Sambono v Pettit [2010] NTSC 4

PARTIES:	CASSANDRA SAMBONO
	v
	MARK PETTIT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA49/2009 (20927190)
DELIVERED:	28 January 2010
HEARING DATES:	25 January 2010
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

MAGISTRATES – Appeals from Magistrates – appellant convicted of serious common assault – commission of offence contributed to by appellant's state of intoxication - suspended custodial sentence – condition of suspension that appellant abstain from consumption of alcohol during operational period – whether appellant denied procedural fairness – whether condition unduly onerous – appeal dismissed.

Cranssen v R (1936) 55 CLR 509*; Brandenburg Hales and Carlon* [2006] NTSC 3; *Dunn v Woodcock* [2003] NTSC 24*; R v* Bugmy [2004] NSWCCA 258; *Salmon v Chute and Anor* (1994) 94 NTR 1; *Williams v Marsh* (1985) 38 SASR 313, discussed

REPRESENTATION:

Counsel:

Plaintiff:	J Brock
Defendant:	J Truman

Solicitors:

Plaintiff:	North Australian Aboriginal Justice Agency
Defendant:	Director of Public Prosecutions

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

Sambono v Pettit [2010] NTSC 4
No. JA 49 of 2009 (20927190)

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:

CASSANDRA SAMBONO
Appellant

AND:

MARK PETTIT
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 28 January 2010)

Introduction

[1] The appellant, by notice dated 17 November 2009, appealed against a sentence imposed on her by a stipendiary magistrate, consequent upon her plea of guilty to a charge of unlawful assault contrary to s 188 of the *Criminal Code* (NT).

[2] When the matter came before the learned magistrate it was necessary to conduct a disputed facts hearing because, although the appellant conceded

that she had assaulted the alleged victim (to whom I will simply refer as "the victim") on the occasion in question, she denied that she had been guilty of a circumstance of aggravation that had been alleged against her.

[3] As a consequence of that hearing, the learned magistrate found that the asserted circumstance of aggravation had not been proved beyond reasonable doubt.

[4] In the result, a conviction was recorded against the appellant on the basis that she had punched the victim, pulled her by the hair and kicked her whilst she was on the ground. The alleged circumstance of aggravation found not proven was a contention that the appellant threatened the victim with an offensive weapon, namely a 375 ml glass Strongbow stubbie.

[5] Having recorded a conviction for unlawful assault, the learned magistrate imposed a sentence of imprisonment for 28 days, suspended in full on the conditions that:

(1) the appellant was to be subject to supervision by Community Corrections;

(2) she was to obey reasonable directions and attend counselling sessions;

(3) she was not to consume alcohol; and

(4) she was not to approach or contact the victim directly or indirectly.

[6] An operative period of 12 months was imposed in respect of the suspension.

The appeal

[7] The original appeal was founded on two grounds, namely:

(1) That the learned magistrate erred in requiring a condition that the appellant not consume alcohol; and

(2) That the sentence imposed was manifestly excessive.

[8] However, on the hearing of the appeal, the second ground of appeal was not pressed. Submissions were therefore confined to the first.

Relevant narrative facts

[9] In the course of her findings at the conclusion of the disputed aspect of the case, the learned magistrate focused on the issue of whether or not the prosecution had established an assertion that, in the course of the relevant altercation that gave rise to the charge against her, the appellant had thrown a Strongbow stubbie at the victim or, in some manner, struck her with it.

[10] I took the learned magistrate to accept that the appellant had, however, in some way, struck the victim on or in some way applied force to her head. That said, she did not, at any stage, express definitive findings as to what had actually constituted the assault perpetrated by the appellant.

[11] It, therefore, becomes necessary to extract that information, as best I can, from the transcript of the evidence given before and submissions made to the learned magistrate.

[12] The relevant events took place near the relatively remote Daly River Aboriginal Community on 11 August 2009. The victim was a young Aboriginal woman about 20 years of age. The documentation on file indicates that the appellant was also a young Aboriginal woman about the same age.

[13] At about 6:30 pm, the victim went to the Daly River Hotel to buy cigarettes. She was accompanied by her cousin's sister and her niece. It was common ground that the victim was pregnant at the time.

[14] The victim testified that, whilst she was in the drinking area, the appellant confronted her and, in an angry tone, asked who was the father of her baby. The appellant also commenced pushing the victim.

[15] The victim narrated that, when this occurred, she attempted to ignore the appellant and turned and tried to walk up some steps into the hotel -- at which point she felt what she took to be a blow on the back of her head.

[16] It seems that, at about that stage, the victim fell to the ground, at which point the appellant was punching her, kicking her in the stomach and elsewhere and pulling her hair.

[17] The victim's auntie and sister dragged the appellant away, pulled the victim up and then assisted her to go to the clinic. The victim had not consumed any alcohol at the hotel and had not gone to it for other than the purpose of procuring cigarettes. There was no evidence to suggest that the victim was intoxicated to any degree.

[18] It emerged from the cross-examination of the victim that the appellant's anger had stemmed from the fact that she had received information that the victim had been seeing her partner and that he may have been the father of the victim’s baby.

[19] It was accepted that the appellant had no prior record of offending.

[20] The learned magistrate was told that the appellant had given birth to a child in June 2009, following which some difficulties had arisen for her, possibly of the nature of post-natal depression.

[21] Her counsel said that, on the evening in question, she was moderately intoxicated, having consumed about five Strongbows. She lost control of her emotions as a result of rumours circulating concerning an alleged relationship between the victim and the appellant's partner.

[22] Counsel for the appellant conceded to the learned magistrate that the assault had been both intense and serious, but he submitted that no lasting harm had been occasioned to the victim and there was no reason to suppose that

violence was entrenched in her personality. Reference was made to the appellant's good work history.

[23] In her sentencing remarks, the learned magistrate had this to say:

> "Now, it is pretty clear from what has been said today that there are two reasons why you acted in the way you did: one, you were probably intoxicated; two, jealousy.
>
> Jealousy is at the bottom of a lot of violent offending in the community between women and between men and between men and women. Jealousy seems to be a very big factor in violence in the communities, particularly in these remote communities, and while you may or may not be suffering post-natal depression from the birth of your child and there is no real evidence before me about that, you still, in my view, [are] a person who I can send a message to other people out in the community that this sort of behaviour just cannot continue to happen.
>
> Ms Black is pregnant and will be having a child, and whether or not your partner is the father of that child does not give you the right to attack her in this way. The fact is that she has this child and this child is going to be living in this community as she is, so you're going to have to cope with the fact this child may very well be your partner's child. It may not be, I do not know. It is not an assumption you should make. It is not an assumption anyone should make. Even if the child is, you are going to have to cope with that and that is why I have structured the sentence the way I have done because it is my view that there will be continuing contact between you and Ms Black and there will be continuing conflict if you still have the belief that this child is the child of your partner and I do not know whether you do.
>
> I do know when you pleaded you indicated a plea of guilt to the actual assault on the second mention of this, although the hearing was required only for circumstance of aggravation which I have not found you guilty of. So I take that into account. I also have to take into account that the victim was pregnant at the time and continues to be pregnant. She feared for her unborn child and you pursued her even though she tried to ignore you and walk away."

[24] The learned magistrate proceeded to impose the sentence now sought to be impugned.

The basis of the appeal

[25] Counsel for the appellant took, as a commencement point for his submissions, a consideration of a series of authorities touching on the proper approach to the crafting of conditions attaching to the suspension of custodial sentences.

[26] Principal amongst them were *Dunn v Woodcock*[1], *Williams v Marsh*[2] and *R v SW Bugmy*[3].

[27] In particular, he submitted that the core principles that have been established are that:

(1) any conditions imposed must reasonably relate either to the character of the particular crime or the purposes of punishment for the crime, including deterrence and rehabilitation;

(2) they must be certain, in the sense of defining with reasonable precision conduct that is proscribed; and

(3) the conditions should not, in their operation, be unduly harsh or unreasonable or needlessly onerous.

[1] [2003] NTSC 24 at [7]
[2] (1985) 38 SASR 313 at [16]
[3] [2004] NSWCCA 258

[28] His primary contentions were that neither the circumstances of the offence nor those of the offender justified the imposition of a condition that the appellant not consume alcohol; and that, in any event, what he described as a complete prohibition of an otherwise lawful activity was both unnecessary and also imposed an unrealistic and needlessly onerous burden on her.

[29] Counsel sought to reinforce those submissions by making these specific points:

(1) no-one had submitted to the learned magistrate that the degree of the appellant's intoxication had been a significant cause of the offending behaviour or that the appellant had any long-standing alcohol problem, and there was no evidence to that effect;

(2) there was no evidence of alcohol abuse suggesting that liquor was a causal factor in relation to continuing offending;

(3) there was no history at all of alcohol abuse by the appellant;

(4) the learned magistrate did not give any indication that she was considering imposing an alcohol prohibition condition and the prosecutor had not specifically requested one. The appellant was, therefore, effectively denied an opportunity of making submissions in that regard -- she was thus denied procedural fairness; and

(5) the finding of the learned magistrate that the probable intoxication of the appellant had been a causative factor in the offending may

indicate that the former had not come to a positive conclusion that consumption of alcohol had in fact been a primary cause of the offending behaviour.

Principles as to the approach of the Court to appeals against sentence

[30] It is trite to say that the principles applicable to an appeal of this nature are well settled. They derive from authorities such as *Salmon v Chute and Another*[4] , and *Cranssen v R*[5] . With respect, both were very conveniently summarised by Thomas J in the course of her judgment in *Brandenburg v Hales and Carlon*[6].

[31] She reiterated the oft-made point that it is fundamental that the exercise by a magistrate of the sentencing discretion is not to be disturbed on appeal unless error in that exercise is demonstrated, it being presumed that there is no error.

[32] It is not enough that an appellate court considers that it would have imposed a different sentence or that it thinks, for example, that a sentence is over severe. It interferes only if it be shown that the sentencing judicial officer was in error or acted on a wrong principle or misunderstood or wrongly assessed some salient feature of the evidence. Error may appear in what the sentencing judicial officer has said, or the very terms of the sentence itself may be such as to patently manifest such error.

[4] (1994) 94 NTR 1 at 24
[5] (1936) 55 CLR 509 at 519
[6] [2006] NTSC 3

Consideration of the appeal

[33] I must confess that I have considerable difficulty with certain of the appellant’s submissions.

[34] As counsel for the appellant conceded at first instance, this was a serious example of common assault which, as he described it to the learned magistrate, was one of high intensity. It was, he said, "*a very serious and disturbing offence*". This was, of course, the more so as the victim was known by the appellant to be pregnant at the time and the appellant sought to kick her in the region of her stomach and about her body generally.

[35] Whilst it is true that reference was made to the emotional condition of the appellant following the birth of her child, there was a clear concession by her counsel that she was in fact moderately intoxicated at the time of the offence -- the clear inference from her counsel's submissions at the time being that this was at least a significant contributing factor to the commission of the assault, even if it was not shown to have been the primary factor.

[36] As Ms Truman, of counsel for the respondent, stressed, the learned magistrate was entitled to take such a scenario into account in the context that the consumption of alcohol has been and is a well-known (if not notorious) and widespread contributing factor in relation to the violent behaviour that is so prevalent in Aboriginal communities.

[37] It is plain that, in employing the expression "*probably*" in the course of her *ex tempore* sentencing remarks, the learned magistrate was in no sense purporting to express any doubt either as to the fact that the appellant had been intoxicated or as to the obvious contributing role of that condition. There is no reason why she would have done so in light of the express representations that had been made to her.

[38] Whilst the use of that word may not have been entirely felicitous, it is obvious that the learned magistrate was setting out to use it in a positive, rather than a negative, sense.

[39] There cannot be the slightest doubt that the impugned condition did directly relate to the character of the offence committed by the appellant and was clearly designed to both facilitate the appellant's rehabilitation and also address the factor of personal deterrence. It certainly defined with precision the conduct that was to be proscribed.

[40] I consider that the only issues that attract a need for consideration are whether it may fairly be said that the appellant was denied procedural fairness and whether, in the circumstances, it can reasonably be argued that the condition imposed was unduly harsh or unreasonable or needlessly onerous.

[41] Although s 103 of the *Sentencing Act* contains a directory provision that, in effect, mandates the procurement of a report from Community Corrections as to the suitability of an offender for supervision in a case where it is

intended to order supervision as a condition of suspending a sentence, no such report was obtained in the instant case. I assume that this was because of the circuit nature of the particular sittings and the impracticability of obtaining such a report in a rapid time frame.

[42] It is stating the obvious to say that a condition such as that now sought to be impugned is unremarkable. It is almost invariably requested by Community Corrections in reports of this type in relation to the suspension of custodial sentences where alcohol has been a substantial contributing factor or the relevant offending has occurred against a background of considerable alcoholism. In such circumstances, it is routinely imposed by the Court.

[43] It is equally true to say that the suspension of a custodial sentence evidences considerable leniency to an offender, particularly where an offender is convicted of perpetrating a serious assault of the nature here in contemplation. Suspension is usually ordered as a positive means of facilitating rehabilitation and was obviously ordered in this case with that in mind. Hence, any conditions associated with such a suspension are specifically pitched at what are seen to be the particular rehabilitative features that require to be addressed in the relevant circumstances.

[44] In the instant case the learned magistrate was quite properly focusing on what appear to have been obvious needs for supervision and counselling in relation to the appellant's apparent emotional and anger control problems

and also the desirability of removing the appellant from the apparent adverse effects of alcohol -- at least for an appropriate period.

[45] In my experience it is not the invariable, or even the frequent, practice of sentencing judicial officers to discuss with counsel in advance *all* of the detailed conditions that they may have in mind in imposing a suspended sentence. No doubt it is, from time to time, desirable to debate *some* specific aspects in individual cases, but it would be impractical in the context of busy lists, to seek to discuss *all* details in advance. The main requirement to do so would arise in situations in which what is proposed is unusual or, patently, would be extraordinarily onerous.

[46] I am not persuaded that any failure on the part of the learned magistrate to indicate that she was giving consideration to the imposition of the impugned condition did amount to a denial of procedural fairness in the context of this case. It was an obvious option that counsel ought to have anticipated and identified for debate, if debate was considered to be appropriate and necessary, even if there was no s 103 report to flag the specific issue.

[47] It must be said that, particularly in the case of offenders residing in aboriginal communities in which consumption of alcohol is the norm, a non-consumption of alcohol condition will always present some obvious difficulties and, to some extent, be considered by an offender as onerous. There is, of course, always the problem that an offender might simply be set up to fail.

[48] However, at the end of the day, an offender must accept proper disciplinary measures aimed at rehabilitation and the protection of the community as a proper price for leniency. Such was the seriousness of the instant offending that it plainly merited a custodial sentence. If that sentence was not actually to be served then the proper protective and rehabilitative measures had to be put in place.

[49] The appellant cannot have the benefit of the suspension without associated obligations justifying and underpinning that suspension.

[50] Whilst Mr Brock has put forward all that may properly be said in support of the appeal, I consider that he has been unable to demonstrate error warranting an allowance of this appeal. There can be no doubt that, on her own counsel's submissions to the learned magistrate, the appellant's state of intoxication played a significant part in the commission of the offence. A condition such as that imposed was well-nigh inevitable.

[51] The appeal must, therefore, be dismissed.
