Midjumbani v Moore [2009] NTSC 27

PARTIES:	MIDJUMBANI, Rita Redford v MOORE, David Steven
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 23 of 2009 (20836229)
DELIVERED:	26 June 2009
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JUDGMENT OF:	RILEY J

CATCHWORDS:

JUSTICES APPEAL – breach of domestic violence order – "particular circumstances" – circumstances of the offence may include those directly related to the offender – appeal dismissed

R v Day (2004) 14 NTLR 218; *Duthie v Smith* (1992) 83 NTR 21, followed

Baker v Arnison; Burnett v Arnison [2009] NTSC 11; *R v Crabbe* (2004) 145 NTR 50; *R v Davey* (1980) 50 FLR 57; *Wanambi v Thompson* (1994) 120 FLR 243, referred to

Domestic and Family Violence Act (NT) s 120, s 121, s122

CRIMINAL LAW – SENTENCING –GENDER – gender alone should not form the basis of differential treatment in sentencing – appeal dismissed

R v Nagas (1995) 5 NTLR 45, distinguished

DPP (Victoria) v Ellis (2005) 153 A Crim R 340; *R v Harkness* [2001] VSCA 87, referred to

Fox and Freiburg: *Sentencing, State and Federal Law in Victoria,* 2nd ed

Sentencing Act (NT) s 5

REPRESENTATION:

Counsel:

Appellant:	S Barlow
Respondent:	R Coates

Solicitors:

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

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Midjumbani v Moore [2009] NTSC 27
No JA 23 of 2009 (20836229)

BETWEEN:

RITA REDFORD MIDJUMBANI
Appellant

AND:

DAVID STEVEN MOORE
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 26 June 2009)

[1] This appeal raises for consideration the application of s 121 of the *Domestic Violence Act*.

[2] On 29 April 2009 the appellant pleaded guilty to two offences, namely, that on two separate occasions on 28 December 2008 she engaged in conduct that resulted in a contravention of a Domestic Violence Order (DVO) contrary to s 120(1) of the *Domestic and Family Violence Act*. She was convicted and sentenced to imprisonment for seven days on each charge. The sentences were directed to be served concurrently.

[3] The appellant appealed against the sentences on four grounds:

(a) the learned Magistrate erred in the interpretation of s 121(3) of the *Domestic and Family Violence Act*;

(b) the learned Magistrate imposed a sentence which was manifestly excessive;

(c) the learned Magistrate failed to properly consider whether "particular circumstances" existed that justified a sentence other than actual imprisonment in that:

- the learned Magistrate failed to properly identify the "particular circumstances" test,
- the learned Magistrate failed to properly apply the "particular circumstances" test,
- the learned Magistrate took into account irrelevant matters; and

(d) the learned Magistrate failed to properly consider the relevance of the gender of the appellant.

The offending

[4] There was no dispute before the learned sentencing Magistrate, or before this Court, that the appellant was the subject of a domestic violence order at the relevant time. She was restrained from contacting or approaching her former partner, RM, directly or indirectly whilst she was intoxicated and she was also restrained from:

(a) harassing, threatening or verbally abusing him;

(b) assaulting or threatening to assault him;

(c) remaining in any place where he may be living, working or visiting whilst intoxicated; and

(d) acting in an offensive and/or provocative manner towards him.

[5] The appellant and RM had previously been in a domestic relationship but had been separated for some five to six years. On 28 December 2008 the appellant was intoxicated and, at about 2.00 pm, attended at the residence of the victim. There she abused the victim, accusing him of being a "druggie" and of stealing money. She threatened to arrange for others "to bash you, to kill you." She then left the premises.

[6] The appellant returned to the premises at about 4.00 pm and yelled at the victim that, "my family kill you". As the victim came outside to tell her to leave she picked up a large rock. The victim retreated inside his residence and the appellant left.

[7] Later that day the appellant was detained by police. Due to her level of intoxication she was lodged in the Darwin Police Watchhouse under the provisions of s 137 of the *Police Administration Act*. In a subsequent interview she admitted breaching the terms of the domestic violence order.

[8] At the time of sentencing the learned sentencing Magistrate was informed that the appellant, on occasions, took care of the victim who was suffering from cancer. Whilst the appellant had a prior conviction for failing to

comply with a restraining order, it was submitted on her behalf that she should not be given a gaol sentence because there was no actual harm caused to the victim. It was also submitted that his Honour should take into account her age (50 years), her plea of guilty and the circumstances of the relationship between the appellant and the victim. In addition, it was noted that she had not offended in the period of four months leading up to the court appearance.

Ground 1: The application of the penalty provision

[9] Section 121 of the Act, insofar as it is relevant for present purposes, is in the following terms:

> 121 Penalty for contravention of DVO – adult
>
> (1) If an adult is found guilty of an offence against section 120(1), the person is liable to a penalty of 400 penalty units or imprisonment for 2 years.
>
> (2) The court must record a conviction and sentence the person to imprisonment for at least 7 days if the person has previously been found guilty of a DVO contravention offence.
>
> (3) Subsection (2) does not apply if:
>
> (a) the offence does not result in harm being caused to a protected person; and
>
> (b) the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

[10] The appellant had previously been found guilty of a DVO contravention offence and, therefore, was to be sentenced in accordance with the provisions of s 121(2) and s 121(3) of the Act. The prior conviction was recorded in the Court of Summary Jurisdiction on 7 March 2007.

[11] In sentencing the appellant the learned sentencing Magistrate made the following observations:

> (T)he essence of the breach is that you approached the victim whilst you were intoxicated and that when you were with him, you abused and threatened him. It seems from the facts that you didn't go there to treat him, although I am told that you do care for him from time to time. In other words, you went there for your own purposes, that is, to change your clothes and have a shower. Your counsel has submitted to me that because you are an elderly person and, perhaps, a woman and because you care for the victim from time to time for his cancer I should not send you to gaol.
>
> Section 121(3) of the Act allows a court in certain circumstances not to sentence you to a period of imprisonment. But before I can do that I must be satisfied of at least two things. The first thing I must be satisfied of is that there was no harm caused to the protected person. In the circumstances of this case, I am satisfied that you did not cause any actual harm, although it seems that on the second occasion the fact that you picked up a rock caused him to go back inside his house.
>
> The second thing I must be satisfied is that it is not appropriate to record a conviction and sentence you to imprisonment. In the circumstances of this case, I find that I cannot be so satisfied and the reasons for this are principally that you went there for your own purposes, that you went there and breached several aspects of the domestic violence order, that you did it two times on the same day. So in such circumstances it seems that you have deliberately disobeyed an order of the court now on three separate occasions; once before in January 2007 and now twice in December 2008.
>
> I do not think that I would be properly administering the law as it is set down by Parliament if I were not to impose at least the minimum of seven days imprisonment required by s 121(2).

The scheme of the Act

[12] The purpose of the *Domestic and Family Violence Act* is to provide for the protection of persons, inter alia, by the making of DVOs to protect people from domestic violence. In making such an order the paramount consideration is the safety and protection of the protected person. The thrust of s 121(2) of the Act is to ensure compliance with the terms of domestic violence orders and to maintain the integrity of the legislative scheme. The starting point provided for in the section is that a person who has previously been found guilty of a DVO contravention offence shall be the subject of a conviction and a sentence of imprisonment for at least seven days. However, s 121(3) enables a court to avoid that consequence in specified circumstances. The requirements of the subsection are cumulative and it is for an offender seeking to rely upon the provision to raise matters which may bring him or her within the ambit of the subsection.

[13] The first requirement is that the offence does not result in harm being caused to the protected person (s 121(3)(a)). "Harm" is defined by reference to the definition in s 1A of the *Criminal Code*. In the present case there was no suggestion that relevant "harm" had been caused to the protected person.

[14] The focus of the present proceedings was to identify the correct approach to the balance of the section (s 121(3)(b)) and then consider whether, in this case, the learned sentencing Magistrate adopted that approach and

whether he erred in concluding that he was satisfied that it was appropriate to record a conviction and sentence the appellant in the particular circumstances of the offence.

[15] In applying the section the court must consider whether it is “not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence". The first thing to notice is that the reference is to the "circumstances of the offence" rather than of the offender. The respondent submitted that the provision is to be distinguished from similar directions provided for in the *Misuse of Drugs Act* where, in s 37(2), there is a reference to "the particular circumstances of the offence or the offender". It was submitted that it is only when the court decides that because of the particular circumstances of the "offence" it is not appropriate to record a conviction and sentence the person under the subsection that the court can avoid sentencing the person under s 121(2) of the Act.

[16] Notwithstanding the different wording, in my opinion the reference to "the particular circumstances of the offence" should be given a wide interpretation to achieve the purpose of the legislation. Where appropriate such circumstance will include relevant circumstances of the offender. Such factors as immediate remorse, immediate cooperation with the

authorities and an early plea of guilty may be so closely connected to the offender's culpability as to affect the seriousness of the offence.[1]

[17] The fact that a wide interpretation was intended is supported by reference to s 122 of the *Domestic and Family Violence Act* which applies the same terminology as is found in s 121 to a "young person". In that section reference is made to "the particular circumstances of the offence, including, because of the person's age", suggesting that the age of a person is part of the circumstances of the offence. Further, a wide interpretation is consistent with the apparent intention of the legislature, as revealed in the second reading speech, to provide for a "discretion not to impose a mandatory sentence if the court is of the opinion that in the circumstances of the offence it is not appropriate to do so". There would appear to be no reason why all the circumstances of the offence including those directly related to the offender should not be included.

[18] For the exception to apply, the court must be satisfied that it is not appropriate to "record a conviction and sentence the person under the subsection". A person can only be sentenced to imprisonment under s 121(2) if a conviction has been recorded. That requirement is provided for in relation to these proceedings in s 121(2) and, more generally, by operation of s 7 of the *Sentencing Act* which requires a conviction to be recorded before an offender can be sentenced to a term of imprisonment of any kind.

[1] *R v Crabbe* (2004) 145 NTR 50 at 68.

[19] If there is no conviction there cannot be a sentence of imprisonment. Once it has been determined that a conviction is appropriate then it follows that a term of imprisonment can be imposed. The issue then to be resolved is whether a sentence of imprisonment ought to be imposed. The response is governed by the terms of s 121(3) of the *Domestic and Family Violence Act,* which requires the court to consider whether it is appropriate to both record a conviction and sentence the person under the subsection in the particular circumstances of the offence**.** In my opinion, the phrase is to be read in its entirety to determine its meaning. The provision is expressed in conjunctive terms requiring a consideration of the cumulative penalty being a conviction and imprisonment for at least seven days. The sentencing court is required to look at the particular circumstances of the offence to determine whether it is satisfied that it is not appropriate to both "record a conviction **and** sentence the person under the subsection". That is the natural and ordinary meaning of the provision.

[20] This view of the section is supported by reference to the second reading speech which includes the following:

> What this bill will do is make the operation of mandatory provisions fairer. Under the new legislation, the court must record a conviction and impose a sentence of imprisonment of at least seven days for a second or subsequent offence where harm results to the protected person. In circumstances where the breach of the order does not, in fact, result in harm, the court will have discretion not to impose a mandatory sentence if the court is of the opinion that in the circumstances of the offence it is not appropriate to do so.

> In circumstances where there has been a technical breach of an order that resulted in no harm to the victim, the court will maintain its discretion, however, and the potential injustice that arises from the current mandatory sentencing system will be avoided. This change will encourage victims to report breaches when they occur. It may also encourage defendants to consent to orders as they will more likely not fear the inflexibility of the previous sentencing regime.

[21] It is apparent from the second reading speech that one purpose of the change to the sentencing regime effected by the Act was to make the regime more flexible by providing the court with the power to avoid potential injustice.

[22] In my view s 121(2) of the Act is to be interpreted to provide that, subject to s 121(3), a court must record a conviction and sentence the person to imprisonment for at least seven days if the person has previously been found guilty of a DVO contravention offence. That requirement will always apply if the offence results in harm being caused to the protected person. If harm is not caused, the court is required to consider the particular circumstances of the offence. Only where the court is satisfied that it is not appropriate to record a conviction and sentence the person under the subsection to a period of imprisonment of at least seven days will the subsection not apply.

Ground 3: "Particular circumstances"

[23] It is convenient to address Ground 3 of the grounds of appeal before turning to Ground 2.

[24] The expression "in the particular circumstances" is found in a similar provision in the *Misuse of Drugs Act*. The phrase was considered in the context of that Act in the judgment of Mildren J in *Duthie v Smith*[2]*;* which judgment was later followed by the Court of Criminal Appeal in *R v Day*[3]. The expression was there held to require the accused to establish circumstances relative to the proscribed conduct constituting the offence sufficiently noteworthy or out of the ordinary to warrant a non-custodial sentence. The circumstances do not need to be either rare or exceptional. In my view a similar approach should be adopted in relation to the provision now under consideration.

[25] By reference to the sentencing remarks it is, in my opinion, plain that his Honour applied the correct test. He observed that he must be satisfied "that it is not appropriate to record a conviction and sentence (the appellant) to imprisonment" and then went on to consider the circumstances of the case. I see no error in the approach adopted by the learned sentencing Magistrate.

[26] Further, the submissions on behalf of the appellant that the learned sentencing Magistrate failed to properly apply the test and took into account irrelevant matters have not been made out. The submissions on behalf of the appellant sought to treat the ex tempore sentencing remarks of the learned Magistrate delivered in a busy court as if they were a reserved

[2] (1992) 83 NTR 21 at 27 - 28
[3] (2004) 14 NTLR 218

judgment. The courts have, on many occasions and over many years, warned against such an approach: *R v Davey*[4]*; Wanambi v Thompson*[5]*; Baker v Arnison*[6]. In addition, the matters referred to by the learned Magistrate in determining sentence were matters that made up the surrounding circumstances and could not be said to be "irrelevant matters". They were matters necessary to the application of the sentencing provision and were recounted in the course of explaining to the appellant the reasons for reaching the penalty imposed.

[27] These grounds of appeal must be dismissed.

Ground 2: The sentence was manifestly excessive

[28] In the present case the learned sentencing Magistrate found that the appellant behaved deliberately in approaching the victim. There is no challenge to those findings. The appellant breached the order twice on the same day. On each occasion she made threats to the victim of a serious kind. On the first occasion she threatened to arrange for others to "bash" and "kill" the victim. On the second occasion she again threatened the victim that her family would kill him. On that occasion she went further and armed herself with a large rock causing the victim to retreat inside his residence. Whilst the DVO allowed contact and cohabitation between the parties the conduct constituting the offence on each occasion was precisely that prohibited by the order.

[4] (1980) 50 FLR 57 at 66
[5] (1994) 120 FLR 243 at 264
[6] [2009] NTSC 11

[29] It was submitted on behalf of the appellant that the offending on the separate occasions amounted to a course of conduct, however, it is to be noted that the conduct was separated by a period of some two hours during which the appellant had left the scene and then made a conscious decision to return and repeat her offending behaviour.

[30] In support of the appellant it was also submitted that she had entered a plea of guilty at an early time, she had shown remorse and had cooperated with the police. She was a female aged 50 years with a “minimal criminal history”. She had, in the past, acted as a carer for the victim. It was submitted that in all the circumstances "particular circumstances" existed.

[31] Those matters were placed before his Honour immediately before he proceeded to sentence, he referred to them in his sentencing remarks and it can be accepted that they were fresh in his mind. It can also be accepted that his Honour took them into account in considering the particular circumstances of the offence.

[32] The submission to this Court that the appellant had a "minimal criminal history" requires further consideration. The criminal history of the appellant included a conviction in 1997 for possession of cannabis in relation to which she was fined. Of significance for present purposes is the fact that in June 2006 she was convicted of two offences involving her being armed with an offensive weapon at night and possessing a controlled weapon. In relation to that offending she was sentenced to imprisonment

for a period of 19 days indicating that the offending was sufficiently significant to warrant such a penalty. In addition she breached her bail in 2007 and, of course, she was convicted of having failed to comply with a restraining order in March 2007. The criminal history of the appellant was a relevant consideration in considering the particular circumstances of the offence.

[33] The approach to an appeal of this kind is well established. 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 the 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 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 excessive as to manifest such error. In relying upon the ground that the sentence is manifestly excessive it is incumbent upon the appellant to show that the sentence was not just excessive, but manifestly so. The appellant must show that the sentence was clearly and obviously, and not just arguably, excessive.

[34] I have concluded that in this case the learned sentencing Magistrate identified and applied the correct test. In the event that I am wrong in reaching that conclusion I would, in any event, not interfere with the

penalty imposed. It is consistent with the legislative scheme and I see nothing in the particular circumstances of the offence to warrant a departure from the requirements of s 121(2) of the Act. In the circumstances of this offending the penalty of a conviction and imprisonment for seven days on each count was appropriate. It was also appropriate to direct that the sentences be served concurrently. The appellant has failed to establish that error occurred or that the sentences were manifestly excessive.

Ground 4: The gender of the appellant

[35] The appellant complained that the learned Magistrate failed to properly consider the relevance of her gender. It was submitted that her gender should have been taken into account both generally and in relation to the prevalence of the offending. As to the issue of prevalence, it was asserted that, in cases of this kind, it is rare for the offender to be a female. No evidence to that effect was placed before the learned Magistrate or before this Court and I would not accept the mere assertion that it is rare for a female to breach a DVO. When challenged, counsel did not press this assertion.

[36] Further, and contrary to the submission made on behalf of the appellant, I do not accept that the gender of the offender is, per se, a relevant matter that should have been taken into account by his Honour. The submission

relied upon the judgment of the Court of Criminal Appeal in *R v Nagas*[7] where their Honours made the passing observation that "in practice women are commonly treated with less severity than men" and, in that regard, reference was made to comments in the first edition of Fox and Freiburg: *Sentencing, State and Federal Law in Victoria*[8] . The second edition of that work revisits the issue and notes that the empirical evidence in support of such assertions "is at best equivocal and over recent years any biases, if they do exist, are likely to be less pronounced." The learned authors go on to observe that it is now accepted that gender alone should not form the basis of differential treatment in sentencing. See also the discussion in *DPP (Victoria) v Ellis*[9] and *R v Harkness*[10].

[37] The sentencing guidelines provided in s 5 of the *Sentencing Act* identify the need to discourage other persons from committing the same or a similar offence as a purpose for which a sentence may be imposed. I see no reason why the sentence in this case should not be regarded as an appropriate vehicle for general deterrence notwithstanding that the offender is a female.

[38] I see no error on the part of the learned sentencing Magistrate.

[39] The appeal is dismissed.

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[7] (1995) 5 NTLR 45 at 55.
[8] 2nd ed, at 278.
[9] (2005) 153 A Crim R 340 at 345.
[10] [2001] VSCA 87 at [58].