Kurawul v McMaster & Anor [2005] NTSC 71

PARTIES:	KURAWUL, Alfonso v McMASTER, Dean and KENNEDY, Gavin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 36 of 2005 (20217655) JA 37 of 2005 (20514870) JA 38 of 2005 (20514893)
DELIVERED:	28 September 2005
HEARING DATES:	22 September 2005
JUDGMENT OF:	MARTIN AJ

CATCHWORDS:

CRIMINAL LAW - Appeal - Justices - Appeal against sentence - Aggravated assault and fail to comply with restraining order

Justices Act (NT) 1928

REPRESENTATION:

Counsel:

Appellant:	P Dwyer
First & Second Respondent:	F Hardy

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service
First & Second Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	mbf0505
Number of pages:	10

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

Kurawul v McMaster & Anor [2005] NTSC 71
No. JA 36 of 2005 (20217655)
JA 37 of 2005 (20514870)
JA 38 of 2005 (20514893)

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 Darwin

BETWEEN:

KURAWUL, Alfonso
Appellant

AND:

McMASTER, Dean
First Respondent

AND

KENNEDY, Gavin
Second Respondent

CORAM: MARTIN AJ

REASONS FOR JUDGMENT

(Delivered 28 September 2005)

[1] The appellant appeared before the learned Chief Magistrate in the Court of Summary Jurisdiction in Darwin to plead guilty to a number of offences.

[2] The date on which the proceedings commenced is unclear. It was either 26 or 27 July 2005. The records do not make it quite sure, but in my view it is probably 27 July 2005, there being an adjournment on the first day and the matter resumed on 28 July 2005.

[3] The appellant was sentenced on 28 July 2005 for firstly, an aggravated assault, it being male upon female, on the 17 August 2002. The penalty for that is $2000 or imprisonment for six months and he was sentenced to seven days imprisonment concurrent with a sentence imposed for an assault on that day.

[4] The next offence occurred on 20 February 2005. Again an assault aggravated by the fact that it was conducted upon a female, and five years is the maximum. Convicted and sentenced to eight months' imprisonment for failure to comply with the restraining order associated with that offence. He was convicted and sentenced to 14 days imprisonment concurrent with the assault of that day, cumulative on the sentences which were imposed in respect to the offences on the 17th of August.

[5] The last matter he faced was that on 22 June 2005 he failed to comply with a restraining order and for that he was sentenced to 14 days imprisonment cumulative on those previous sentences. The sentence was therefore 14 months and 14 days commencing on 22 June 2005.

[6] The learned Chief Magistrate ordered the sentence be suspended after he served seven months, with an operational period of two years from the date of his release with supervisory conditions for 12 months.

[7] The circumstances of the defendant, as outlined by his Worship, were these, taken from his sentencing remarks. As to the first two matters the facts as recited by the learned Chief Magistrate are that:

> He was cranky with his wife about food and that for no reason beyond that, in other words as it was put without provocation by her the appellant kicked her three times to her side with his bare foot. She cried out when he started kicking her and cried harder each time she was kicked. She ended up on the floor and was very scared; she got up and ran away. She sustained considerable bruising and it was hard for her to move for several days.

[8] The learned Chief Magistrate regarded that as being a very serious assault that was committed upon the appellant's wife and who, he said, undoubtedly deserved the protection of the law. It is serious also because she sustained injury as a result, and as was noted, it was the third time the court had to deal with him in relation to that kind of offence.

[9] For the second of the two offences, the same lady was walking across the community oval and she had in her arms a one year old child. She saw the appellant and she became frightened. She tried to move away. The appellant caught up with her, got in front of her, and struck her with his fist to her left eye. She still had the child in her arms and fell to her knees and the appellant said he walked away. Another serious assault charge, it was said. Serious because of the same pattern which has been taken into account

previously and it was important, as it was remarked, that both assaults had taken place whilst the appellant was subject to an order of the court.

[10] The order there referred to is the domestic violence order, which was in force on each of those occasions. The first assault took place about two months after the order was put in place and then the second only a week or two after the order had been made by the court breaching two separate orders.

[11] The learned Chief Magistrate remarked that it would seem to him that contrary to what counsel had put on behalf of the appellant, the appellant really did not care too much about the laws the court makes and that he would conduct himself as he saw fit. The purpose of the sentence was said to ensure that he fully understood the courts would not accept that behaviour and will do everything they can to protect women from conduct of that sort.

[12] The third matter, that is the last of the offending, related to a further breach of a restraining order when the appellant was found in the house of the same woman contrary to provisions of that order.

[13] The offender had a series of prior convictions which the learned Chief Magistrate took into account. Two aggravated assaults in October 1998 for which he had been sentenced to three months imprisonment cumulative in respect of each of those convictions, but they were suspended after one month and an operational period of two years was fixed.

[14] An offence committed in January 1999 came before the court in December 1999 when the appellant was convicted of an assault causing bodily harm on the same lady. He was sentenced to imprisonment. The length of the sentence to be served was unclear and remains unclear, notwithstanding the record being before the learned Chief Magistrate, and has not been clarified before this court.

[15] The time to be served is not clearly made out, but a two year operational period was fixed, and supervision for six months, indicating to me that sentence was either just wholly or partly suspended.

[16] All those assaults were upon the same victim as here. As the learned Chief Magistrate pointed out, of the five assaults on the woman, that is the appellant's wife, including these, two of them had been in breach of domestic violence orders.

[17] In the context of breaches of domestic violence orders, in my opinion, it is quite right for the learned Chief Magistrate to say that the appellant did not really care much about the laws the court makes.

[18] The appellant was not dealt with for the 2002 offences until 2005 because he could not be found. His breach of bail, I note, was dealt with in the courts in 2003.

[19] In the course of submissions to the learned Chief Magistrate, it was observed that the offence was committed in the face of the domestic

violence orders and as was put, on prior behaviour, but the Chief Magistrate did hen not know that the prior conviction for aggravated assault involved the same victim.

[20] Counsel then appearing for the appellant said that it was a prevalent and serious offence and that deterrence was required, quite rightly considering that. He pointed out that bodily harm caused by the first assault was only bruising and that no offensive weapon was used and the appellant was not wearing shoes.

[21] The value of the guilty pleas was stressed, given the time lapse since the first offending and what was said to have been reluctance on the part of the victim, in that community particularly, in testifying against her husband or ex-husband.

[22] The cause of the assaults was put down by counsel on behalf of the appellant as to be momentary loss of control attributed to the victim's conduct which caused some affront to the appellant.

[23] At the close of submissions the learned Chief Magistrate adjourned the proceedings to enable inquiries to be made as to whether the victim of the prior assaults was the same as here. The next day it had been confirmed that she was, and it was noted that on one occasion the appellant had used a hammer.

[24] In the course of making those inquiries a report concerning the appellant prepared by Correctional Services in 1999 came to light. The police prosecutor said that it continued to apply almost as if it was written in this month, this year.

[25] It narrated, in parts, conditions in Port Keats where the offences took place and where the appellant lived. The place which, I have no doubt, would have been visited by the learned Chief Magistrate in the course of his judicial functions on many occasions.

[26] Counsel for the appellant before the learned Chief Magistrate did not object to the report being taken into account in those proceedings. The learned Chief Magistrate did not refer to the report in the course of his sentencing remarks. He said little about the appellant's personal circumstances, other that that he was young in "relative terms". He expressed the hope that the sentence that he imposed would teach the appellant and others like him that domestic violence should not happen. Personal and general deterrence was obviously in mind.

[27] The grounds of appeal, upon the hearing, revolved around that the sentence was manifestly excessive, followed by propositions put in an effort to demonstrate that ground; that the Chief Magistrate erred in giving excessive weight to general and specific deterrence; failed to give sufficient weight to the circumstances of the appellant, and in that, failed to consider the appellant's prospects of rehabilitation.

[28] Further, in considering that the appellant appeared to have spent time in custody and the learned Chief Magistrate erred in failing to take into account the totality principle.

[29] As to failure by omission, the respondent submits, with reference to authority, other matters which were pointed out to which no particular attention had been paid. But it is well to remember that much business of the Court of Summary Jurisdiction is conducted in circumstances that do not present opportunity to provide detailed considered reasons for decision. See the authority of this court to that effect. With respect I agree.

[30] I do not accept that when an experienced Territory magistrate, who is familiar with sentencing principles, sits in the locality where the offences are committed and is dealing ex tempore with an all too common type of prevalent offending by a person who is obviously a common type of offender, needs to recite details from materials and submissions just placed before him for consideration if he or she it to avoid having sentences overturned on appeal.

[31] To require otherwise would place an intolerable burden upon the magistrates. Of course, if there is something about the circumstances of the offence or the offender, that takes the case out of the familiar, then it is well to deal with that matter.

[32] Here, the learned Chief Magistrate specifically dealt with the matters which he considered most important, the history of the appellant's offending, the

prevalence of the offending and the appellant's age. It is well nigh impossible for a Court of Appeal to make findings about the weight given to the various factors to be taken into account in fixing a sentence.

[33] In the course of his remarks the learned Chief Magistrate said:

> The purpose of my sentence today is to ensure that he fully understands the courts will not accept such behaviour.

[34] I do not accept that he thereby excluded all other considerations from his sentencing. Those remarks must be seen in the context of his remarks on the whole.

[35] I reject the arguments that the learned Chief Magistrate failed to consider the appellant's prospects for rehabilitation. He expressly referred to his age:

> As the only good things I've said about him and I express the hope that the appellant would be able to start work within the community in a positive way.

[36] His suspension of the sentence after seven months also recognises a sentencing option to be rehabilitation.

[37] In my opinion there is no substance to the submission that the learned Chief Magistrate erred in holding that the appellant had previously spent time in custody - he had. The record shows one month in 1997, 14 days in 1998, at least one month of a suspended sentence of three months in 1998. It may have been more but the record is unclear and, as I have already remarked, has not been clarified in this court.

[38] No evidence was put before this court that tends to show that any of the individual sentences fell outside the acceptable range. The learned Chief Magistrate must be taken as having a general understanding about that. Indeed, during the course of submissions he said:

> It's not unusual to get 10 or 12 months for a male to female assault… But here you have got a male/female assault in the face of domestic violence order with prior behaviour.

[39] And none of that is specifically challenged. And in those circumstances, what was said and what the learned Chief Magistrate had in mind, cannot be disputed.

[40] As to the totality principle, it is plain that the learned Chief Magistrate did not expressly refer to it. However he did construct the overall sentence by applying the concepts of cumulation and concurrency.

[41] I do not consider that the learned Chief Magistrate erred in the result.

[42] It is not manifest to me that the sentence of 14 months and 14 days is excessive, nor is the period to be served before the sentence is suspended.

[43] For these reasons the appeal is dismissed.

———————————————————————————