Parmbuk v McMaster [2005] NTSC 72

PARTIES:	PARMBUK, Patrick v McMASTER, Dean Stuart
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 18 of 2005 (20425867)
DELIVERED:	5 December 2005
HEARING DATE:	15 November 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

APPEAL FROM MAGISTRATE – APPEAL AGAINST CONVICTION - APPEAL AGAINST SENTENCE

Melee – goes armed in public – what amounts to goes armed – fight in a public place – manifestly excessive – totality principle

Criminal Code s 69; Justices Act s 165; Summary Offences Act s 47AA

Attorney-General v Tichy (1982) 30 SASR 84; *Brown v Lynch* (1982) 15 NTR 9; *R v Burnett* (1983) 19 Qld Lawyer Reps 23; *Dearnley v The King* [1947] St R Qd 51; *Dixon v Seears* (1982) 16 NTR 20; *Ellis v The Queen* [2005] NTCCA 1; *R v Hildebrandt* [1964] Qd R 43; *R v Kolb & Adams*

(unreported, Vic CCA, 14 December 1979); *Miles v The Queen* [2001] NTCA 9; *Mill v The Queen* (1988) 166 CLR 59; *Miller v Hrvojevic* [1972] VR 305; *R v Standley* (1996) 90 A Crim R 67, applied

J Aberdeen, *"What is 'Going Armed'?"*, (1998) 19 The Queensland Lawyer 57

REPRESENTATION:

Counsel:

Appellant:	P Dwyer
Respondent:	M Johnson

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Sou0515
Number of pages:	11

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

Parmbuk v McMaster [2005] NTSC 72
No JA 18 of 2005 (20425867)

IN THE MATTER OF the *Justices Act*

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

BETWEEN:

PATRICK PARMBUK
Appellant

AND:

DEAN STUART McMASTER
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 5 December 2005)

Introduction

[1] This is an appeal pursuant to s 163 of the Justices Act. The appellant appeals against his conviction for the crime that contrary to s 69 of the Criminal Code on 11 November 2004 at Wadeye he did go armed in public with a rock, without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and against the sentences that were imposed on him by the Court of Summary Jurisdiction on 9 March 2005.

[2] On 9 March 2005 the appellant was convicted of two offences in the Court of Summary Jurisdiction. First, the appellant was convicted of an offence that contrary to s 69 of the Criminal Code on 11 November 2004 at Wadeye he did go armed in public with a rock, without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage. Secondly, the appellant was convicted of an offence that contrary to s 47AA(a) of the Summary Offences Act on 11 November 2004 at Wadeye he took part in a fight in a public place, namely, Bottom Camp. The fight being of such a nature as to alarm a person of reasonable firmness and courage.

[3] For the first offence the Court of Summary Jurisdiction sentenced the appellant to four months imprisonment to be suspended forthwith. An operational period of two years from 9 March 2005 was specified by the Court of Summary Jurisdiction and no conditions of supervision were imposed on the appellant. For the second offence, the appellant was ordered, with his consent, to participate in an approved work project for 160 hours. The work was to be completed at 20 hours a week and the appellant was to do the work over an eight week period.

The appeal

[4] The appeal was instituted out of time. On 18 November 2005, pursuant to s 165 of the Justices Act the appellant was granted an extension of time until 30 August 2005 within which to appeal.

[5] On 15 November 2005 and again on 5 December 2005 leave was granted to the appellant to amend the grounds of appeal. There are six amended grounds of appeal. First, the sentence imposed was manifestly excessive. Secondly, the learned magistrate failed to give adequate consideration to the personal circumstances of the defendant, in particular his youth. Thirdly, the learned magistrate failed to engage in the two step process required before imposing a suspended sentence. Fourthly, parity with sentences imposed on co-offenders suggests that the sentence was manifestly excessive. Fifthly, the learned magistrate failed to have regard to the principle of totality. Sixthly, the learned magistrate erred by finding that the offence "going armed in a public place" contrary to s 69 Criminal Code was proven on the facts that were admitted by the appellant.

[6] The primary question in the appeal was whether the appellant was wrongly convicted of the crime of going armed in public. In my opinion he was wrongly convicted of that crime. The appellant's conviction for going armed in public should be quashed and he should be acquitted of that offence. An important but now somewhat irrelevant question in the appeal was whether the learned magistrate failed to have regard to the principle of totality. In my opinion he did not have regard to the principle of totality and had the appeal against conviction not been allowed I would have the allowed the appeal against sentence.

Ground 6 - Section 69 Criminal Code

[7] Section 69 of the criminal Code provides as follows:

> "Any person who goes armed in public without lawful occasion in such a manner as to cause fear to a person of reasonable firmness and courage is guilty of a crime and is liable to imprisonment for 3 years."

[8] The object of the section is to prevent people going about openly carrying arms. There are three elements to the offence. First, the person must be armed. Secondly, he or she must go armed in public. Thirdly, the manner in which the person goes armed in public must be such a manner as to cause fear to a person of reasonable firmness and courage.

[9] In the circumstances of this appeal it is necessary to say a little bit more about the first and second elements of this offence. As to the first element of the offence, to be armed with a weapon means to be something more than to be in mere possession of it; the weapon must also be available for immediate use as a weapon or for an offence: *Dixon v Seears* (1982) 16 NTR 20; *Miller v Hrvojevic* [1972] VR 305 at 306; *R v Standley* (1996) 90 A Crim R 67. It is not necessary that an accused has a weapon in his hand: *R v Kolb & Adams* (unreported, Vic CCA, 14 December 1979). A weapon is a physical object that may be used to injure or overcome an opponent in any way.

[10] As to the second element of the offence, "Goes" means to go about. "Go" is not synonymous with the word "be" – to "be armed" is not to "go armed".

"Goes armed" refers to the manner of a person proceeding in public. It refers to the open exhibition of a weapon, for example, by the parading or promenading of arms. The following factors apply to the second element of the offence: (a) it is not necessarily satisfied by a user alone: *Dearnley v The King* [1947] St R Qd 51 at 65; (b) "going" may not require physical progress (or motion) by reference to the position of other people: *R v Hildebrandt* [1964] Qd R 43 at 63; an assault committed by a person who threatens another with a weapon does not necessarily constitute a going armed even if it is done in public: *R v Burnett* (1983) 19 Qld Lawyer Reps 23 at 24. I agree with what is stated in a helpful paper published in The Queensland Lawyer that the second element of the offence essentially involves a state of things namely, being armed and a degree of continuity of that particular state: J Aberdeen, *"What is 'Going Armed'?"*, (1998) 19 The Queensland Lawyer 57 at 62

[11] The facts that were admitted by the appellant and accepted by the Court of Summary Jurisdiction are as follows. The defendant lives at Wadeye. He is a member of the Evil Warriors gang. On 11 November 2004 the defendant and about 100 members of his gang confronted members of the Judas Priest and Fear Factory gangs and a melee occurred. The defendant was seen by police in the melee throwing a rock at the opposing gang members. The rock was a tennis ball size rock. As a result of what the police saw the appellant was charged with the two offences that the Court of Summary Jurisdiction convicted him of on 9 March 2005.

[12] There is no issue between the parties that the above facts were the only facts that were relied on by the prosecution and that it was on these facts alone that the appellant was advised to plead guilty and did plead guilty to having committed an offence contrary to s 69 of the Criminal Code. The appellant was misadvised.

[13] The facts do not disclose that the appellant carried the rock in public. Nor do they establish any continuity in the appellant's possession of the rock prior to it being thrown. All they establish is an instantaneous event. The appellant may well have picked the rock up immediately prior to throwing it. There is nothing to suggest that the appellant was furnished with the rock or that he displayed or brandished the rock prior to throwing it. There is nothing to suggest that the appellant has gone about armed with the rock in any sense. The gist of the offence is going armed not the using of arms: *Dearnley v The King* (supra) at 65. In my opinion the offence is not constituted by the instantaneous throwing of the rock by the appellant that occurred in this case: *R v Burnett* (1983) (supra) at 24. The element of the offence of "goes armed in public" is not proven by the facts that were admitted by the appellant in the Court of Summary Jurisdiction.

The totality principle

[14] Each of the offences with which the appellant was charged arose from substantially the same conduct. The effect of imposing both the four month sentence of imprisonment that was suspended forthwith and the 160 hours

community work order on the appellant is that there was an accumulation of penalties. Two separate penalties were imposed on the appellant by the Court of Summary Jurisdiction for essentially the same criminal conduct without regard to the common elements of the offences and the appellant's conduct viewed as a whole.

[15] The totality principle requires that the total sentence of imprisonment or the aggregate of penalties to be imposed on a multiple offender be of a degree of severity appropriate to the offender's conduct viewed as a whole: *Mill v The Queen* (1988) 166 CLR 59; *Ellis v The Queen* [2005] NTCCA 1.

[16] In *Attorney-General v Tichy* (1982) 30 SASR 84 Wells J observed (at 92 - 93):

> "What is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterised, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with technical offences or they may not. Sometimes, the process of characterisation rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice."

[17] In *Brown v Lynch* (1982) 15 NTR 9 Forster CJ said (at 11 - 12):

> "In a number of unreported decisions of this Court it has been held that, save in special circumstances, when a number of offences arise

> from substantially the same act or same circumstances or a closely related series of occurrences, cumulative penalties should not be imposed, and many sentences passed from day to day have demonstrated adherence to this principle."

[18] The assessment will always be a matter of fact and degree. In many cases there will be no clearly correct answer and the overriding concern is that the penalties imposed be proportionate to the criminality in each case: *Miles v The Queen* [2001] NTCA 9 at par 36.

[19] In the present case the same criminal conduct resulted in two charges being laid against the appellant. In my view if the charge of going armed in public was proven and I have found it was not, the learned sentencing magistrate should have had regard to this fact and should have reflected it in the penalties that he imposed on the appellant in order to adhere to the principles I have referred to above. It was an error to impose both the suspended sentence of imprisonment of four months and the 160 hours community work order without at the very least reducing these penalties to reflect the principle of totality.

[20] The error of the Court of Summary Jurisdiction in imposing two cumulative penalties without any reduction in either penalty to reflect the principle of totality resulted in the imposition of a manifestly excessive penalty that lacked parity with the other sentences that have been imposed on others who were convicted of similar criminal offences arising out of the same melee: McMaster v Benildus Narndu (NTSC 20425865, 27/7/05, Southwood J*);* The Police v Albert Jongmin (NTMC 20425864 7/12/2004 McGregor SM). The

other offenders who committed similar offences have either received a four month suspended sentence of imprisonment or a four months suspended sentence and a fine of $750 and no other penalty.

Grounds 2 and 3

[21] Amended ground 2 of the appeal cannot be sustained. I agree with the submissions of counsel for the respondent. The learned magistrate gave adequate consideration to all of the appellant's personal circumstances. He made reference to all of the factors counsel for the appellant made submissions about in the Court of Summary Jurisdiction.

[22] Nor can amended ground 3 of the appeal be sustained. The learned magistrate did make a primary determination that a sentence of imprisonment was called for. He did so because of the weight that he gave to the issue of deterrence. He stated that, "I do not want to set up a situation where everyone who was involved and has gone to court will go to gaol…. I do have to make it clear to the other foot soldiers around the place that they have got to find something better to do with their time…. Now, sometimes a young man will come to court charged with something quite serious. Something that he should probably go to gaol for…" He also took the appellant's subjective factors and other factors into account to come to a conclusion that the sentence of imprisonment should be suspended. He stated, "So, I have finally talked myself around to the position where I am

prepared to let this man have his liberty today. He will have his liberty with a suspended sentence…"

Re-sentencing

[23] As the appeal against conviction is to be allowed there is no need re-sentence the appellant. I see no reason to interfere with the community work order imposed by the learned sentencing magistrate in respect of the charge that contrary to s 47AA(a) of the Summary Offences Act on 11 November 2004 at Wadeye the appellant took part in a fight in a public place.

Orders

[24] I make the following orders:

1. The appeal against the appellant's conviction of the charge that contrary to section 69 of the Criminal Code on 11 November 2004 at Wadeye he did go armed in public with a rock, without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage is allowed.

2. The appellant's conviction for the crime that contrary to s 69 of the Criminal Code on 11 November 2004 at Wadeye he did go armed in public with a rock, without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage is set aside.

3. The appellant's suspended sentence of four months imprisonment for the crime that contrary to s 69 of the Criminal Code on 11 November 2004 at Wadeye he did go armed in public with a rock, without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage is set aside.

4. The appellant is acquitted of the charge that contrary to s 69 of the Criminal Code on 11 November 2004 at Wadeye he did go armed in public with a rock, without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage.

[25] The effect of the above orders is that the appellant must still complete 24½ hours of the community work that he was ordered to perform.

[26] I will hear the parties as to costs.