Mamarika v Rourke [2016] NTSC 51

PARTIES:	MAMARIKA, Travis v ROURKE, Josette Lisa
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 53 of 2015 (21521584)
DELIVERED:	30 September 2016
HEARING DATE:	26 August 2016
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – manifest excess ground – sentencing principles – general and specific deterrence – punishment and denunciation – where offender went armed in public – offender in company – late plea of guilty – sentence three months' imprisonment suspended after one month – manifest excess not established – appeal dismissed.

CRIMINAL LAW – Sentencing – parity principle – "like offenders" – interpretation of – distinguishing factors – age – timing of plea – sense of grievance – test objective – different sentences justified – appeal dismissed.

Sentencing Act (NT) 1995

Postiglione v The Queen (1997) 189 CLR 295; *Wong v The Queen* [(2001) 207 CLR 584; *R v Wei Pan* [2005] NSWCCA 114, applied.

Green v The Queen; *Quinn v The Queen* [2011] HCA 49; (2011) 86 ALJR 36; *Lowe v The Queen* (1984) 154 CLR 606, cited

REPRESENTATION:

Counsel:

Appellant:	G O'Brien-Hartcher
Respondent:	S Ledek

Solicitors:

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

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

Mamarika v Rourke [2016] NTSC 51
No. JA 53 of 2015 (21521584)

BETWEEN:

TRAVIS MAMARIKA
Appellant

AND:

JOSETTE LISA ROURKE
Respondent

CORAM: BARR J

REASONS FOR DECISION

(Delivered 30 September 2016)

[1] On 26 August 2016, I dismissed the appeal against severity of sentence. I now publish my reasons.

[2] The appellant was charged by count 3 on information that, at Angurugu on 12 May 2015, he went armed in public, namely armed with a spear and machete, without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage, contrary to s 69 of the Criminal Code.

[3] That offence carried a maximum penalty of imprisonment of three years.

[4] The appellant and other co-offenders had earlier pleaded not guilty to a number of charges (including count 3), and a hearing commenced in the

Court of Summary Jurisdiction on 17 September 2015. The hearing was adjourned part-heard to November 2015. On 19 November 2015 the appellant pleaded guilty to the offence charged as count 3.

[5] The agreed facts, exhibit P1 at the sentencing hearing, established that on 12 May 2015 the appellant and co-offenders attended a residence at Lot 383 Angurugu community. The defendant was armed with a spear and a machete. Other co-offenders were armed with spears, machetes, tomahawks and axes. The defendant and co-offenders were part of a large gathering of approximately 200 to 300 people, including many women and children. Most of the male adults present were carrying weapons of some description.

[6] The appellant and co-offenders yelled at the residents of Lot 383 who in turn yelled back at the appellant and co-offenders.

[7] Police had been alerted to the growing unrest and attended the scene.

[8] When police arrived, a number of people began throwing spears and other weapons. The co-offenders threw multiple weapons into the front yard of Lot 383.

[9] The appellant and co-offenders then withdrew to another house in the Angurugu community.

[10] Subsequently, although it is unclear how much later, the appellant and co-offenders again attended at Lot 383. The appellant was armed with a spear

sitting on a woomera, and a machete. The co-offenders were also armed with various weapons.

[11] After both sides resumed yelling at each other, the appellant and co-offenders went to the front driveway of Lot 383, where the appellant raised his right arm and threw the spear with force, using the woomera, towards Lot 383. The co-offenders were also throwing weapons into the front yard of Lot 383.

[12] It was an agreed fact that CCTV footage of the incident showed more than 12 persons throwing weapons into the residence at Lot 383 Angurugu.

[13] On this second occasion, two males were struck by projectiles. One of the men received a substantial wound to his left forearm and lacerations to his arm and buttock, which required approximately 15 stitches. Another man was hit in the foot with a machete and treated in the Royal Darwin Hospital for a severed tendon and a chipped bone.

[14] Police were present at or near Lot 383 Angurugu when these events took place. They activated lights and sirens on several occasions in an effort to disperse the crowd, in particular the male adults carrying weapons. Police efforts had little effect. Police used a marked police vehicle to drive into the crowd of people, but were still unable to disperse them. Because of the aggressive and hostile nature of the offenders, the threat of weapons, and the presence of women and children, police did not leave their vehicles to take more active steps to deal with the situation.

[15] The appellant and co-offenders eventually returned to Lot 423 Angurugu community, where they remained.

[16] Subsequently, the appellant was arrested and participated in a formal interview with police during which he made admissions to the offending.

[17] The appellant was born on 29 September 1989, and so was 25 years and seven months old at the time of offending

[18] In sentencing the appellant, the magistrate observed as follows, inter alia:

> The matter is serious because not only did you go armed, but you threw your weapon.
>
> It is also serious because you were part of a large group of people who were behaving in a very threatening way. And it is also very serious because the police were there trying to calm things down and you didn't listen to them, nor did anybody else.
>
> People were injured, although you did not cause those injuries. And now in another incident people have even died.
>
> It is very important that you and all the community get the message that the courts will not allow you to go armed and take matters into your own hands.
>
> It was not your direct argument, but you got involved and many people got involved. So general deterrence – the message to the community – has to be that you are not allowed to join in, in this kind of family argument.

[19] Her Honour thus emphasised the sentencing objectives of general and specific deterrence. I note that punishment and denunciation were also very important.

[20] Her Honour referred to the maximum penalty of three years' imprisonment and observed that the appellant's offending was objectively serious.

[21] Her Honour's starting point in sentencing was a term of imprisonment of four months.

[22] Her Honour observed that two older co-offenders (one only slightly older), Ezekiel Mamarika and Terrence Mamarika, had each received sentences of three months' imprisonment, in circumstances where they had both pleaded guilty at an early opportunity.

[23] Although the appellant had not pleaded guilty at an early opportunity, the magistrate took into account that the appellant was younger and had less of a criminal history than the two older co-offenders and determined that the head sentence for the appellant should also be three months.

[24] The learned magistrate then ordered that the sentence be suspended after the appellant had served one month, with a 12-month operational period applicable to the two months' balance of sentence.

[25] It is apparent that her Honour extended considerable clemency to the offender, whilst at the same time imposing a head sentence which appropriately emphasised deterrence.

[26] In my opinion, there can be no doubt as to the seriousness of the offence. The deadly potential of the weapons with which the appellant armed himself, the fact that the appellant's intentions were aggressive rather than

defensive (as evidenced by the circumstances in which he deployed the spear by throwing it), and the fact that he was in company with many others all placed the offending in the more serious range for such offences.

[27] On appeal, the appellant failed to establish that the head sentence of three months was excessive, let alone manifestly excessive. Further, given the partial suspension of that sentence, the appellant failed to establish that the overall disposition was manifestly excessive.

Parity

[28] Defence counsel argued before her Honour, and it was pressed by counsel on appeal, that the parity principle required the sentence imposed on the appellant to reflect the sentence imposed on another offender, Chappy Mamarika. Her Honour examined the file for that other offender and determined that he was an 18-year-old with no prior criminal history at all. Her Honour said, in or preliminary to her sentencing remarks: "It doesn't require parity for Travis [a reference to the appellant] particularly because of the significant difference in age between the two offenders."

[29] It would appear also that the other offender had pleaded guilty at an early time, a matter acknowledged by the appellant's counsel in the court below.

[30] The parity principle has an important role in sentencing. As Mason J stated in *Lowe v The Queen*,[1] consistency in the punishment of offences against the

[1] *Lowe v The Queen* (1984) 154 CLR 606 at 610.

criminal law is “a reflection of the notion of equal justice” and “is a fundamental element in any rational and fair system of criminal justice”.

[31] However, the parity principle does allow for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances: *Postiglione v The Queen*.[2]

[32] The High Court more recently considered the parity principle in *Green v The Queen*; *Quinn v The Queen*.[3] There the majority observed that the equal justice principle, from which the parity principle derives, requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. Their Honours referred with approval to the observations of Gaudron, Gummow and Hayne JJ in *Wong v The Queen*:[4] that equal justice requires identity of outcome in cases that are relevantly identical and different outcomes in cases that are different in some relevant respect.

[33] In the present case, her Honour treated the appellant, an arguably ‘like offender’ to Chappy Mamarika in terms of culpability, in a different way to that in which Chappy Mamarika had been treated. However, her Honour justified the different outcome, inter alia, having regard to the age

[2] *Postiglione v The Queen* (1997) 189 CLR 295 at 301, per Dawson and Gaudron JJ.
[3] *Green v The Queen*; *Quinn v The Queen* [2011] HCA 49; (2011) 86 ALJR 36 at [28], per French CJ, Crennan and Kiefel JJ.
[4] *Wong v The Queen* [(2001) 207 CLR 584 at [65].

difference. An 18 year old, akin to a youth, would normally receive considerable leniency from an adult court, particularly for a first offence. That would not apply, or would not apply to the same extent, in the case of a 26 year old. In my opinion, the difference in age was a "relevant respect", as that term was used in *Wong v The Queen*, as was the fact that Chappy Mamarika had entered an early plea of guilty, whereas the appellant had not. They were both relevant differences which her Honour was permitted to take into account.

[34] Mr O'Brien-Hartcher also referred to the notion of a sense of grievance in relation to the difference in sentences imposed.

[35] In *R v Wei Pan*,[5] Johnson J (Giles JA and Hoeben J agreeing), noted that the test for determining the existence of a sense of grievance is objective not subjective. What has to be demonstrated by the person complaining on the grounds of parity is not that *he* feels aggrieved, but that a reasonable mind looking overall at what has happened would see that the offender's grievance was justified. This reflects the observations of Gummow J in *Postiglione v The Queen*,[6] cited by counsel for the respondent, that the difference between two sentences need be "such as to engender a justifiable sense of grievance by giving the appearance, in the mind of an *objective observer*, that justice has not been done."

[5] *R v Wei Pan* [2005] NSWCCA 114 at [34] - [35].
[6] (1997) 189 CLR 295 at 323.

[36] In my judgment, the difference between the two sentences was not such as to engender a justifiable sense of grievance in the mind of an objective observer.

[37] The appellant thus failed to establish that the learned magistrate erred in law in not properly considering or not properly applying the principle of parity in sentencing the appellant. Given the similar failure to establish manifest excess, as found in [27], the appeal was dismissed.
