Mansray v Rigby [2014] NTSC 62

PARTIES:	MANSRAY, Mohammed
	v
	RIGBY, Kerry Anne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 5 of 2014 (21311682)
DELIVERED:	30 December 2014
HEARING DATES:	11 July 2014
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

SENTENCING – Repealed mandatory sentencing provision for violent offences – section 12(c) *Interpretation Act* preserved offender's liability notwithstanding repeal of s 78BA *Sentencing Act* – liability incurred at time offence committed – liability included punishment under mandatory sentencing provision in place at time of offence – appeal dismissed.

Criminal Code 1983 (NT) s 14(2), s 188
Interpretation Act 1978 (NT) s 12(c)
Justices Act 1928 (NT) s 177(2)(b)
Sentencing Act 1995 (NT) s 78BA, s 78BA(2), s 78CA(3), s 78DC(2), s 78DG
Sentencing Amendment (Mandatory Minimum Sentences) Act 2013 (NT) s 6, s 78EA
Supreme Court Act 1979 (NT) s 21(1)

Manning v Howlett [1971] Tas SR 85; *The Queen v Scott Brancourt* (2013) 280 FLR 356, applied.

Byrne v Garrisson [1965] VR 523; *R v Olbrich* (1999) 199 CLR 270; *R v White* (2006) 206 FLR 51; *R v Storey* [1998] 1 VR 359; *Snedden v Minister for Justice (Cth) and Another* (2013) 306 ALR 452; *Undershaft (No 1) Limited v Commissioner of Taxation* (2009) 175 FCR 150, referred to.

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	D Jones

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
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

Mansray v Rigby [2014] NTSC 62
No. JA 5 of 2014 (21311682)

BETWEEN:

MOHAMMED MANSRAY
Appellant

AND:

KERRY ANN RIGBY
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 30 December 2014)

[1] The appellant was charged on information laid on 9 April 2013 that, on 12 March 2013 at Darwin, he unlawfully assaulted NM, with the alleged circumstances of aggravation that NM suffered harm and that NM was unable to effectually defend himself due to the situation.

[2] When the matter came before the Court of Summary Jurisdiction on 4 September 2013, the appellant pleaded guilty to the offence of assault and to the first circumstance of aggravation (harm), but not guilty to the second circumstance of aggravation (victim unable to effectually defend himself).

[3] After the plea had been entered, the agreed facts were tendered and read to the court by the prosecutor, as follows:

> The defendant and the victim are known to each other. On Tuesday, 12 March 2013, about 3:35 PM, the defendant was at the Casuarina Shopping Complex outside Kmart when he approached the victim from behind, punching him to the back of the head, causing him to stumble forward. The defendant then attempted to coerce the victim into a fight, saying 'come on fight me, you pussy'.
>
> The victim informed the defendant that he was not going to fight him. The defendant immediately swung a right fist which missed, followed by a left fist which struck the victim above his right eye. The victim attempted to tackle the defendant to the ground to stop the assault but was flung heavily to the ground by the defendant. The defendant punched the victim to the nose as he lay on the floor. The defendant then fled the area.
>
> As a result of the assault, the victim suffered a deviated septum to his left nasal passage and is awaiting surgery. The victim further received a swollen right temple and swelling to the back of his head.
>
> At 9:40 AM on 20 March 2013 the defendant was arrested by police at his residence and conveyed to the Darwin Watch House. The defendant declined to participate in an electronic record of interview, he was later charged and bailed considered. At no time did the victim give the defendant permission to assault him.

[4] The prosecutor then informed the court that it was alleged that, following the punch to the victim's nose as he lay on the floor, the defendant kicked, stomped or used a leg strike to the victim's face. By implication, that was the basis of the second alleged circumstance of aggravation, to which the appellant had pleaded not guilty.

[5] A hearing then took place in relation to the disputed aggravating circumstance. After hearing evidence and submissions, the magistrate said that she could not be satisfied that the appellant had kicked or struck a blow to the victim with his foot while the victim was on the ground. The

prosecution thus failed to prove the second circumstance of aggravation beyond reasonable doubt.

[6] The magistrate then proceeded to sentence the appellant for aggravated assault with the circumstance of aggravation that the victim suffered harm. The appellant had no criminal history. The prosecution submitted to the magistrate that the mandatory sentencing provisions in the repealed s 78BA *Sentencing Act* applied.

[7] The matter was adjourned to 12 September 2013 for submissions on sentence. The matter was then further adjourned to 6 December 2013, for sentencing. Her Honour then convicted the appellant and sentenced him to 14 days imprisonment, suspended on the rising of the court. An operational period of six months was fixed. In the course of sentencing, her Honour made the following remarks:

> So there is nothing that would suggest to me that you would ever repeat this sort of behaviour and were I not bound by mandatory sentencing requirements I wouldn't have thought that this was a case that required a sentence of imprisonment to be set, but I'm bound by the requirements of that legislation. I would have thought that this was a matter that could have been dealt with by a good behaviour bond and probably in the circumstances by a non-conviction on the good behaviour bond, but I'm not in a position to do that.
>
> However, in my view there is no need to impose a lengthy term of imprisonment to reflect the offending and there is no need to impose a lengthy operational period on the suspension that I'm going to give to that sentence.

[8] The sole ground of appeal is that the magistrate erred in finding that the repealed provision s 78BA *Sentencing Act* applied to the offence to which

the appellant had pleaded guilty. In brief, the appellant argues that s 78BA of the *Sentencing Act* did not apply, because it was repealed with effect from 1 May 2013. The replacement provision did not apply in relation to an offence committed prior to 1 May 2013. There was as a result a lacuna such that there were no mandatory sentencing provisions applicable to the appellant's offending.

[9] As at 12 March 2013, the date on which the appellant unlawfully assaulted NM, s 78BA *Sentencing Act* applied to the violent offence he committed. Section 78BA(2) read as follows:

> (2) If a court finds an offender guilty of an offence to which the section applies, the court must record a conviction and must order that the offender serve:
>
> (a) a term of actual imprisonment; or
>
> (b) a term of imprisonment that is partly, but not wholly, suspended.

[10] On 1 May 2013, s 78BA (and the whole of Part 3 Division 6A *Sentencing Act* in which s 78BA was contained) was repealed by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*, Part 3 Division 6A of which introduced a new mandatory sentencing regime for specified violent offences, including the offence committed by the appellant. The only express transitional provision in the amending Act was s 78EA, which read as follows:

> This Division does not apply in relation to an offence committed before the commencement of s 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*.

[11] Thus, the new Part 3 Division 6A did not apply to the assault committed by the appellant on 12 March 2013.

[12] The submission of the prosecutor before the magistrate, and the submission of the respondent to the appeal in this Court, is that s 78BA applied to the appellant's offending. For the reasons mentioned in [8], the appellant contends that there were no mandatory sentencing provisions applicable to the offence committed by the appellant.

[13] In *The Queen v Scott Brancourt*[1] Kelly J decided that s 12(c) *Interpretation Act* applied in circumstances the same as in the present case.[2] On Her Honour's reasoning, the offender incurred a liability to punishment for an offence of aggravated assault committed before the repeal of s 78BA, and that liability included punishment in accordance with the mandatory sentencing provisions of s 78BA in place at the time of the offence.[3] Her Honour held that s 12(c) *Interpretation Act* applied to preserve the offender's liability notwithstanding the repeal of s 78BA *Sentencing Act*.

[14] Counsel for the appellant argues that the decision in *R v Brancourt* is wrong, and should not be followed.

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[1] [2013] NTSC 56; (2013) 280 FLR 356.
[2] The aggravated assault in *Brancourt* was committed on 23 December 2012.
[3] At [15], [17].

[15] I am not bound to follow the decision in *Brancourt*, it being a decision of co-ordinate authority. However, a single judge of this Court should as a matter of judicial comity and precedent follow the decision of another single judge of this Court unless persuaded that the earlier decision is clearly or plainly wrong. In the present case, I am obliged to give my independent consideration to the proper construction of s 12(c) *Interpretation Act* and of the legal questions to be decided. If I independently reached the same view as that of Kelly J, there would be no difficulty. If I did not reach the same view as that of Kelly J, I would then have to decide whether, notwithstanding my inconsistent view, I should nonetheless follow her Honour's decision. In an appropriate case, the proceeding could be referred to the Full Court pursuant to s 21(1) *Supreme Court Act*. The authorities suggest that a single judge should not lightly depart from an earlier single judge decision where the correctness of that decision is a matter on which minds may differ, and particularly so on questions of statutory construction. Consistency and stability in judicial decision-making advance the interests of justice. I should only depart from her Honour's decision if I considered that the decision was "plainly" or "clearly" wrong.[4]

[16] In my respectful opinion, however, for reasons briefly explained in [17] to [23] below, the decision in *R v Brancourt* was correct.

[4] *Undershaft (No 1) Limited v Commissioner of Taxation* (2009) 175 FCR 150 at [68]; *Snedden (aka Vasiljkovic) v Minister for Justice (Cth) and Anor* (2013) 306 ALR 452 at [17].

[17] Her Honour's construction of s 12(c) *Interpretation Act*, that a "liability … incurred" included criminal liability as well as civil liability, is undoubtedly correct, and is supported by an established line of authorities.[5]

[18] Her Honour's finding that Mr Brancourt incurred liability to punishment for the offence of aggravated assault at the time he committed the offence of aggravated assault is uncontentious. Her Honour's further finding that such liability was to a penalty for that offence in accordance with the law as it stood at the date of commission of the offence logically follows. Her Honour's conclusion that the law as it stood included the mandatory sentencing provisions of s 78BA *Sentencing Act* as well as the penalty provisions applicable under s 188 of the *Criminal Code*, is a logical extension of the earlier findings. It also accords with the authorities referred to in the footnote to the previous paragraph. For example, in *Manning v Howlett*,[6] Burbury CJ said:

> Unless constrained by binding judicial precedent to adopt a different interpretation I would construe the expression "liability incurred" as meaning (in relation to an offence) liability incurred for such legal consequences as may flow from committing that offence, (i.e. prosecution, conviction and punishment). Criminal liability for an offence surely accrues when a person commits a complete *actus reus* with such mental concomitants as may be necessary to constitute the offence. He then becomes criminally responsible for his actions … .
>
> [underline emphasis added]

[5] *Byrne v Garrisson* [1965] VR 523 at 527-531; *Manning v Howlett* [1971] Tas SR 85 at 87; *R v White* [2006] NTSC 95; 206 FLR 51 at [11]-[14]. See also Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths 2014), Chapter 6, par 6.12.
[6] [1971] Tas SR 85 at 88.

[19] The present appellant argues that the liability incurred by him when he committed the offence, i.e. liability which was capable of being preserved by s 12(c) *Interpretation Act*, was limited to being convicted or being found guilty of the offence.[7] That argument is unsupported by authority, and I consider that it is quite artificial. There is no proper basis in law to limit the appellant's liability in that way.

[20] The appellant also argues that s 78EA, referred to in [10] above, repealed a pre-existing mandatory minimum custodial sentence provision, and therefore s 14(2) *Criminal Code* applies. That subsection reads as follows:

> If the law in force when the conduct impugned occurred differs from that in force at the time of the finding of guilt, the offender cannot be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law.

[21] The appellant's argument then proceeds as follows: the former law, in its terms, provided for a term of mandatory imprisonment, whereas the latter law removed that provision.[8] Therefore, to punish the appellant under the former law, to a greater extent than is authorised by the latter law, would be contrary to s 14(2).[9]

[22] The fundamental problem with the appellant's argument is that it assumes that there was no mandatory imprisonment in place under Part 3, Division 6A, within which s 78EA was contained. That assumption is incorrect. The offence committed by the appellant was classified as a level 3 offence under

[7]Appellant's Outline of Submissions, par 8.
[8]Appellant's Outline of Submissions, par 11.
[9]Appellant's Outline of Submissions, par 12.

s 78CA(3) *Sentencing Act* at the time the appellant was found guilty; therefore s 78DC(2) required that, for a first violent offence, in circumstances where the victim suffered physical harm, the court impose a term of actual imprisonment. Under s 78DG, the court had to record a conviction and sentence the offender to a term of imprisonment, which could be suspended in part. This is the same regime as under the repealed s 78BA, extracted in [9] above.

[23] The appellant was not punished by the application of the repealed s 78BA to a greater extent than was authorised by the subsequently enacted provisions of Part 3, Division 6A referred to in the previous paragraph, in force at the time of his sentencing. The contention based on s 14(2) *Criminal Code* is therefore not made out.

Conclusion

[24] The appellant has not established that the decision of Kelly J in *Brancourt* was wrong. Contrary to the appellant's submissions, I consider that the decision was correct. It follows that the appellant has not established that the magistrate erred in applying the repealed s 78BA *Sentencing Act* in the sentencing of the appellant.

[25] The appeal must therefore be dismissed.

Additional matters

[26] I wish to add some further comments. This appeal seems to have been brought on the assumption that, if the appeal were successful, this Court

would impose the non-custodial sentence which the magistrate indicated was appropriate, that is, a good behaviour bond. In my view, however, that was not an appropriate sentence. The offence was a violent assault committed in a public place. The young male victim was walking in the Casuarina Shopping Centre with two friends, one a female. The appellant approached from behind and punched the victim to the back of the head. There was no provocation and there was no warning. After that initial punch, and notwithstanding that the victim did not respond aggressively and in fact said that he did not want to fight, the appellant punched him to the forehead, just above the eye. Then, when the victim was on the ground, the appellant punched him to the nose with sufficient force to cause a deviated septum which required surgery. The nose bled profusely.[10] The victim subsequently suffered bouts of breathlessness at night and pain on sneezing,[11] as well as psychological sequelae.

[27] The learned magistrate described the assault as "the sort of impulsive behaviour that young men sometimes seem to get caught up in, where there is some physical aggression". In my view, however, that description does not fully and accurately characterise the offending.

[28] Moreover, the appellant did not explain to the court below why he attacked the victim. He said in evidence that he knew the victim because they had

[10] Transcript 4/09/2013, p 12.1.
[11] Transcript 4/09/2013, p 12.5.

worked at McDonald's together, for about a year.[12] He admitted in giving evidence that he saw the victim, went towards him, that the victim was not expecting him and that he hit him from the back.[13] He admitted that he was angry at that point, but did not say why:

> Yeah coz, there's a story that happened but I couldn't say.[14]

[29] On 12 September 2013, Mr Read, senior counsel for the appellant, made submissions in mitigation. He referred to a disfigurement to the appellant's eye resulting from a childhood accident, which had caused severely impaired vision and weeping from the eye. Senior counsel continued:

> But the physical aspect has not been the real issue. The real issue has been the attention he has received from the kids at school and on my instructions that was part of a sort of a lead up to what is this very unfortunate and serious assault – and it is a serious assault – that led up to him being involved in this.
>
> One of the things he has said in his instructions is that McDonalds and his employment was one of the places that he didn't get that sort of attention in relation to his disfigurement.[15] …
>
> …. in my submission this incident would appear to be quite out of character and if there is any truth in the suggestion that it was something that built up out of being perhaps bullied at school by other people and then some remark in relation to this incident, then it does perhaps give an explanation, because there can't be really an explanation for a young boy, just – who appears to be of such good character to react in such a savage way.

[12] Transcript 4/09/2013, p 21.5.
[13] Transcript 4/09/2013, p 21.6.
[14] Transcript 4/09/2013, p 22.9. This is taken from the appellant's evidence at the hearing of the contested circumstance of aggravation, and thus the background to the assault may not have been relevant and admissible. However, no further evidence was given at the sentencing stage.
[15] Transcript 12/09/2013, p 3.7.

> HER HONOUR: This seems very random, unless there is something that sparked the confrontation.
>
> MR READ: Yes, but there had been some bad blood between he and the victim and it is not now the time to denigrate the victim, but there is something there that caused this to happen.[16]

[30] Senior counsel then informed the magistrate that the appellant's schooling at Sanderson Middle School had been characterised by significant bullying, focused on his eye disfigurement, and that during his high school education at Casuarina Secondary College, "… the remarks continued". Somewhat inconsistently with that submission, at least in relation to the appellant's time at Casuarina Senior College, a reference tendered from a teacher at that College referred to the appellant's "pleasant social skills and sense of humour" and said that he was "popular with both students and teachers"; also that the appellant was "able to get along with most people".

[31] Even if the appellant had been bullied or been the subject of unkind taunts relating to his eye disfigurement at Sanderson Middle School, he was in Year 12 at Casuarina Senior College at the time of offending and, on the evidence, had been a student there for Years 10 and 11. Therefore, any bullying or taunts at Sanderson Middle School must have occurred at least two years previously. That would represent a very long 'lead up' to the events of 12 March 2013.

[32] It may be also noted that the appellant said he knew the victim because they had worked at McDonalds together; yet Mr Read told the magistrate that

[16] Transcript 12/09/2013, p 3.7.

McDonalds was one of the places where the appellant had *not* had any unwelcome attention in relation to his disfigurement. A reference from the manager of Casuarina McDonalds said that the appellant was loved by his workmates.

[33] On my reading of the evidence and submissions, no proper or clear explanation was given by senior counsel as to why the appellant had attacked the victim. The submission that "attention" directed towards the appellant by the kids at school was "part of a sort of a lead up" to the assault made no mention of the victim. There was no indication that the victim had anything to do with whatever had happened to the appellant at any school. The further submission, "… *if* there is any truth *in the suggestion* that it was something that built up out of *being perhaps bullied at school by other people* and then *some remark in relation to this incident*, then it does *perhaps give an explanation* …" is no explanation for the appellant's violence to the victim. To the extent that it was advanced as an explanation, it was (1) a conditional suggestion ("if there is any truth"), (2) made by senior counsel himself, and no one else (3) of possible bullying of the appellant at school (4) at some time in the past, not specified, (5) by people other than the victim; coupled with (6) an unspecified remark, detail not disclosed, (7) made by a person not identified by counsel, the suggestion being that the victim made the remark.

[34] Senior counsel kept the explanation vague. He made no direct allegation that the victim had bullied or taunted, or participated in the bullying or taunting

of the appellant. Senior counsel asserted "some bad blood" between the appellant and the victim, but did not elaborate or explain what he meant.

[35] My reading of the transcript indicates that senior counsel for the appellant did a masterful job of not telling the magistrate why the appellant had attacked the victim, while at the same time subtly suggesting that the victim had 'done something' or 'said something', because otherwise the appellant would not have attacked him so savagely! The 'vibe' thus created, in the absence of any evidence or even a clear explanation from the bar table, influenced the magistrate to make the following sentencing remarks:

> It seems to have arisen out of some history between yourself and the young man who was the victim of the assault arising, I think, one can pretty clearly infer, from comments that were made and I was told by Mr Read who appeared for you previously that throughout your time at high school here a lot of people have given you a pretty hard time about a disfigurement that you have to your eye and a loss of vision in that eye, arising from something which occurred when you were quite young and to your credit you haven't gone into detail to disparage the victim in the matter, but clearly that's got to have been something that triggered what happened at Casuarina that day.

[36] It can be seen that the defence strategy was so effective that the magistrate even gave the appellant credit for not disparaging the victim.

[37] Given the evidentiary deficiencies identified,[17] I find it difficult to understand how the magistrate could have drawn any inference favourable to the appellant in respect of his reasons for offending. Clearly there had been bad blood between the appellant and the victim, but the true reason for that

[17] See *R v Storey* [1998] 1 VR 359 at 369, per Winneke P, Brooking and Hayne JJA and Southwell A-JA, approved by the majority (Gleeson CJ, Gaudron, Hayne and Callinan JJ) in *R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270, at [27].

was never disclosed. There was no proper basis to infer that the violence was in response to comments made by the victim about the appellant's disfigurement.

[38] Her Honour also expressed her view that the assault had had "a disproportionate impact on the victim", in reference to the statement of the victim that he was afraid to go out into public places.[18] In his supplementary victim impact statement, the victim disclosed that he had been seeing a psychologist for his anxiety and fear. In my experience, psychological or emotional sequelae of the kind described are not unusual, even in older men, and could well be expected in the case of a young man who has been the victim of unexpected physical violence: bashed from behind, without provocation or warning, in a public place where he reasonably expected to be safe. The fact that he later required surgery for a deviated septum would probably have added to the overall post traumatic effects. I see no disproportion in the psychological impact suffered by the victim, given the nature and circumstances of the assault and the physical injuries he suffered.

[39] Notwithstanding the youth of the offender, and the fact that he had no prior record, I consider that the offence was of sufficient seriousness to warrant a conviction. Moreover, the assault justified a head sentence in the range of six to eight months, less an appropriate reduction for the plea and remorse. In my opinion, the sentence imposed was manifestly inadequate and the

[18] Victim Impact Statement, 28 May 2013.

sentence which her Honour indicated she would have imposed was even more so manifestly inadequate.

[40] Her Honour's decision to partially suspend the appellant's sentence took into account the appellant's youth and prior good character; his efforts to integrate and succeed despite significant social disadvantage; good character references, and the subjective matters referred to by her Honour. I note also that the prosecutor did not oppose that course.

[41] There is no cross-appeal, and because the appeal has not been successful, the magistrate's sentencing decision stands. I am not required to re-sentence the appellant.

[42] Pursuant to s 177(2)(b) *Justices Act*, I affirm the conviction and sentence imposed by the magistrate.
