

Pike v Rigby [2011] NTSC 97

PARTIES: PIKE, Timothy
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: 25 of 2011 (21023075)

DELIVERED: 28 November 2011

HEARING DATES: 24 November 2011

JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: FONG LIM SM

CATCHWORDS:

APPEAL AGAINST SENTENCE – manifestly excessive – negligently causing serious harm – young adult – one punch – home detention – appeal dismissed

Criminal Code (NT) s 174E
Sentencing Act s 44, s 45, s 46, s 47, s 48

Dinsdale v The Queen (2000) 202 CLR 321; *Hampton v The Queen* [2008] NTCCA 5; *Ross v Toohey* [2006] NTSC 92, followed

REPRESENTATION:

Counsel:

Appellant: I Rowbottom
Respondent: I Taylor

Solicitors:

Appellant:
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

Pike v Rigby [2011] NTSC 97
No. 25 of 2011 (21023075)

BETWEEN:

TIMOTHY PIKE
Appellant:

AND:

KERRY ANNE RIGBY
Respondent:

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 28 November 2011)

Introduction

- [1] This is an appeal against sentence.
- [2] On 24 August 2011 following a plea of guilty, the appellant was convicted by the Court of Summary Jurisdiction of negligently causing serious harm contrary to s 174E of the *Criminal Code* (NT). He was sentenced to a term of imprisonment of eight months which was suspended upon him entering into a home detention order on conditions. The appellant was also ordered to make restitution.
- [3] The express conditions of the appellant's home detention order are that he shall: (a) reside at 7 Mopoke Court Wulagi and shall not leave those

premises/that place for a period of eight months except as permitted by the Director of Correctional Services or an authorised Surveillance Officer; (b) be under the supervision and obey all reasonable directions of the Director of Correctional Services or an authorised Surveillance Officer; (c) wear or have attached a monitoring device and allow the placing or installation on the premises or place of residence of the offender the related machine, equipment or device in accordance with the directions of the Director; (d) not consume or purchase alcohol and to submit to random breath analysis; (e) obey the directions of his Probation and Parole Officer regarding the wearing of a monitoring device; and (f) participate in assessment counselling and/or treatment [as directed] by his Probation and Parole Officer. Further conditions are imposed on the appellant under r 4 of the *Prisons (Correctional Services) (Home Detention Orders) Regulations*. Under those regulations the appellant may, with the approval of the Director, attend at a place of religious worship or an educational or rehabilitation centre.

- [4] The sole ground of appeal is that the sentence was manifestly excessive in all the circumstances of the offender and the offending.
- [5] Counsel for the appellant also submitted that there was an apparent lack of consideration of a discount for the appellant's early plea by the sentencing magistrate. However, this submission cannot be sustained. I accept the respondent's submission that the sentencing magistrate is an experienced magistrate and a discount for an early plea has been a fundamental

sentencing principle for many years, one which is legislated for, and it would be artificial to assume that because no reference was made to a discount for a plea that such a fundamental principle had been overlooked.

Home detention orders

- [6] The provisions for home detention orders are in Part III, Division 5, Subdivision 2 (s 44 to s 48) of the *Sentencing Act*. Home detention orders are almost as serious a disposition as a sentence of actual imprisonment as the detainee's freedom of movement is severely constrained¹. The consequences of a failure to comply with a home detention order may be very serious, particularly if the breach is constituted by further offending punishable by imprisonment, because in those circumstances the court must revoke the order and order the offender to serve the whole of the term of the sentence without any credit being given for time already served². Courts consider home detention orders to be a real alternative to short sentences of actual imprisonment³.

The principles applying to “manifestly excessive” as a ground of appeal

- [7] The principles that apply when considering whether or not a sentence is manifestly excessive were considered by the Northern Territory Court of Criminal Appeal in *Hampton v The Queen*⁴. The Court of Criminal Appeal applied the principles enunciated by the High Court of Australia in *Dinsdale*

¹ *Ross v Toohey* [2006] NTSC 92 per Mildren J at [18].

² s 48(6) *Sentencing Act*.

³ *Ross v Toohey* [2006] NTSC 92 per Mildren J at [19].

⁴ [2008] NTCCA 5.

*v The Queen*⁵. Riley J with whom Martin CJ and Southwood J agreed stated at par [44] that:

It is necessary for the excess to be "plainly apparent": *Dinsdale v R*. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon an appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive. The sentence must be so very obviously excessive that it was unreasonable or unjust.

[8] As has been observed on numerous occasions, a submission that a sentence is manifestly excessive is not one which is capable of a great deal of elaboration.

The facts

[9] The facts of the offending are as follows.

[10] At around 7.30 pm on 26 March 2010 the appellant attended an 18th birthday party at the Cyprus Hall in Karama. There were 100 guests at the party. During the course of the evening the appellant consumed alcohol and became intoxicated.

[11] Shortly before midnight the party was closed down by the organisers due to glasses being smashed and damage being caused to the Hall. As a result

⁵ (2000) 202 CLR 321 at [6].

some of the guests became upset and there was an altercation involving the party organisers and these guests.

[12] As the guests were leaving the appellant walked up behind Taylor Di Carlo, the victim, and punched him once to the right side of his face with a clenched fist. The force of the punch dislodged several of the victim's teeth and knocked him to the ground. He did not lose consciousness and he did not suffer concussion. His soft tissue injury was limited to minor swelling and minor lacerations and bruising.

[13] The victim was taken to the Royal Darwin Hospital by ambulance and received emergency medical treatment. After attending Royal Darwin Hospital he attended at Palmerston Dental Surgery where he was examined by Dr George Lathouras. The victim presented with a displaced upper right canine, upper right lateral incisor and upper right central incisor. The victim's displaced teeth required surgical repositioning under local anaesthetic and splinting with wire and white filling material. The right upper canine required immediate commencement of root canal treatment and following a review, at a later date, the victim's upper right lateral incisor and upper right central incisor also required root canal treatment. The wire splint has since been removed.

[14] All of the victim's displaced teeth are at risk of experiencing root resorption and are likely to require extraction in the future. The ideal treatment will be the placement of three titanium implants which retain porcelain crowns. If

the victim's injuries were left untreated it is more than likely that significant and longstanding injury and loss of function would have resulted. This would be in the form of physical disfigurement, pain and infection, loss of function and eventually loss of these teeth. In his victim impact statement the victim stated that since the incident he has suffered from low self esteem.

[15] After he king hit the victim the appellant left the area. He declined to speak to the police in a formal record of interview.

[16] The appellant is a first offender. At the time of the offending he had just turned 18 years of age. He completed year 10 of High School and since leaving school he has been in gainful employment. He is employed as a driver with U Cart Concrete. He comes from a good and supportive family and he is a good Australian Rules football player.

[17] By way of explanation of the offending the Court of Summary Jurisdiction was told that the appellant had tried to break up the altercation that occurred at the Cyprus Hall and while he was doing so he received a blow to his head. As a result he became extremely frustrated. Somebody told him that the victim had punched him and he then struck the victim. However, the appellant struck the wrong person as the victim had not struck the appellant.

[18] By way of mitigation the Court of Summary Jurisdiction was told that the offending was completely out of character. Prior to committing the offence the appellant had a good reputation. The appellant had offered an early plea

to the charge and he was genuinely remorseful for his conduct. He had met with the victim and apologised to him and he was prepared to make restitution. The appellant was a young man who had good prospects of rehabilitation.

The remarks of the sentencing magistrate

[19] When sentencing the appellant the sentencing magistrate made the following remarks.

I said to you before when I dealt with you on the other matter which I found you not guilty, that to get involved in this sort of behaviour in the situation that you did is clearly behaviour that you need to stay away from. There has been a lot said in the media about how a single punch can kill and it is particularly poignant for Sergeant Meredith to be here today. It is clear on this occasion how dangerous this could be because [the victim] hit his head on the way down and that is where the danger - that is where the injury came from.

You are a young person and as a young person I have to accept that your rehabilitation is something that is probable. I believe that you come from a good family and I believe that you obviously have the support of your family, even though mum and dad have left town for business purposes. I know that your sister obviously supports you. The references that have been provided to the court show me that you are normally a responsible young man.

It is a serious offence, the consequences are serious and the maximum penalty is very high. You are being dealt with as an adult, not a youth. I think a term of imprisonment is warranted. [However] in your case I do not believe that sending you to Berrimah Prison today is going to be of any benefit to the community or to yourself and your rehabilitation.

There will be a term of imprisonment but it will be suspended upon a home detention order being entered into. You have had that

explained to you by the probation and parole officer you would have seen for assessment.

Basically, you have to do everything they tell you to do. You cannot drink alcohol. You must submit to breath analysis and be at home. You may have to wear a monitoring device but that is a matter for the discretion of the probation and parole officer. Obviously, if you are employed you could get permission from your probation and parole officer to go to work. You will be going to work and staying at home.

You will be paying restitution to Mr Di Carlo ... and that will be within three months and you will be back to court at 10 o'clock on 24 November to show cause why you have not paid restitution if you have not paid the [restitution].

You will be found guilty and convicted and sentenced to a term of imprisonment of eight months. That term of imprisonment will be suspended from today upon you entering into a home detention order for eight months. The conditions that I have spoken to you about will be part of that home detention order.

[20] It is apparent that the sentencing magistrate gave weight to the dangerous nature of the appellant's conduct, the appellant's young age, the appellant's prospects of rehabilitation, his family support, the appellant's prior good character, the maximum penalty, the fact that the appellant was being sentenced as an adult, and the impact that a term of actual imprisonment would have on the appellant. The most significant weight was given to the sentencing purposes of general deterrence and rehabilitation.

Consideration

[21] In my opinion the sentence imposed on the appellant was not manifestly excessive. The sentencing magistrate did not act on a wrong principle or misunderstand or wrongly assess some salient feature of the evidence. The

maximum penalty for the offence of negligently cause serious harm is 10 years imprisonment. The conduct of the appellant was objectively serious. He deliberately king hit the victim from behind with considerable force and the victim who was unguarded was knocked to the ground and sustained serious injuries. The victim did nothing to provoke the attack upon him. The appellant's conduct involved a great falling short of the standard of care that a reasonable person would exercise in the circumstances of this case and a very high risk of serious harm. Such offences are prevalent and the courts must do what they can to protect the community against such conduct. Having had regard to the objective seriousness of the offence a starting point of 10 to 11 months imprisonment was within the range for the instant offence.

[22] Further, the sentence of home detention imposed on the appellant by the Court of Summary Jurisdiction gives due weight to his subjective factors including his age, his prior good character and his prospects of rehabilitation. The appellant has been able to continue his employment and he has commenced or is about to commence an appropriate rehabilitation course.

[23] While it is arguable that another sentencing magistrate may have accorded the appellant greater leniency or mercy because of his age and his prior good character that does not mean that the sentence imposed on the appellant was manifestly excessive. Given the prevalence of such offences and their objective seriousness it is appropriate that significant weight be given to the

sentencing purposes of general deterrence and to denunciation. The appellant's conduct was highly dangerous and the objective seriousness of his conduct overrode the mitigating factors of his age and prior good character.

[24] The appeal is dismissed.
