Mamarika v Chambers [2007] NTSC 13

PARTIES:	MAMARIKA, Constantine
	v
	CHAMBERS, Kim
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 41 of 2006 (20606557)
DELIVERED:	19 February 2007
HEARING DATES:	13 February 2007
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:
JUSTICES ACT – Justices appeal – assault on a police officer – appeal on grounds that erred in not imposing a sentence of imprisonment to the rising of the court or a partly suspended sentence – sufficient weight not given to rehabilitation – appeal dismissed

Yardley v Betts (1979) 22 SASR 108, *White v Brown* (2003) 13 NTLR 50, referred to

REPRESENTATION:

Counsel:

Appellant:	P Dwyer
Respondent:	M Walsh

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Sou0742
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Mamarika v Chambers [2007] NTSC 13
No JA 41 of 2006 (20606557)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Alyangula

BETWEEN:

MAMARIKA, Constantine
Appellant:

AND:

CHAMBERS, Kim Trevenan
Respondent:

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 19 February 2007)

Introduction

[1] On 20 June 2006 the appellant pleaded guilty to having assaulted a police officer, Constable Rothe, in the execution of his duty on 30 January 2001. On 15 August 2006 the appellant was sentenced to imprisonment by the Court of Summary Jurisdiction for a period of one month.

[2] He now appeals against that sentence on the following grounds:

1. That the learned magistrate erred in not considering:

(i) a sentence of imprisonment to the rising of the Court;

(ii) whether any sentence of imprisonment should be partly suspended.

2. That the learned magistrate did not give sufficient weight to the principle of rehabilitation in the circumstances of the case.

[3] The delay in finalising the matter was largely the fault of the appellant.

The facts

[4] The facts are as follows. On 30 January 2001 the appellant and his brother had been drinking moselle after the funeral of their grandfather. Later that day they were walking along an alley in Moulden when an incident occurred and police were called. The appellant was approached by police and he was arrested. While being escorted to the rear of the police paddy wagon he twisted away from the police officer and tried to run away. He was ground stabilised and held until he calmed down. When he was again taken towards the police paddy wagon the appellant jumped up and kicked Constable Rothe with his right leg, striking the constable in the vicinity of his groin. The constable felt extreme pain as a consequence. The appellant was then taken to the Berrimah watch house where he wrongly identified himself as Thomas Mamarika. He was processed under that name. On the following day the appellant was charged and bailed under the name of Thomas Mamarika. He then failed to appear on the return date and a warrant was issued in the name of Thomas Mamarika.

[5] On 23 June 2005 the real Thomas Mamarika was arrested on the warrant and fingerprint checks revealed that he was not the offender who had assaulted Constable Rothe. Further checks were conducted and ultimately the appellant was identified. On 1 March 2006 a warrant was issued for the appellant's arrest. He was in fact in custody at that time. He was released from custody on 1 May 2006. On 17 May 2006, he attended at the Court of Summary Jurisdiction for the summary hearing of the charge which is the subject of this appeal and he entered a plea of guilty. The matter was adjourned until the afternoon session of the court when the appellant failed to appear. A further warrant was issued. The appellant next appeared on 20 June 2006 when he again entered a plea of guilty and a pre-sentence report was ordered. On 15 August 2006 he appeared before the learned sentencing magistrate and was sentenced to a term of imprisonment of one month dated from 15 August 2006.

Ground 1

[6] It was submitted on behalf of the appellant that the learned magistrate erred in not imposing a sentence of imprisonment to the rising of the court or, at least, in not imposing a partly suspended sentence.

[7] It is not in dispute that a sentence of imprisonment to the rising of the court is a sentence to a term of imprisonment: *White v Brown* (2003) 13 NTLR 50 at 55. It is also not in dispute that in an appropriate case a term of imprisonment can be suspended until the rising of the court. The sentencing

remarks of the learned sentencing magistrate make it clear that he was aware of the power to sentence to the rising of the court and that such a sentence may be appropriate in some cases. However, in this case, he ultimately determined that such a sentence was not appropriate. In so doing he stated that the matter was not a "low range assault". He went on to make the following remarks:

> "Section 78BA applies to you and accordingly a sentence of actual imprisonment must be applied in your case. The assault was not a minor one or at the lower end of the scale. I think it was a reasonably serious assault on a police officer in the execution of his duty. You kicked the police officer and connected with him in the groin area. He was in immediate and serious pain. Fortunately it hasn't been and wasn't ongoing. He appears to have recovered some time later. There's no bodily harm involved but it was not a minor or low range assault. My view of the assault is a starting point that you'd be looking at something in the order of about 3 months or so as a starting point for that sort of assault on a police officer. The question is what to do with you."

[8] It was submitted that, notwithstanding the appellant's criminal record which included two offences of violence that had been committed prior to 30 January 2001, any sentence imposed by his Honour should have been limited to the rising of the court or should have been partly suspended because:

(a) Following his release from prison on 1 May 2006 the appellant had demonstrated that he had some prospects of rehabilitation;

(b) The appellant had served a lengthy term of imprisonment since his offending during which he had completed alcohol treatment programs;

(c) The appellant had abstained from alcohol during the period that he had been released from prison;

(d) The relative youth of the appellant;

(e) The appellant had remained out of trouble since being released from his lengthy sentence;

(f) The offence was not at the higher end of the scale of seriousness;

(g) There had been a plea of guilty;

(h) The appellant was the subject of a positive pre-sentence report and that he had gained and maintained employment following his last period of incarceration.

[9] While the above matters have been put by counsel for the appellant, there is no challenge to the sentence as being manifestly excessive.

[10] In relation to a sentence to the rising of the court the learned magistrate correctly noted, in my opinion, that such a sentence should be reserved for those cases "which really warrant that sort of leniency". The assault with which his Honour was dealing was a relatively serious assault upon a police

officer in the course of his duty which caused that officer "immediate and serious pain." His Honour noted that there was no bodily harm involved "but it was not a minor or low range assault." I agree with that assessment. The learned magistrate observed that, in all the circumstances, a starting point for an offence of that kind would be something in the order of "about three months or so" but in this case reduced the sentence to imprisonment for a period of one month. In so doing he observed:

> "So effectively we have reduced the sentence down by two months so that you have a short, sharp sentence to serve and then hopefully you can return to Groote, continue not drinking, continue back working, establish a family and stay out of trouble."

[11] The learned sentencing magistrate directly considered the imposition of a sentence of imprisonment to the rising of the court and rejected that. In so doing, and in the reasons to which I have referred, he gave reasons for imposing a sentence which was not partly suspended.

Ground 2

[12] The appellant submitted that the learned sentencing magistrate failed to give sufficient weight to the principle of rehabilitation. It was put that the gap in time between the appellant being released from prison on 1 May 2006 and his being sentenced for this offence allowed the appellant to demonstrate his prospects of rehabilitation. It was submitted that he had gained full-time employment and had continued in that employment. He had abstained from drinking alcohol and had been reunited with his wife and three year old child.

[13] While it is true that there were signs of rehabilitation and that this aspect of sentencing should never be lost sight of: *Yardley v Betts* (1979) 22 SASR 108 at 112, the evidence of rehabilitation was quite limited. The learned sentencing magistrate took those matters into account. He observed that he did not "want to impose a sentence which is going to send you away from the path of rehabilitation". He went on to say:

> "Although in the last three months I am told and I hope it's the case that you are trying to make serious efforts to change your ways, please understand I don't want to impose any sentence which might deter that or which might be crushing. But in addition I must impose a sentence which is the minimum which I consider would be justified."

[14] In the circumstances, the appellant's submission that the learned magistrate did not give sufficient weight to the appellant's prospects of rehabilitation cannot be sustained. The sentence is not so crushing as to destroy the appellant's prospects of rehabilitation. No sentencing error by the learned magistrate has been demonstrated.

[15] It was not submitted by counsel for the appellant that the age of the matter mitigates sentence.

[16] The appeal is dismissed. I will hear the parties further as to costs.
