Sargeant v Verity [2009] NTSC 39

PARTIES:	SARGEANT, CHRISTOPHER PETER
	v
	VERITY, BRETT JUSTIN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 21 of 2009
DELIVERED:	5 August 2009
HEARING DATES:	22 July 2009
JUDGMENT OF:	OLSSON AJ
APPEAL FROM:	COURT OF SUMMARY JURISDICTION AT DARWIN

CATCHWORDS:

Sentence -- Appellant convicted on his plea of guilty of one count of offensive behaviour in or about a dwelling house -- Sentence of one-month imprisonment, suspended forthwith with operative period of 12 months -- whether learned magistrate erred in principle in approach to sentencing disposition or took irrelevant matters into account -- Whether offence inappropriately characterised -- Whether sentence manifestly excessive.

REPRESENTATION:

Counsel:

Appellant:	S Barlow
Respondent:	A Holland

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency

Respondent:	Office of the Director of Public Prosecutions
Judgment category classification:	C
Judgment ID Number:	Ols200905
Number of pages:	18

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

Sargeant v Verity [2009] NTSC 39
No. JA 21 of 2009 (20833131)

IN THE MATTER OF the *Justices Act*

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

BETWEEN:

SARGEANT, CHRISTOPHER PETER
Appellant

AND:

VERITY, BRETT JUSTIN
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 5 August 2009)

Introduction

[1] This is an appeal against a sentence imposed on the appellant on 8 April 2009 by a stipendiary magistrate constituting the Court of Summary Jurisdiction at Darwin.

[2] The appellant had pleaded guilty to one count of behaving offensively in or about a dwelling house. Particulars of that charge were that the appellant

had entered Unit 14/10 Mardango Crescent, Batchelor and began yelling at Allan Johnson and knocked him to the floor.

[3] The learned magistrate imposed a sentence of imprisonment for one month, to be suspended forthwith, with an operational period of 12 months.

[4] The appeal was originally prosecuted on the ground that the sentence imposed was manifestly excessive, it being asserted that the learned magistrate gave excessive weight to the factor of deterrence and insufficient weight to the concept of the Sentencing Act that a custodial sentence ought to be a sentence of last resort.

[5] On the hearing of the appeal counsel for the appellant sought and obtained leave to amend the grounds of appeal. As so amended those grounds assert that:

(1) The learned magistrate erred in finding that the prosecutor should have presented a victim impact statement or victim impact report to the court;

(2) The learned magistrate erred by taking into account irrelevant matters;

(3) The learned magistrate erred by failing to properly consider the plea of guilty;

(4) The learned magistrate gave insufficient weight to the principle of imprisonment being a sentence of last resort;

(5) The sentence was manifestly excessive; and

(6) The learned magistrate erred by finding that the offence was a "violent offence" or a "serious violence offence".

Narrative history

[6] At approximately midnight on what I take to be the night 25/26 November 2008 the appellant, having consumed an unknown quantity of alcohol prior to that time, attended at Unit 14/10 Mardango Crescent Batchelor. Those premises were occupied by his niece, Geraldine Hampton, who was holding a party there at the time.

[7] The court was told that the appellant had been drinking with some friends at another residence and was walking home. The path taken by him went past his niece's unit and he heard the party there. He decided to go into the unit, apparently uninvited, and have some more drinks there.

[8] The victim Allan Johnson was attending that party. The appellant had known him for approximately four to five years and, in the past, had drunk with him regularly and played pool with him at the local club.

[9] Indeed, the appellant had been drinking with Allan Johnson earlier on what I take to be 25 November. It appears that, at some stage, Mr Johnson had made some remarks to the appellant concerning the appellant and his partner, to which the appellant took offence. The appellant then left Johnson, went elsewhere and continued drinking.

[10] Soon after entering Ms Hampton's unit the appellant saw Allan Johnson and began to yell abuse at him. He walked up to Johnson, grabbed him by the back of his shirt and began to shake him around, knocking him to the ground. He continued to shake Johnson until other persons in attendance intervened.

[11] At that point the appellant then exited the unit but continued to yell and swear at Johnson from outside, before leaving the area. He was arrested on 29 November 2008 and participated in an interview with the police. In the course of that interview he said that "I just knocked him to the ground because I was sick of listening to all of his shit all day, so I wanted to sort it out."

[12] The learned magistrate was told that the appellant had originated from New South Wales but had lived in the Territory for about the past 20 years. He had mainly worked as a labourer or in landscaping and, at the time of the offence, had resided in Batchelor for approximately 10 years with his partner and two children. He had been studying through the Batchelor Institute to obtain an advanced diploma in Indigenous Primary Health Care.

[13] At the time that he appeared before the learned Magistrate the appellant had moved to Katherine where he was working at an aboriginal health clinic. It was said that he had significantly decreased his intake of alcohol.

[14] It was conceded that, whilst at Batchelor, both he and his partner had been quite heavy drinkers, particularly after his partner had suffered a

miscarriage in 2008. It seems that his partner and the two children had remained in Batchelor whilst the appellant was working in Katherine. They had separated and a domestic violence order against the appellant was in force.

[15] The learned magistrate was informed that the appellant, who was then upwards of 36 years of age, had a not insignificant antecedent record dating back to 1990. This spanned a variety of offences including stealing, unlawful entry, trespass, criminal damage, disorderly behaviour, being armed with an offensive weapon at night, and aggravated assault. It was said that a substantial number of the offences were alcohol-related.

[16] There was some suggestion that the appellant had resolved his differences with Johnson subsequent to the commission of the offence.

[17] After his arrest he had been in custody for about four or five days.

[18] In sentencing the appellant, the learned magistrate did not have before him any victim impact statement but was told that Mr Johnson did not suffer any harm as a consequence of his interaction with the appellant.

[19] The learned magistrate commented that it had been his initial intention to require the appellant to serve an actual period in custody. However, he felt that there were a number of factors that militated against such a course. He noted that the incident under consideration was the first time that there had been an offence involving violence on the part of the appellant in recent

times. He also had due regard to the fact that the appellant had removed himself from an environment where he was drinking to excess and getting into trouble. He further took into account the separation by the appellant from his family and also the fact that the appellant had obtained a full-time job in an area in which he could serve both himself and the community very well.

[20] Having regard to the circumstances and, particularly the appellant's antecedent record, the learned magistrate resolved to impose a short custodial sentence suspended immediately, on the basis of a 12 month operative period.

Issues arising on the appeal

Ground 1 - Failure to present a victim impact statement or victim impact report

[21] The appellant seeks to argue that, by virtue of certain exchanges that took place between the learned magistrate and the prosecutor, the sentencing process miscarried.

[22] In the course of submissions, the learned magistrate was initially somewhat critical of the prosecutor for not having tendered any victim impact statement or victim impact report pursuant to s106B of the Sentencing Act. He went to some lengths to point out the duty of the prosecutor in that regard. However, any such omission did not give rise to any specific comment in the relevant sentencing remarks.

[23] It is unsurprising that this issue was raised by the learned magistrate, as he was not initially given any definitive information by the prosecution as to the consequences of the assault on the victim. As he pointed out to the prosecutor, a brief altercation can give rise to a variety of outcomes that might well necessitate presentation of a victim impact statement or report.

[24] At the end of the day, the prosecutor gave the learned magistrate an oral assurance that the victim had not suffered any harm within the meaning of the section. The learned magistrate did not then pursue the issue further.

[25] As I understand the appellant's case on this appeal, it is contended that what passed between the learned magistrate and the prosecutor caused the sentencing process to miscarry.

[26] In my view there is no substance in such a suggestion. The issue and its importance were quite properly raised by the learned magistrate, given that the prosecutor had failed to address this aspect at all. When he finally had assured the learned magistrate that there had been no harm occasioned to the victim (and thus s 106B was inapplicable), the topic was no longer pressed.

[27] There is no indication that the ventilation of this question somehow inappropriately impacted on the sentencing process, or unduly preoccupied the learned magistrate in some inappropriate manner. He did not display any misconception as to s 106B of the Sentencing Act, as asserted by the appellant. Absent any initial comment by the prosecution and given the facts stated with regard to the physical interaction between the appellant and

his victim, it was a topic that naturally arose. The absence of a victim impact statement thus required explanation and this was ultimately given.

Ground 2 - Taking into account irrelevant matters

[28] This Ground is essentially interwoven with Ground 1.

[29] Complaint is made that, in the course of his sentencing remarks, the learned magistrate, after noting that the appellant had gone in there, saw red and gave the victim a very hard time, putting him on the floor commented that this "would have caused him a lot of fright and those around him some fear and apprehension". He pointed out that if someone were to wander into the appellant's home and start thrashing somebody, the appellant would be very upset.

[30] The appellant argues that there was no specific evidence or information before the learned magistrate to warrant such comments and that the making of them were indicative of a taking into account of irrelevant matters. It was said that the information that absolutely no harm was suffered by the victim was in fact inconsistent with the conclusions expressed by the learned magistrate.

[31] Counsel for the appellant invited attention to the judgment in *Ross v The Queen*[1] and submitted that, as in that case, there was simply no evidentiary basis for an inference that the victim would have been frightened.

[1] (2006) 160 A Crim R 526 at 530-531.

[32] The learned magistrate was, in essence, told that:

(1) The offender gratuitously entered the relevant premises uninvited;

(2) He had been drinking for some time prior to doing so, the inference being that he was substantially intoxicated at the time;

(3) He began to yell abuse at the victim;

(4) He then walked over to him, grabbed him by the back of his shirt and began to shake him around;

(5) As a result of his actions, the victim was knocked to the ground; and

(6) The appellant then sought to continue to shake him until other persons present intervened.

[33] Whilst it is true that there was no detailed information provided by the prosecution concerning the actual impact of that situation on the victim, the inference drawn by the learned magistrate as to the likely impact on him and those present and a natural apprehension of continuing violence at the time was plainly warranted as a conclusion of logic and plain commonsense.

[34] The fact that no "harm" within the meaning of s 106B was occasioned to the victim as the consequence of the appellant's conduct by no means gainsays what was said by the learned magistrate. He did not suggest that it had and the issue of harm is a quite separate consideration from and does not necessarily impact on the point made by the learned magistrate. I fail to

perceive how the conclusion of the learned magistrate could possibly have invalidated the sentencing process.

[35] In making the impugned statement he was not making a finding of the existence of a positive aggravating circumstance. Rather, he was simply drawing attention to the inherent degree of gravity of this type of conduct and its obvious likely effect.

Ground 3 - Failure to adequately recognize the appellant's plea

[36] In essence, the appellant complains that, in arriving at the impugned sentencing disposition, the learned magistrate failed to recognize and make an appropriate allowance for what the appellant argues was his timely plea.

[37] The first point to be noted in that regard was that defence counsel informed the learned magistrate that the matter had only been resolved on the previous day, with the result that four associated charges were not then proceeded with. There was no information of any earlier offer or agreement.

[38] It is true that, in the course of his sentencing remarks, the learned magistrate did not specifically advert to the appellant's plea and the manner in and extent to which it was taken into account.[2] However, as was said by Buchanan JA in the case of *Gillick*[3]

> "In a case in which a sentencing judge does not state that he or she has made allowance for a plea of guilty, it may be more readily

[2] Cf Thomson and Houlton (2000) A Crim R 104, Wright v The Queen (2000) 115 A Crim R 104 and Kelly v The Queen (2000) 10 NTLR 39 at 48-49.
[3] (2001) 125 A Crim R 395 at 398.

> inferred that they have not done so. I am not, however, persuaded that failure to state that a guilty plea has been taken into account necessarily and in every case is an error that vitiates a sentence……
>
> …… in every case it will be necessary to determine whether an appropriate discount has been given. If the judge has not said that they have done so, it may nonetheless be inferred in an appropriate case".

[39] It must be borne in mind that, given the surrounding circumstances, this was a serious offence of its generic type. The appellant was fortunate indeed that the prosecution was disposed to drop the original associated charges of assault and unlawful entry with intent.

[40] I accept that, although the learned magistrate had just noted the plea of guilty made by the appellant, he made no reference to it in relation to the sentence imposed or that he had arrived at that sentence after giving due allowance for it. Nor did he indicate that this had been a factor influencing his decision to suspend the custodial sentence imposed. He expressed other specific reasons for the decision to suspend.

[41] The sentence actually imposed was towards the top end of a range reasonably applicable to the type of offending under consideration.

[42] The authorities relied on by counsel for the appellant confirm that the policy considerations there referred to dictate that an appropriate discount in sentence should normally be given in recognition of a timely plea; and that a sentencing judicial officer ought explicitly to state that such a plea has been taken into account and to what extent.

[43] The difficulty that arises in the instant case is that this was not done. Moreover, given that the sentence imposed is at the top end of the range, there is no compelling reason to infer that an appropriate discount was in fact given. Also the expressed reasons for the suspension of the sentence do not include any reference to a plea discount as being a factor giving rise to that suspension. What is said in paragraph [29] in *Kelly*[4] is therefore not applicable.

[44] I consider that this ground of appeal has been made good.

Grounds 4 and 5 - Insufficient weight to the principle of imprisonment being a sentence of last resort and sentence manifestly excessive

[45] These grounds were argued together.

[46] The appellant submits that, on the face of it, the sentence actually imposed was manifestly outside the exercise of a proper sentencing discretion, given the nature and relative gravity of the offence. It was argued that, on a realistic appraisal of that offence, it simply did not warrant the imposition of a custodial sentence and that such an offence ought normally to attract a fine.

[47] I took counsel for the appellant to argue that, not only was the offending conduct towards the lower end of the range of offending of this type, but also that the learned magistrate had patently failed to make due allowance for the combined facts that the appellant had not committed any offence

[4] Kelly v The Queen (2000) 10 NTLR 39.

attracting actual imprisonment for some 12 years, had recognized the existence of his drinking problem and voluntarily left the environment in which he was getting into trouble, had qualified for and obtained a full time job as a health worker, had reconciled with the victim, cooperated with the police and had entered a timely guilty plea.

[48] True it is that the Sentencing Act treats the imposition of a custodial sentence as being a disposition of last resort, reserved for conduct that is of such a nature that other lesser forms of penalty are inappropriate, given a proper balancing and application of the factors set out in s 5 of the statute.

[49] However, in the final analysis, sentencing involves the exercise of judgment having regard to *all* of the relevant considerations mandated by the statute. In reviewing a sentence imposed, an appellate court will normally assume that the sentencer has considered all matters that are necessarily implicit in any conclusion arrived at.

[50] In the course of his sentencing remarks the learned magistrate clearly bore in mind the mitigatory circumstances put to him and, in particular, the steps that the appellant had taken to rehabilitate himself.

[51] However, he was plainly influenced by the inherent seriousness of uninvited entry into the house of another person and the intoxicated disorderly behaviour of the appellant, including the gratuitous, quite unprovoked assault perpetrated on the victim. It is evident that he was certainly not disposed to accept the present contention of counsel for the appellant that

this was an unremarkable and inconsequential incident involving two grown men who were drinking buddies and who had shaken hands and moved on with their lives.

[52] Moreover, such conduct was that of an offender who, by virtue of his prior conduct, was not only the subject of a domestic violence order but also had a substantial antecedent history, albeit much of it some time ago, of a variety of offences including some involving violent behaviour. The learned magistrate was specifically made aware and accepted that the situation was not one to which s 78BA of the Sentencing Act was applicable. His actual disposition reflects that awareness.

[53] On an objective review of his expressed reasons and his actual disposition, save for my conclusion as to Ground 3 of the appeal and one other aspect to which I shall shortly refer, it is impossible to conclude that these indicate that the learned magistrate either failed to give sufficient weight to the principles embodied in the Sentencing Act or that the disposition was so far outside a reasonable range of sentencing outcomes in the circumstances as to suggest error.

[54] As I have indicated, this was a serious offence of its type, well along the range of relative inherent gravity. The maximum penalty prescribed was a fine of $2000 or imprisonment for six months or both. It seems to me that the submissions of counsel for the appellant unduly trivialise what was, inherently, a significant offence of its type at the time. I do not accept the

appellant's proposition that gratuitous, uninvited entry into a private house and the perpetrating of an offence that involved a clear assault was equivalent to a simple, run of the mill disturbing the public peace in a public place.

[55] Given the antecedent record of the offender and the context of the actual offending it well merited a custodial sentence. The suspension of that sentence adequately and appropriately recognized those mitigatory factors that were identified. The fact that the learned magistrate did not specifically traverse other possible alternative sentencing options in his sentencing remarks is not significant. He made it quite clear that the inherent gravity of the offending necessarily attracted a custodial sentence.

[56] The appellant was by no means a first offender and the learned magistrate was entitled to take the view that the inherently serious nature of the offending, given that the appellant's background not only, mandated the imposition of a custodial sentence and the commencement point but also, in terms of length of sentence, as adopted by the learned magistrate was a proper reflection of the gravity of the offence.

Ground 6 - Finding that the offence was a "violent offence" or a "serious violence offence".

[57] It is conceded by the respondent that, in the course of his sentencing remarks, the learned magistrate inappropriately commented that "…… this is

probably in effect the first at least that a violence (sic) offence or a serious violence (sic) offence that you have had in recent times".

[58] No doubt this was an unfortunate mode of expression, but I remain unpersuaded that the learned magistrate was setting out to characterise the appellant's conduct for sentencing purposes as being that which, technically, fell within relevant definitions in s 3 of either the Sentencing Act or the Bail Act.

[59] Rather, I consider that he was loosely utilising the expressions employed to indicate that the offence under consideration was one that had, in fact, involved the offering of actual physical violence to the victim. It is to be remembered that he used the impugned phrases not in relation to the imposition of a custodial sentence, but in the course of expressing justification for its suspension. He was merely seeking to make the point that, despite the fact that the relevant offence did involve some degree of violence, nevertheless, there were other mitigatory factors that warranted suspension of any custodial sentence imposed.

[60] In any event, the impugned sentencing disposition did not, on the face of it, reflect the adoption of the technical characterisation complained of.

[61] Complaint was also made of the learned magistrate commenting that the admitted facts would amount to assault. Whilst it is true that the appellant was not then being charged with and convicted of the offence of common assault, as might well have been the case, the fact of the matter is that the

appellant's plea necessarily conceded that a significant deliberate assault that knocked the victim to the floor had occurred. This was the real gravamen of the particular offending. It was this element of the conduct as constituting the relevant offensive behaviour that took the offending out of the trivial category and constituted the offence a serious example of its type.

[62] The learned magistrate was entitled to proceed on that basis. He was not, as the appellant suggests, sentencing him for an offence other than that to which he had pleaded. The offence of offensive behaviour potentially spans a wide range of possible conduct extending from the fairly trivial to the quite serious. Hence the prescription of a maximum penalty of imprisonment for six months.

[63] I conclude that there is no substance in this ground of appeal as argued. Whilst the sentence imposed is at the high end of a range of reasonable sentencing outcomes I am unable to say that it was outside such a range as a proper commencement point. On the other hand, it must be accepted that there is no evidence that the sentence imposed allowed for time already served by the appellant, although this was not stated to be the subject of a specific ground of appeal.

Conclusion

[64] As Ground 3 has been made good the appeal must be allowed and it falls to me to re-sentence the appellant.

[65] In doing so, I see no reason to interfere with the basic sentencing strategy adopted by the learned magistrate, save that credit should be given for time already served. I consider that the proper approach is to take the impugned sentence as a commencement point, reduce it to three weeks to allow a discount of 25 percent in recognition of the appellant's timely plea and then to further reduce it by five days to allow for time already served.

[66] In the circumstances the orders of the court will be as follow:

(1) Appeal allowed and sentence imposed set aside.

(2) In lieu of that sentence, order that the appellant be imprisoned for two weeks and two days, such sentence to be fully suspended, with an operational period of 12 months.

———————————————————