Norris v Sanderson & Ors [2007] NTSC 1

PARTIES:	NORRIS, Bradley
	v
	SANDERSON, Karen
	AND:
	NASH, Mark
	AND:
	BRENNAN, Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	JA 22 of 2006 (20519915) JA 23 of 2006 (20522621) JA 24 of 2006 (20603842)
DELIVERED:	12 January 2007
HEARING DATE:	5 January 2007
JUDGMENT OF:	RILEY J

CATCHWORDS:

CRIMINAL LAW – procedure – sentence on appeal – weight of antecedents – manifestly excessive – Domestic Violence Act – appeal dismissed.

CRIMINAL LAW – extra-curial punishment – injuries suffered whilst offending.

DOMESTIC VIOLENCE ACT – scheme and purpose of legislation.

Justices Act
Domestic Violence Act

Veen v The Queen [No 2] (1987-1988) 164 CLR 464
Liddy v R [2005] NTCCA 4
McDonagh v Hales [2003] NTSC 93
Pungatji v Woodcock [2003] NTSC 31
R v Jadurin (1982) 7 A Crim R 182
R v Minor (1992) 59 A Crim R 227
Fletcher (1980) 40 Crim LJ 244
Barci v Asling (1994) 76 A Crim R 103
R v Noble & Verheyden (1996) 1 Qd R 329
R v Daetz [2003] NSWCCA 216
Turnbull v Dinale [2000] NTSC 14

REPRESENTATION:

Counsel:

Appellant:	G Smith
Respondents:	N Browne

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondents:	Office of the Director of Public Prosecutions

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

Norris v Sanderson & Ors[2007] NTSC 1
Nos JA 22-24 of 2006 (20519915) (20522621) (20603842)

IN THE MATTER OF the *Justices Act, Domestic Violence Act* and *Criminal Code*

AND IN THE MATTER OF appeals against sentences handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

NORRIS, Bradley
Appellant

AND:

SANDERSON, Karen
Respondent

AND:

NASH, Mark
Respondent

AND:

BRENNAN, Mark
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 12 January 2007)

[1] The appellant appeals against sentences imposed upon him in the Court of Summary Jurisdiction on 27 April 2006.

[2] On that day the appellant was before the court in relation to a number of matters. The appeal is limited to a challenge to five of the sentences imposed. The first of those was a sentence of imprisonment for 60 days for unlawful damage caused on 12 August 2005 (file 20519915). The remaining four offences were for breaches of a domestic violence order. Two of those breaches (file 20519915) occurred on 20 August 2005, and led to the appellant being sentenced to imprisonment for an aggregate period of 30 days of which 20 days was made concurrent with the sentence imposed for the offence of causing unlawful damage. The total period of imprisonment imposed upon the appellant in respect of the two breaches and the offence of unlawful damage was for a period of 70 days dated from 27 April 2006.

[3] In relation to the remaining two charges of breaching the domestic violence order those offences occurred on 19 September 2005 and 21 October 2005. On those matters his Honour sentenced the appellant to imprisonment for a period of 30 days (file 20522621) and 40 days (file 20603842) with the sentences being expressed to be cumulative upon the earlier sentence of 70 days but wholly suspended upon commencement. The effective sentence was therefore to imprisonment for a period of 140 days of which 70 days was suspended upon conditions providing for supervision. An operational period of 18 months from the date the sentence commenced was imposed.

[4] The grounds of appeal were as follows:

1. That the learned sentencing magistrate erred in that he placed too much weight on the appellant's criminal antecedents.

2. That the learned sentencing magistrate erred in that the sentence he imposed was disproportionate to the objective seriousness of the offence.

3. That the learned sentencing magistrate erred in that he failed to give sufficient weight to the appellant's prospects for rehabilitation.

4. That the overall sentence imposed by the learned sentencing magistrate was manifestly excessive.

[5] The grounds were argued together and the ultimate submission was that the combination of the grounds led to a sentence which was manifestly excessive. It was argued that the circumstances of each of the offences was an example of offending "at the lowest end of seriousness for that type of offence".

[6] The offending with which the learned sentencing magistrate was dealing occurred in the period from July 2005 to October 2005. However his Honour made detailed reference to the criminal history of the appellant in order to place the matters with which he was dealing in an appropriate context.

[7] At the time of sentencing the appellant was aged 22 years. He had previously been the subject of orders made under the Domestic Violence Act and he had previously been dealt with by the courts for breaches of those

orders. It was the view of his Honour that the history of breaches of court orders, the circumstances of those breaches, the circumstances of his other offending and the nature of the offending then before the court all combined to demonstrate a blatant and serious disregard on the part of the appellant for the orders of the court and for the rights of others. This was particularly so in relation to orders made under the Domestic Violence Act.

[8] The antecedent report relating to the appellant revealed that his first breach of a domestic violence order dealt with by the court occurred on 3 April 2003 and related to his then partner, SC. He was arrested and bailed with conditions including that he not contact SC directly or indirectly. He appeared in court on 7 April 2003 when bail was continued. He left the court and later the same day, in breach of his bail conditions and in breach of the existing domestic violence order, went to the residence of SC. He was denied entry. He abused SC and threatened assault against her and another person at the house. He was again arrested and spent time in custody before being bailed.

[9] Notwithstanding that history, at about 10 pm on 3 May 2003 he again approached the residence of SC and argued with her. Her father intervened and forced him to leave. He returned at 5 am the following day and once more the father of his victim intervened. Police were called. The following day he confronted SC whilst she was visiting friends. She tried to make a phone call but he took her telephone. The incident ended with the appellant headbutting SC to the face, punching her and knocking her down. He threw

the telephone and smashed it. He was arrested on 6 May 2003 and remanded in custody until 2 June 2003 when he was granted bail. There were further breaches of the order on 5 June, 6 June and 10 June 2003. As his Honour observed, these breaches of the order occurred within a very short time of him having been released after a period spent in custody. When he was dealt with for some of those matters he was sentenced to a period of imprisonment suspended on condition that he serve a period of home detention of three months, which he successfully completed. The remaining breaches were dealt with at a later time and he received a three month good behaviour bond in respect of those offences.

[10] There was no further offending in relation to SC. The appellant then commenced his relationship with JA, the victim in the matters before the learned sentencing magistrate. A domestic violence order in relation to JA was first obtained in November 2004. Its terms were varied from time to time.

[11] The appellant's first offending in relation to JA occurred when he breached the restraining order on 9 January 2005. He was dealt with for that matter on 18 July 2005 and sentenced to imprisonment for a period of seven days.

[12] The first of the offences with which his Honour was concerned occurred on 2 July 2005. At the time the appellant was the subject of a domestic violence order relating to JA which required him not to assault or threaten her or act in an offensive or provocative manner towards her. On that day

he attended at the residence of JA and her parents where an argument occurred. The victim turned to walk away and the appellant grabbed her by her ponytail to prevent that occurring. He then released the ponytail and police were called. He was charged with the assault of JA (file 20517972) and dealt with on 27 April 2006. In relation to the assault the learned sentencing magistrate described it as "at the lower end of the scale" and sentenced the appellant to imprisonment for a period of six days backdated to allow for time already served. The effect was that the sentence was complete at the time of imposition. There is no challenge to that sentence.

[13] The traffic offences that were also before his Honour on 27 April 2006 arose out of the appellant driving an unregistered and uninsured vehicle (file 20518936). Police stopped him and warned him not to drive the vehicle any further. Once the police left the scene, and contrary to their advice, he did drive the vehicle and was apprehended. He was charged with driving an unregistered and uninsured vehicle. Six days later, on 10 August 2005, he was again apprehended driving the same motor vehicle which was still unregistered and uninsured. In relation to those offences he was convicted and fined respectively $600 and $800. There is no challenge to those sentences. The relevance of the offending is, however, to provide what was described by his Honour as an indication of the appellant's general disregard for authority and an indicator that he would "do what he wants, when he wants to, irrespective of what his legal or other obligations are".

[14] The first of the offences which is the subject of challenge in this Court occurred two days later on 12 August 2005. At that time the domestic violence order remained in place. The appellant went to a retirement village where JA was with two of her aunties. JA saw him coming and locked the door to keep him out. The appellant lost his temper and punched the front window louvre causing it to shatter. He suffered a laceration in the process. He then kicked the security door on four separate occasions causing damage valued at $285. Some eight days later, on 20 August 2005, he again breached the domestic violence order which by then had been made into a full non-contact order. He breached the order on two separate occasions, firstly by telephoning JA at 6 am in the morning and then by approaching her several times at a nightclub as a result of which she left and called the police.

[15] The appellant was arrested and granted bail on 21 August 2005. On 19 September 2005, whilst on bail, he further breached the domestic violence order. On that day police observed him in his vehicle with JA notwithstanding the existence of the non-contact order.

[16] The appellant was arrested and remanded in custody. On 23 September 2005 he was granted bail on conditions including that he strictly observe the terms of the existing domestic violence order. One month later, on 21 October 2005, he went to the residence of JA and sounded the horn of his vehicle. JA sent a text message to his mobile phone to the effect that he should leave. He continued to sound his horn and so JA went on to an

upstairs balcony to speak with the appellant below. An argument ensued and the appellant entered her front yard yelling and swearing, including referring to her as a "dumb fuck". Police were called.

[17] The appellant pleaded guilty to the various offences and was sentenced on 27 April 2006. His Honour regarded the offence of causing unlawful damage as serious and, as has been noted, sentenced the appellant to imprisonment for 60 days. In relation to the breaches of the domestic violence order his Honour imposed the sentences detailed in par [2] and [3] above.

[18] In relation to the offence of causing unlawful damage it was submitted on behalf of the appellant that the offending was at the lowest end of seriousness for offences of that kind because the amount of damage caused was limited, the acts of damage were of short duration and spontaneous in nature, the appellant suffered significant injuries as a result of his actions and he had no prior convictions for offences of that kind.

[19] Whilst it was true that the amount of damage suffered was limited and the offending was of short duration the surrounding circumstances made the offending more serious than the appellant submitted. The response of the appellant to being locked out was an immediate, frightening and explosive outburst of violence. The occupants of the house were three women (including JA against whom his anger was directed) and a very young child. Those people were given every reason to fear for their safety. They were

aware of the nature of the appellant and that he was already the subject of a domestic violence order. His conduct in breaking the glass and kicking the security door on three to four occasions must have given rise to an extremely frightening experience for those concerned. In my opinion the offending could not be said to be at the lowest end of seriousness for this type of offence.

[20] It was also true that the appellant had no prior convictions for offences of this specific kind. However, it remains the fact that he did have prior convictions for offences of violence and it was the very violent nature of his actions which made the offending all the more serious on this occasion.

[21] As to the injuries suffered by the appellant, the learned magistrate was informed that the appellant spent four days in hospital and had to undergo an operation. There was no suggestion that he had any permanent or ongoing disability.

[22] Courts in the Northern Territory have treated extra-curial punishment of an offender as being capable of providing mitigation in appropriate circumstances, eg *R v Jadurin* (1982) 7 A Crim R 182 and *R v Minor* (1992) 59 A Crim R 227. The fact that the injury occurs in the course of committing the offence does not preclude it from being taken into account: *Fletcher* (1980) 40 Crim LJ 244; *Barci & Asling* (1994) 76 A Crim R 103; *R v Noble & Verheyden* (1996) 1 Qd R 329 and *R v Daetz* [2003] NSWCCA 216. Whether an injury suffered in the course of offending will be taken

into account and, if so, to what extent, is a matter to be considered in light of all of the circumstances of the particular case. In this case the appellant suffered injury when he smashed his fist into a glass window louvre causing it to break. His injuries were sufficient to require his attendance at hospital and to undergo an operative procedure. There is no suggestion that he suffered any permanent disability. In my view, whilst his injury was a matter to be considered, it was not of great weight.

[23] In relation to the breaches of the domestic violence order it was submitted on behalf of the appellant that the first two of those involved no threatening or disturbing language (file 20519915). In relation to the third (file 20522621) it was noted that there was no suggestion of any untoward behaviour on the part of the appellant or that the victim was in any way unwilling to be with him. In relation to the final breach (file 20603842) it was submitted that the offending occurred when the domestic violence order allowed contact between the appellant and JA and he breached the order by making the offensive remark “you’re a dumb fuck”. It was submitted that each of the breaches was at the lowest end of the scale.

[24] The appellant complains that the learned sentencing magistrate placed too much weight upon the appellant’s criminal antecedents. Having recited those antecedents, it can be seen that they provide a context for the offending which highlights the extent of the culpability of the appellant in relation to what might otherwise have been regarded as less serious offending. The surrounding circumstances were such as to lend colour to

what occurred enabling the learned magistrate to assess the true level of culpability of the appellant. To adopt the expression used by the High Court in *Veen v The Queen [No 2]* (1987-1988) 164 CLR 464 at 477, it "illuminates the moral culpability of the offender in the instant case". It demonstrated his attitude of ongoing disregard for the orders of the court and highlighted the need to impose condign punishment in order to deter the appellant, and others like him, from committing further offences of that kind. In my view it has not been demonstrated that the learned sentencing magistrate placed too much weight on the appellant's criminal antecedents. The detailed and careful reference to those antecedents was relevant to determining an appropriate sentence.

[25] It was also submitted that the learned sentencing magistrate failed to accord sufficient weight to the appellant's prospects for rehabilitation. It was argued that his Honour failed to pay sufficient regard to the youth of the appellant and other factors which were said to be: his preparedness to undertake counselling; his good employment record; his otherwise good behaviour in relation to his family; his positive sporting record; the ongoing support of his partner JA; and the fact that he was assessed as being suitable for supervision by the Office of Corrections.

[26] The nature of the ongoing support of JA was not made clear. She had been in court at the time of submissions being made but the circumstances in which that came to be were not revealed. This is, at best, a neutral factor in all the circumstances. As has been observed in the past, a victim of

domestic violence may not be the best judge of what is or is not in his or her best interests and such a person may not be a free agent: *Turnbull v Dinale* [2000] NTSC 14.

[27] The sporting career of the appellant involved representative rugby union and an ongoing involvement in the Palmerston Raiders A-grade side. He had other sporting interests. His work history involved working as a warehouse manager and then moving to work as a despatch operator at Parmalat on a casual basis. He had been in that employment for three or four weeks. In relation to his family the Court was told that his father died when he was 15 years of age and he had assisted his mother in the care of his siblings. His mother said that she was reliant on him. These are all matters to his credit.

[28] The appellant had undertaken some counselling in relation to his anger management. He indicated through his counsel a willingness to undergo further counselling. The learned magistrate expressed scepticism regarding the counselling, noting that the appellant's expressed willingness to undergo counselling arose at a very late time. His Honour expressed the view that "it doesn't appear particularly genuine".

[29] His Honour dealt with the appellant's prospects for rehabilitation in the course of his sentencing remarks. He did so with the benefit of the information to which I have referred. He noted the need to send a clear message to the appellant that there must be compliance with orders of the

court. He said that previous messages of that kind had not been heeded by the appellant and that "the time for chances has gone". Notwithstanding that remark his Honour referred to the youth of the offender and observed that his chances of rehabilitation cannot be said to be "zero" but, nevertheless, serious concerns continue. Those concerns centred upon the appellant's "possessive, obsessive behaviour towards women, his inability to comply with orders of the court, his inability and unwillingness to comply with bail conditions and his clear attitude of doing what he wants irrespective of what his legal or other obligations are". He stated that "the prospect of rehabilitation was still there". He observed that it may be that the appellant would "grow out of this" and "with assistance and counselling he might be able to turn his life around". It is clear that his Honour took into account the appellant's prospects of rehabilitation but regarded them with caution. He reduced the penalty he would otherwise have imposed having been "swayed" by counsel and he partially suspended the sentence because of the appellant's prospects of rehabilitation. In his sentencing remarks he made his concerns clear. Those expressions of concern are not challenged on appeal. His Honour considered the inter-relationship between the offences and the totality of the sentences. He directed some concurrency and some accumulation between sentences. I see no error in the approach adopted by his Honour or in the conclusions he reached.

[30] The final grounds of appeal were that the sentence imposed was disproportionate to the objective seriousness of the offence and that the sentence was manifestly excessive.

[31] The principles applicable to an appeal based upon a claim that a sentence is manifestly excessive are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with a sentence imposed merely because it is of the view that the sentence is excessive. It interferes only 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 must appear in what the sentencing magistrate said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive: *Liddy v R* [2005] NTCCA 4 at [12].

[32] In determining the sentence his Honour expressed concern as to the cumulative effect of the offending. The breaches, taken in isolation, may be said to be at the lowest level of offending of the kind but seen in the context of the conduct of the appellant over a period of time it becomes clear that in determining the appropriate sentence more weight is to be accorded to a

consideration of the protection of persons the subject of the breached order and the need for both personal deterrence and general deterrence.

[33] The Domestic Violence Act is important social legislation, the success of which to a large extent depends upon compliance with the orders for which it provides. Breaches of domestic violence orders tend to undermine the very purpose for which the legislation exists. The legislation is designed to confront and deal with a serious problem in the Northern Territory and orders made under the legislation are not to be treated as being able to be ignored at the whim of either the person who is the subject of the order or any person it is designed to protect: *McDonagh v Hales* [2003] NTSC 93. In the event that the terms of an order prove to be inappropriate or inconvenient then application can be made to vary the order. Until that occurs, the order must be obeyed. It is essential to the operation of the Act that those who seek protection under its terms have confidence that restraining orders made are backed by penalties that will be applied in the event of a breach. Likewise those who may be the subject of a restraining order must know that a failure to comply with the terms of the order will lead to a sanction. Issues of personal and general deterrence are of importance when a breach occurs and a person is before the court for sentence: *Pungatji v Woodcock* [2003] NTSC 31.

[34] In this case the appellant came before the Court of Summary Jurisdiction with a total of 11 prior convictions for failing to comply with restraining orders and one prior conviction for aggravated assault. The last of the

convictions for the breach of a restraining order involved JA and the appellant had received the mandatory sentence of imprisonment for seven days. On 11 August 2003 the appellant had been sentenced to home detention in respect of six of the prior convictions for failing to comply with restraining orders and the conviction for assault. He had previously had the benefit of other dispositions. He had previously served time in prison. Nevertheless he continued to act in defiance of the orders. He was a man who was fully aware of the consequences of failing to comply with the terms of a domestic violence order. His breaches dealt with on the occasion now under consideration could not be said to be uncharacteristic of him but, rather, they demonstrated an attitude of flagrant disobedience of the orders of the court and of the law. The history illuminated the culpability of the appellant and highlighted the need to impose condign punishment to deter him and others from committing breaches of orders of the courts: *Veen v The Queen [No 2]* (supra).

[35] The learned sentencing magistrate formed a view that the appellant should be the subject of condign punishment for his ongoing breaches. That conclusion was clearly open in the circumstances. The penalties imposed, whilst stern, have not been shown to be outside the range of penalties available to his Honour. In my view the appeal must be dismissed.

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