

Higgins v Cahill [2010] NTSC 11

PARTIES: HIGGINS, Adam Charles

v

CAHILL, Leigh

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: No. JA 35 of 2009 (20909544)

DELIVERED: 23 March 2010

HEARING DATES: 22 March 2010

JUDGMENT OF: MARTIN (BR) CJ

APPEAL FROM: Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION –
APPEAL AGAINST SENTENCE

Conviction for assault committed in aggravating circumstances – whether evidence supported finding of guilt – whether Magistrate erred – whether sentence was manifestly excessive – appeal against conviction dismissed – fresh evidence – appeal against sentence allowed – sentence suspended at the rising of the Court.

Sentencing Act (NT) s 78BA.

REPRESENTATION:

Counsel:

Appellant: Self-represented

Respondent: N Browne

Solicitors:

Appellant: Self-represented

Respondent: Office of the Director of Public
Prosecutions

Judgment category classification: C

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

Higgins v Cahill [2010] NTSC 11
No. JA 35 of 2009 (20909544)

BETWEEN:

ADAM CHARLES HIGGINS
Appellant

AND:

LEIGH CAHILL
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 23 March 2010)

Introduction

- [1] This is an appeal against a conviction for assault committed in the aggravating circumstances that the victim suffered harm and the victim was a female. The appellant contends that the evidence did not support the finding of guilt. In addition, the appellant appeals against the sentence of 28 days imprisonment on the basis that the sentence was manifestly excessive.
- [2] For the reasons that follow, the appeal against conviction is dismissed, but the appeal against sentence is allowed to the extent that the sentence of 28 days imprisonment will be suspended immediately.

- [3] The learned Magistrate, Ms Oliver, correctly directed herself as to the matters to be proved beyond reasonable doubt by the prosecution. Her Honour's reasons demonstrate that she had regard to all the evidence and made crucial findings of facts adverse to the appellant. In my opinion, these findings of fact were not unreasonable and were open on the evidence. Further, in my view her Honour reached the correct conclusions.
- [4] The incident in question followed a disagreement between the victim and the appellant, the details of which are not relevant for the present purposes. Significantly, the incident was captured on CCTV and the footage supported the prosecution case.
- [5] The victim and the appellant were approaching each other on a footpath. The appellant's wife was walking behind him. The Magistrate accurately summarised the CCTV footage in the following terms:

“The footage shows Ms Smith striding towards and in the direction of the defendant and his wife who are coming towards her. But she walks directly to the defendant on the foot path. Mrs Higgins at this point is seen to be about two to three paces behind the defendant and to his left on the foot path.

The defendant pushes past Ms Smith and he goes into the drive way of the Bellevue Inn. Ms Smith actually back steps a few paces as he essentially pushes past her and then she follows him in. She has her arms outstretched in what might be described as a quizzical stance.

The defendant continues walking. Ms Smith stops and she turns to Mrs Higgins again with her arms outstretched in the same gesture. Mrs Higgins is still on the foot path almost to the middle of the drive way. Ms Smith is some two to three paces in front of her.

A person who has the appearance of Mr Scott, whose evidence I'll come to shortly, can be seen in the fore ground. The defendant comes back to Ms Smith and to put it in the common expression, he gets right into her face. His stance is clearly confrontational. The defendant turns and he walks a few paces away. Ms Smith follows him. Mrs Higgins remains where she was and then she walks a little further across the drive way. Ms Smith comes back towards her again. Again in the same stance with her arms open, as I've described, above and as Ms Smith described in her own evidence.

Everyone is now to the left side of the driveway. The defendant again moves towards her and again he takes up a position of essentially being in her face. She appears – shortly thereafter, she appears to be struck and she goes backwards. The defendant strides off into the drive way leaving Mrs Higgins behind, pretty well in the area where Ms Smith has gone down.”

- [6] The Magistrate found that the CCTV footage was entirely consistent with the evidence of the victim. In evidence rejected by the Magistrate, the appellant claimed that he saw the victim move towards his wife and that he pushed the victim in defence of his wife. Her Honour accepted the evidence of the victim and rejected the claim of defence of the appellant's wife. She also rejected the evidence of the appellant's wife.

Conclusion

- [7] As I have said, in my opinion, these findings were not only open to the Magistrate but, having regard to all of the evidence, her Honour reached the correct conclusion. The appeal against conviction is dismissed.

Sentence

- [8] As to sentence, it was not clear from the evidence whether the blow was struck with an open palm or a fist. It was struck with sufficient force to

knock out a tooth and cause swelling to the victim's face together with abrasions on the inside of her mouth. In her victim impact statement of 28 July 2009, the victim described three subsequent panic attacks and experiencing considerable pain from the broken tooth which required dental surgery that the victim said she could not afford. The victim also described ongoing emotional effects.

[9] It was a blow struck in anger after the consumption of alcohol in the course of an argument, but in reality there was no provocation. The Magistrate correctly had regard to the policy of section 78BA of the *Sentencing Act* which required her Honour to order that the appellant serve an actual term of imprisonment. Her Honour also referred to the need for general deterrence given that the offending occurred in circumstances common to many offences of this type, namely, a verbal argument between persons who had been consuming alcohol. Significantly, the appellant was not entitled to a reduction of penalty by reason of a plea of guilty and the Magistrate found that the appellant possessed very limited or no remorse about his actions.

[10] The assault occurred on 17 March 2009. The appellant was then aged 37 and his only previous offending involved driving offences committed in March 2008. The Magistrate accepted that the appellant was a person of prior good character and had a good work history.

[11] Her Honour was told that at the time of sentence, the appellant was working in South Australia and 'managing health issues'. A reference from a

previous employer stated that the appellant suffered from a bi-polar condition and depression for which he receives medication. Counsel informed the Magistrate that the appellant consulted a general practitioner about once every six months and, generally speaking, for the most part the medication seemed to address the condition well.

[12] The Magistrate had regard to all relevant matters and, notwithstanding that the offending was out of character, determined that the sentence of imprisonment she was required to impose should not be suspended at the rising of the Court. In reaching that conclusion, her Honour was particularly influenced by the policy of the Legislation and the need for general deterrence.

[13] In my opinion, the sentence of 28 days was not, in itself, a manifestly excessive sentence. There is no single tariff for this type of offending which occurs in a multitude of circumstances, but there is a range of sentence available and a sentence of 28 days imprisonment is not outside the limits of that range.

[14] The issue which has caused me particular concern is the decision to require that the appellant serve a full period of 28 days. The Magistrate was correct in having regard to the policy of the Legislation which directs the Court in these circumstances to order that the offender serve a period of actual imprisonment. The Legislature specifically prohibits the Court from wholly suspending the term of imprisonment.

- [15] Notwithstanding the directive of the Legislation and the importance of general deterrence, on the other side the appellant was a person of prior good character who struck out with a single blow, struck spontaneously in a moment of anger.
- [16] Had it not been for additional material which has been placed before me, I would not have been persuaded that the failure to suspend the sentence upon the rising of the Court, or after service of a period less than 28 days, resulted in a sentence that was manifestly excessive so as to be demonstrative of relevant error by the Magistrate. However, I have now been provided with additional material concerning the background of the appellant and, in particular, matters relating to his mental health. This is material that should have been placed before the Magistrate, but the Crown, appropriately, has not taken any point about this question.
- [17] The appellant was unrepresented in this appeal. He has told me something of his work history in the field of fire protection, a field in which he has worked for something in the order of 20 years. Until three years ago, he had successfully operated a business in fire protection, employing a number of people, but by reason of a failure to pay a large account, the company was put into liquidation. At that time, the appellant was receiving assistance for his mental health problems, but as a consequence of the company going into liquidation and the stress and trauma involved in that process, the appellant suffered a breakdown.

[18] The background to the breakdown is significant. The appellant was diagnosed with a bi-polar disorder approximately seven to ten years ago. He had in place a mental health plan which involved consulting a psychiatrist twice a week and a period as an inpatient in a mental health hospital. He was getting his mental health stabilised at the time that the problem arose with his company. As a result of the financial difficulties, the appellant lost his house and vehicle and, in his words, 'was broke'. In an effort to get his life back on track, the appellant and his wife moved between states operating in the fire protection work, but the appellant suffered a further breakdown in that process.

[19] Speaking generally, the applicant's mental health deteriorated over the three-year period leading to the assault with which I am concerned. At the time of the assault, the appellant's mental health was not stabilised and the appellant was also suffering from an undiagnosed condition known as Asperger's Syndrome.

[20] In a previous case before me, a psychiatrist described Asperger's Syndrome as akin to disordered wiring of the brain and I have a report from a psychologist identifying that Mr Higgins displays a number of those characteristics which are commonly found in Asperger's Syndrome. These include a real lack of empathy, together with black and white thinking. There are difficulties with non-verbal communication, executive functions, sensory processing, communications and relationships.

- [21] The appellant's state of mental health is relevant to his conduct on the day in question and to his, as the psychologist put it, 'black and white thinking'. It is also relevant to the question of sentence and whether the sentence should now be suspended at the rising of the Court.
- [22] The appellant's current situation has stabilised significantly. He now lives in Queensland with his wife and two children of the marriage, aged five and eight. There is also a stepchild aged 16. All of the children live at home and the appellant's wife is on a pension and unable to drive. The appellant has home responsibilities, which include taking the children to school and the eight-year old child to medical appointments, which involve both consultations and tests. This child suffers from a medical condition of significance, details of which it is unnecessary to specify in these reasons. That child obviously needs great support from both the appellant and his wife.
- [23] The appellant was held in custody overnight and for a number of hours during the course of the hearing before the Magistrate. In all the circumstances, there are compelling reasons why the sentence should be suspended at the rising of the Court and it is in the best interests of both the appellant, his family and the community that the appellant be permitted to get on with his life and his rehabilitation.
- [24] The appeal against sentence is allowed for the purpose of suspending the sentence of 28 days imprisonment at the rising of the Court. This, in effect,

becomes the order of the Magistrate and the sentence is suspended with an operative period of 12 months from today. Given the appellant's apparent maturity and awareness of his need to receive appropriate medical assistance, I do not consider that it is necessary to apply any further conditions to the suspension of the sentence.
