CITATION:	*O'Neill v Murray* [2024] NTSC 29
PARTIES:	O'NEILL, Julie Ann
	v
	MURRAY, Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 9 of 2023 (22203394)
DELIVERED:	16 April 2024
HEARING DATE:	30 May 2023
JUDGMENT OF:	Grant CJ

REPRESENTATION:

Counsel:

Appellant:	T Grealy
Respondent:	JB Lawrence SC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Direct brief

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

O'Neill v Murray [2024] NTSC 29
LCA 9 of 2023 (22203394)

BETWEEN:

JULIE ANN O'NEILL
Appellant

AND:

MARK MURRAY
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT
(Delivered 16 April 2024)

[1] This is a prosecution appeal against an order made by the Local Court finding the respondent guilty of aggravated unlawful assault contrary to s 188 of the *Criminal Code 1983* (NT) and imposing a fine without recording a conviction. The appellant's central contention is that because the offence was a 'level 3 offence' under the *Sentencing Act 1995* (NT), the victim suffered 'physical harm' as a result of the offence and the offender had not previously been convicted of a violent offence, it attracted the operation of ss 78DC and 78DG of the *Sentencing Act* such that the court was required to impose a term of actual imprisonment and record a conviction against the offender.

Procedural history and legislative context

[2] On 3 March 2023, the respondent pleaded guilty to unlawfully assaulting the victim with the aggravating circumstance that the victim suffered harm. That plea of guilty proceeded on the basis of facts agreed between the prosecution and defence which were tendered into evidence and read onto the record. Those facts were formally admitted, as was the respondent's criminal history. A victim impact statement was also tendered into evidence.

[3] The agreed facts provided that the offending was constituted by the respondent pushing the victim three times in the chest, causing the victim to fall to the floor and make contact with a pile of beer kegs. It was also agreed that as a result of the offending the victim suffered four fractures to the lumbar spine and bruising. Those injuries affected the victim's mobility and ability to work. In particular, he could not remain on his feet for more than an hour, he needed assistance with the activities of daily living, and he had trouble sleeping.

[4] Section 78C of the *Sentencing Act* defined 'physical harm' in relation to a person to mean 'a physical injury that interferes with the person's health'. With obvious reference to the definition, paragraph 19 of the agreed facts provided expressly:

> The injuries caused by the defendant amount to physical harm under the *Sentencing Act 1995*.

[5] In addition to those agreed facts, the victim impact statement made 12 months after the assault provided that as a consequence of the incident the victim continued to have difficulty sleeping, required ongoing analgesia and had experienced psychological issues.

[6] Counsel for the prosecutor submitted that the provisions of the *Sentencing Act* as it then stood required the sentencing judge to impose a term of actual imprisonment which could not be wholly suspended, with the additional consequence that the court was required to record a conviction.[1] That submission was based upon the following provisions:

(a) s 78CA(3) of the *Sentencing Act* defined a 'level 3 offence' to be an offence against s 188 of the *Criminal Code* committed in one or more of the aggravating circumstances mentioned in s 188(2),[2] other than paragraph (k) relating to indecent assault;

(b) s 78DC of the *Sentencing Act* provided that if a court finds an offender guilty of a level 3 offence and the victim suffers 'physical harm' as a result of the offence, and if the offender has not previously been convicted of a violent offence,[3] the court must impose a term of actual imprisonment; and

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1 Transcript of proceedings, 3 March 2023, p 9.6-10.2.

2 That definition excluded an aggravated assault which constituted a 'level 5 offence', which was defined in s 78CA(1) of the *Sentencing Act* to include an assault involving the actual or threatened use of an offensive weapon in which the victim suffered physical harm.

3 It was common ground that the offender had not previously been convicted of a 'violent offence' as defined for the purpose of the *Sentencing Act*.

(c) s 78DG of the *Sentencing Act* provided that if a court is required to 'impose a term of actual imprisonment' in relation to an offender, the court must record a conviction against the offender and must sentence the offender to a term of imprisonment which could be partly but not wholly suspended.

[7] In response to that submission, the sentencing judge made reference to s 78DC of the *Sentencing Act* but stated that because the respondent had not previously been convicted of a violent offence the mandatory sentencing provisions would be 'read down in that the courts would have a full discretion in sentencing'.[4] In response, counsel for the appellant submitted that where a term of imprisonment was imposed a conviction must be recorded.[5]

[8] The issue was somewhat confused and confounded by the submissions made by counsel for the respondent. Counsel for the respondent initially invited the sentencing judge not to record a conviction on the basis of what was described as the respondent's positive good character.[6] That submission was obviously contrary to the operation of the governing legislation having regard to the agreed facts. When the sentencing judge questioned counsel for the respondent about whether the injury sustained by the victim amounted to 'physical harm', counsel

4 Transcript of proceedings, 3 March 2023, p 10.7.

5 Transcript of proceedings, 3 March 2023, p 10.9.

6 Transcript of proceedings, 3 March 2023, p 8.5.

for the respondent appeared to accept that the defence could not go behind the fact that the victim had suffered 'bodily harm',[7] and did not make any further submission in relation to the consequences of that characterisation under the provisions of the *Sentencing Act*. However, when the sentencing judge stated that he had a 'full discretion in sentencing' because the respondent had not previously been convicted of a violent offence, counsel for the respondent submitted, 'That's not my understanding of the law.'[8]

[9] The sentencing judge proceeded to sentence without inviting further submissions. During the course of the sentencing remarks, the sentencing judge said that although the Crown asserted the victim had suffered 'physical harm', the court had not received any medical evidence in relation to those injuries and found on that basis that 'physical harm' had not been established.[9] In making that finding, the sentencing judge failed to make any reference at all to the agreed facts in relation to the nature of the injury and harm suffered by the victim as a result of the offending conduct. The sentencing judge then purported to apply s 8 of the *Sentencing Act* not to record a conviction for the offence on the basis that the respondent had shown remorse and

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7 Transcript of proceedings, 3 March 2023, p 9.2-9.5. The legislation had previously used the formulation 'bodily harm', which was defined in the same terms as 'physical harm'

8 Transcript of proceedings, 3 March 2023, p 10.8.

9 Transcript of proceedings, 3 March 2023, p 11.9.

was a person of good character.[10] The sentencing judge determined to impose a fine, apparently on the basis that a good behaviour bond would be an inappropriate disposition given that the respondent had been on bail for an extended period.[11]

[10] At the conclusion of those remarks, the prosecutor sought to clarify the sentencing judge's finding by reference to the agreed fact that the injury sustained by the victim amounted to 'physical harm'. The sentencing judge effectively refused to entertain any further submission on the matter.[12]

Grounds and nature of appeal

[11] The grounds of appeal are:

(a) the sentencing judge erred by not accepting uncontested facts;

(b) the sentencing judge failed to afford the prosecution procedural fairness; and

(c) the sentencing judge imposed a sentence contrary to law.

[12] A party to proceedings before the Local Court may appeal to this Court from a conviction, order, or adjudication of the Local Court on a ground which involves either 'sentence' or 'an error or mistake on the part of the Local Court, on a matter or question of fact alone, or a

10 Transcript of proceedings, 3 March 2023, p 12.1-12.7.

11 Transcript of proceedings, 3 March 2023, p 12.8-12.9.

12 Transcript of proceedings, 3 March 2023, p 12.9-13.1.

matter or question of law alone, or a matter or question of both fact and law'.[13] On the hearing of an appeal this Court may affirm, quash or vary the order or adjudication appealed from; substitute or make any conviction, order or adjudication which ought to have been made in the first instance; remit the case for further hearing before the Local Court; or dismiss the appeal despite error if it considers that no substantial miscarriage of justice has actually occurred.[14] It is also of significance in this context that this Court is precluded from taking into account any element of double jeopardy involving the respondent being sentenced again.[15]

[13] Crown appeals against sentence, including prosecution appeals from sentences imposed by inferior courts, should be a rarity brought only to establish some matter of principle, and to afford an opportunity to the Supreme Court (or the Court of Criminal Appeal as the case may be), to perform its proper function in this respect. This is not an appeal brought against sentence on the basis of manifest inadequacy. It is an appeal brought on the basis that the Local Court has committed error in the application of the sentencing legislation. Even allowing for that distinction, the primary purpose of the appeal to this Court is 'to lay

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13 *Local Court (Criminal Procedure) Act 1928* (NT), s 163(1).

14 *Local Court (Criminal Procedure) Act*, s 177(2).

15 *Local Court (Criminal Procedure) Act*, s 177(4).

down principles for the governance and guidance of courts having the duty of sentencing convicted persons'.[16]

Consideration

[14] The sentencing judge was plainly wrong to find that 'physical harm' had not been established.

[15] First, the fact that the victim had suffered 'physical harm' within the meaning of the *Sentencing Act* had been the subject of explicit agreement between the prosecution and the defence, that agreement had been recorded in a set of agreed facts, and those agreed facts had been tendered into evidence during the course of the proceeding. In dealing with the respondent's plea of guilty, the agreed facts constituted the basis on which the respondent was to be sentenced, and the sentencing judge was obliged to sentence on the basis of those agreed facts.[17]

[16] Secondly, even leaving aside the direct concession and agreement in relation to 'physical harm', it must necessarily have been apparent to the sentencing judge from the description of the injuries contained in the agreed facts that they constituted 'physical harm'. As already described, those injuries included four fractures to the lumbar spine which affected the victim's mobility and ability to work, precluded him

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16 See *Green v The Queen* (2011) 244 CLR 462 at [1]; *Griffiths v R* (1977) 137 CLR 293) at 310; *Everett v The Queen* (1994) 181 CLR 295 at 300; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [8]-[20]; *R v Borkowski* (2009) 195 A Crim R 1 at [70]; *The Queen v Mossman* [2017] NTCCA 6, [8]-[17].

17 See *GAS v The Queen* (2004) 217 CLR 198 at [30]; *CL v The Queen* [2014] NSW CCA 196 at [43]; *Edmonds v The Queen* [2019] NTCCA 1 at [35].

from remaining on his feet for more than an hour, required assistance with the activities of daily living, and resulted in sleeping difficulties. The statutory definition of 'physical harm' was 'a physical injury that interferes with the person's health'. On both a plain reading of the text of that definition and the judicial interpretations of it, those injuries clearly and obviously satisfied the statutory definition.[18]

[17] Thirdly, before making a determination in relation to 'physical harm' at variance with the basis on which the prosecution and the defence had agreed to conduct the case, the sentencing judge was required to give the parties opportunity to address that matter.[19] Although the principle has been expressed to have application to a departure from agreed propositions of law, it also has application to a substantive departure from the facts agreed between the parties. In any event, whether the facts before the court were adequate to satisfy a legal definition was ultimately a determination of law.

[18] The sentencing judge was also plainly wrong to conclude that because the respondent had not previously been convicted of a violent offence the mandatory sentencing provisions would be 'read down in that the courts would have a full discretion in sentencing'.

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18 *Gaykamangu v Court & Anor* (2014) 243 A Crim R 215 at [38]; *Wayne v Boldiston* (1992) 62 A Crim R 1; and *Tranby* (1991) 52 A Crim R 228.

19 See *Pantorno v The Queen* (1989) 166 CLR 476 at 473-474; *Forrest v The Queen* (2017) 267 A Crim R 494 at [59]

[19] First, the statement was nonsensical given that the operation of s 78DC of the *Sentencing Act* was expressly predicated on the fact the offender has not previously been convicted of a violent offence, but mandated the imposition of a term of actual imprisonment.

[20] Secondly, the statement was unsupported by any statutory provision or principle known to law. The unmistakable purpose and effect of the mandatory sentencing provisions was to fetter the court's sentencing discretion except to the extent provided by the statute. The only statutory or other exemption to the application of the mandatory sentencing provision was where the court was satisfied 'that the circumstances of the case are exceptional' as provided by s 78DI of the *Sentencing Act*. Counsel for the respondent did not make any submission concerning exceptional circumstances, and nor were any apparent from the evidence before the sentencing judge.

[21] Thirdly, the sentencing judge's conclusion fundamentally misunderstood what is entailed in 'reading down' a legislative provision. That process of construction involves interpreting a statutory provision in a manner which avoids infringing constitutional preclusions which would otherwise render the provision invalid, or which avoids infringing fundamental rights in the absence of a clear and irresistible legislative intention to do so. That is a constructional choice which is legitimate and open only where the terms of the statute might accommodate either construction. In the present case, there was

no potential constitutional invalidity and the operation of the statute was irresistibly clear. The purported 'reading down' by the sentencing judge was obviously unavailable in these circumstances.

[22] It is not clear from the record of proceedings whether the errors committed by the sentencing judge were the result of some misunderstanding of the legislative scheme and the relevant legal principles, or whether those errors were the result of a deliberate refusal to apply legislative provisions which the sentencing judge considered to be unfair in the circumstances.

[23] If it was the former, that failing was remarkable given the agreement as to the material facts, the clear words of the statute and the well-settled legal principles.

[24] If it was the latter, it represented a departure from the fundamental constitutional understanding that the legislature is the supreme law-making body and it is the obligation of the courts to apply valid and unambiguous legislation enacted by the legislature. A sentencing court cannot adopt an artificial interpretation in order to avoid the operation of a mandatory minimum period of imprisonment. That is so even where the sentence mandated by the legislation might be considered by the sentencing court to be unjust in the application of ordinary sentencing principles. As has been observed at the highest level, it is essential for the maintenance of public confidence in the integrity and

impartiality of the courts that they do not set out to defeat a legislative intention because they disagree with the wisdom of the law.[20]

Disposition

[25] Even where no account may be taken of any element of double jeopardy, an appellate court determining a prosecution appeal must give consideration to whether any injustice might be caused to the respondent if the appeal is allowed. In the circumstances of this case, none of the usual considerations which might militate in favour of the exercise of the residual discretion are present.[21] In particular, there has been no delay or fault on the part of the Crown.

[26] However, the mandatory sentencing provisions which had application and operation in this case have been repealed by the *Sentencing and Other Legislation Amendment Act 2022* (NT), which commenced on 25 March 2024. Under the legislation as it now stands, the sentencing judge would not have been required under the terms of a mandatory sentencing regime to impose an actual term of imprisonment or a conviction. That change in circumstances illustrates the vagaries of legislative policy in the field of criminal justice, and specifically in relation to mandatory punishment.

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20 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [23] per Gleeson CJ.

21 See, for example, *Cumberland v The Queen* [2020] HCA 21 at [4]-[6]; *Green v The Queen* (2011) 244 CLR 462 at [32]; *Munda v Western Australia* (2013) 249 CLR 600 at [72]; *R v Wilson* (2011) 30 NTLR 51 at [27].

[27] Were this Court to allow the appeal it would be on the basis of a failure to comply with a mandatory sentencing regime which is no longer in force. Moreover, were this Court now to substitute the order or adjudication which ought to have been made in the first instance, it would be applying that repealed regime. The transitional provisions of the *Sentencing and Other Legislation Amendment Act* provide that any sentence imposed following commencement shall be in accordance with the *Sentencing Act* as amended. That gives rise to an interesting academic question as to whether any re-sentencing exercise would be captured by the transitional provisions such that the re-sentence would need to be in accordance with the legislation as amended, rather than as ought to have been made in the first instance. If so, there would seem to be some anomaly –at least in perception if not also in law – in allowing an appeal on the basis of a failure to comply with the requirement of a mandatory sentencing regime, and then re-sentencing on the basis that there is no such requirement. The categories of circumstance which will attract the application of the residual discretion are not closed, and that result would warrant the exercise of the discretion.

[28] The residual discretion would also be appropriately exercised in this case even were the re-sentencing exercise not captured by the transitional provisions. Having regard to the change in circumstance, it would now be manifestly unfair to apply to the respondent a mandatory

sentencing regime which no longer has application. I also note in this respect that the *Sentencing and Other Legislation Amendment Act* was enacted by the Legislative Assembly and received assent on 9 December 2022, which was before both the subject sentencing proceedings and the hearing of this appeal. The commencement of the legislation was deferred to 25 March 2024 only to allow various operational and administrative arrangements necessary for the practical operation of the legislation to be put in place.

[29] This is not to say that the sentence imposed by the Local Court was otherwise correct. It would be quite arguable that the imposition of a fine fell outside the legitimate sentencing discretion having regard to the seriousness of the offence and the harm suffered by the victim. It would also be arguable that the failure to record a conviction was both manifestly inadequate and erroneous having regard to the governing principles.[22] However, that was not the basis on which the appeal was brought given the clear failure on the part of the sentencing judge to comply with the legislative regime, and other matters going to the correctness and adequacy of the sentence were not the subject of consideration or submissions in the appeal.

22 See, for example, *Rigby v Benfell* [2020] NTCCA 9.

[30] Although the sentence imposed was plainly not in accordance with the law as it stood at that time, the appeal is dismissed in the exercise of the residual discretion for the reasons described above.

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