances in which s 78BA of the Act came to be enacted was the intention of parliament to broaden the base of offences to which mandatory minimum sentences applied from property to sexual and violent offences in order to deter violent offenders from repeatedly committing crimes of violence. There is nothing in the second reading speech of the Sentencing Amendment Bill (Serial 162) which enacted s 78BA of the Act to suggest that so far as the application of s 78BA of the Act is concerned, a distinction is to be made between an adult offender who committed his first violent crime as an adult and an adult offender who committed his first violent offence as a juvenile. During the second reading speech of the Sentencing Amendment Bill (Serial 162) on 1 June 1999 Mr Reed stated:

> "There has been concern among some people that by imposing mandatory sentencing for property offences only, it may suggest to the courts and to the community that the parliament somehow considers those offences to be more serious than, for example, sexual and violent offences. This is certainly not the case, as I made clear when I first announced these measures in the Chamber in August 1996. I said then:

> ‘The schedule of offences that will attract these penalties is limited. It has been restricted deliberately to those offences that are causing particular concern in the community at this time. However, let me make it clear that the government is prepared to add to the schedule if that is necessary. More serious offences have been omitted from the schedule because we believe that the courts will automatically impose harsher penalties than those now prescribed.’

The Sentencing Amendment Bill makes this even clearer by broadening the base of offences to which mandatory minimum sentencing will apply. The bill provides that where an adult offender is sentenced by a court for the first time for a sexual offence under the Criminal Code, the court must sentence the person to a period of imprisonment, some part of which must actually be served. There are to be no second chances. *Although the length of the sentence is left to the discretion of the courts, every offender must go to gaol.* This requirement is consistent with the communities expectations of how such offences should be dealt with by the courts.

Violent offences will be in a similar category. Where an adult offender is sentenced by a court for a second or subsequent time for a violent offence under the Criminal Code, the court must sentence the person to a period of imprisonment, some part of which must be actually served. In contrast to sexual offences, the amendments

allow an offender one chance if he or she commits a violent offence, but one chance only. *The amendments in relation to sexual and violent offences apply to offences committed at any time after the commencement of the legislation. An offender who has already been found guilty of a violent offence is therefore warned that if he or she commits another violent offence, he or she will go to gaol."*(Emphasis added)

[11] The above interpretation of s 78BA of the Act does not lead to a result that is absurd incongruous or unreasonable. Courts have considerable discretion in the length of actual imprisonment that may be imposed. The length of imprisonment ranges from a sentence to a term of imprisonment to the rising of the court: *White v Brown* [2003] NTSC 51 at [19] to the maximum term of imprisonment provided by the Criminal Code for each offence. So that if there is a considerable gap between the first offence and the offence to which section 78AB of the Act is applicable or if the first offence was committed at a young age appropriate adjustments can be made to the length of the term of actual imprisonment that is to be imposed on an offender for his or her second violent offence.

MANIFESTLY EXCESSIVE

[12] The appellant also argues that the sentence of imprisonment is manifestly excessive because the Court of Summary Jurisdiction placed too much emphasis on general deterrence and too little emphasis on five relevant

matters. First, the appellant's relatively modest antecedents. Secondly, the significant period of time that had elapsed since the appellant's earlier conviction for assault and the appellant's age at the time of the earlier offence. Thirdly, the appellant's character and prospects of rehabilitation as demonstrated by his employment history and stated employment intentions; his past contributions to the community; and his role as primary carer for his young children. Fourthly, the circumstances of the offence, including that: no physical or psychological injury was suffered by the police officer who was the victim of the assault; the offence was committed while the appellant was extremely agitated due to his concern for the immediate safety of his partner; the conduct was spontaneous and not a deliberate act of thuggery; the conduct did not occur over an extended period of time; the appellant was out numbered and easily subdued by police; the assault did not occur in a remote area or in circumstances where the conduct was likely to encourage others to join in and no weapon was used. Fifthly, the significant impact any custodial sentence would be likely to have on the appellant and his family, particularly given his personal circumstances of being the primary carer for two young children.

[13] In my opinion the argument cannot be sustained. The learned magistrate gave appropriate consideration to each of the five factors referred to by counsel for the appellant. When sentencing the appellant the learned magistrate made the following remarks. At about 4 am the appellant was semi intoxicated. He was in Todd Street. The police went to the 24 hour

store for a disturbance involving a group of people. They were disbursed. The appellant was arrested. The appellant went to the rear of the cage and he was originally compliant. He was asking after his girlfriend. The police were using minimal force. They took the appellant to the rear of the cage. The appellant then using a left hand jabbed Constable Conroy twice to the left of his face. There were a lot of intoxicated people around. There were two jabs to the police officer's face. Bodily harm is not part of the charge. The police officer does not suggest that he suffered any pain or that he needed any treatment. The learned magistrate said that she regarded this assault at the low to medium range for assault police. It is not the least serious assault. Punches will always be viewed seriously, especially into the face region. The police were doing their job. When intoxicated people are around in groups their job is potentially much more dangerous. The appellant was intoxicated. He was upset about his girlfriend, but his behaviour did not assist her in any way shape or form. It just made the police officer's job more difficult. The area in front of the 24 hour store is notorious for incidents which flare up and require police attention. Deterrence needs to be a prominent part of the sentencing process. The appellant's rehabilitation will not be ignored, but deterrence will be a prominent part of the sentencing process. Supreme Court decisions have stressed the need for deterrence in cases such as this and the need to make the court's disapproval clear when looking at cases of assault police. The need to protect police officers is also stressed. The appellant was 25 years

of age at the time of the assault. He has a prior conviction for aggravated assault causing bodily harm in 1996. That is a gap in offending with respect to the assault. Since that time there has been two other sets of charges. The appellant was very intoxicated. He needs to be given a very clear message that if he is out in an intoxicated state he must act more appropriately. He was upset about his wife but his judgment was impaired by alcohol. There is no excuse for his behaviour to police officer Conroy. The appellant does have a relevant prior for the purposes of mandatory sentencing. It is a relevant prior for the purposes of sentencing generally. He was 17 years of age at the time of that offending. However, he was dealt with by the Court of Summary Jurisdiction as an adult because that was what was required in 1996. As a consequence of s 78BA of the Act there must be a period of imprisonment served.

[14] The learned magistrate further stated that she did not regard this case as a case where a rising of the court disposition would be appropriate. She said that the assault itself and the circumstances of its commission were too serious. She said so mindful of the fact that the appellant's relevant prior conviction was some years ago and was prior to the changes made in the Juvenile Justices Act which increased the age of people to whom that act is applicable. The learned magistrate acknowledged that the appellant had no warning at the time of his first conviction for assault as to the effect that conviction may have for him.

[15] The learned magistrate then went on to make the following remarks. There are aspects of the appellant's circumstances that have been put before me that I do regard as very positive mitigation, in particular his work history, the work he has done within the community and his family. He is caring for two young children while his partner is doing training. That is a positive thing. It has not been suggested that there are no alternative arrangements available. The appellant is trying to improve himself through training and once again that is a very positive thing. However, the appellant has not elected to be assessed by the credit program. Successful participation in such a program generally affects penalty in a way that is advantageous to the participant. Finally the learned magistrate stated that she did not propose to order a sentence that would be crushing to the appellant. She said that the sentence takes into account all of the matters that have been put on behalf of the appellant.

[16] In the circumstances a sentence of two months imprisonment to be suspended after seven days was within the range of appropriate sentencing options. There were some aggravating circumstances of the case. The offence took part in the very early hours of the morning, the assault was unprovoked, the police officer was deliberately punched twice in the face and the assault occurred when the police were confronted with a crowd of drunken people at a known trouble spot. Further, although the police officer who was the victim did not suffer any harm there is always a serious risk that people may suffer harm if they are punched in the face. The sentence of

imprisonment will not cause undue hardship to the appellant or his family. The structure of the sentence of imprisonment gave appropriate weight to the principles of both general and specific deterrence: *Kumantjara v Harris* (1992) 109 FLR 400; *Robertson v Flood* (1992) 111 FLR 177; *Curtis v Burgoyne* [2005] NTSC 15 at [31]. As counsel for the respondent submitted, the Court of Summary Jurisdiction imposed by reference to the head sentence, a sentence that properly reflected the objective seriousness of the offence and the need for general deterrence, but which by reference to the subjective mitigating factors peculiar to the appellant, was ameliorated by the period of suspension. Police should be protected from such assaults.

ORDERS

[17] The appeal is dismissed. I will hear the parties as to costs and any ancillary orders.