Baillie v Dixon [2006] NTSC 10

PARTIES:	BAILLIE, Neil
	v
	DIXON, Garnet Alan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 40/2005 (20511816)
DELIVERED:	13 February 2006
HEARING DATE:	9 February 2006
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

Magistrates – appeal against sentence – police officer – previous good character – indecent assault on a female - manifestly excessive – appeal dismissed.

R v Anzac 50 NTR 6; *Cranssen v The King* (1936) 55 CLR 509; *House v The King* (1936) 55 CLR 499; applied

R v Harrop [1979] VR 549; *White v Brown* (2003) 175 FLR 325, referred to

REPRESENTATION:

Counsel:

Appellant:	M Preston
Respondent:	A Barnett

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

Baillie v Dixon [2006] NTSC 10
No. JA 40/2005 (20511816)

BETWEEN:

NEIL BAILLIE
Appellant

AND:

GARNET ALAN DIXON
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 13 February 2006)

Introduction

[1] This is an appeal against a sentence of three months imprisonment, to be suspended after seven days, that was imposed on the appellant by the Court of Summary Jurisdiction on 14 October 2005 for the crime of indecent assault on a female. The appeal is brought pursuant to s 163 Justices Act by a notice of appeal dated 14 October 2005. An appeal against conviction was abandoned on 9 February 2006.

[2] On 9 February 2006 the appellant was granted leave to amend the grounds of appeal. The appellant relies on four grounds of appeal. First, the Court of Summary Jurisdiction erred in finding that the fact that the appellant was a serving police officer was an aggravating circumstance. By so doing it is

said that the Court of Summary Jurisdiction took an extraneous factor into account. Second, the Court of Summary Jurisdiction misapprehended the facts in that it found without any evidence that the appellant misused his position as a police officer. Third, the Court of Summary Jurisdiction misapprehended the facts in that it found without any evidence that the appellant stood in a position of trust to the victim and that he breached that trust. Fourth, the Court of Summary Jurisdiction imposed a sentence of imprisonment on the appellant that was manifestly excessive.

Nature of the appeal

[3] An appeal against sentence is an appeal against the exercise of a judicial discretion. The Supreme Court may intervene and exercise its own discretion in an appeal against sentence from the Court of Summary Jurisdiction if a sentencing magistrate acts upon a wrong principle, if the magistrate allows extraneous or irrelevant matters to guide or affect the sentence that is imposed, if the magistrate mistakes the facts or if the magistrate does not take into account some material consideration: *House v The King* (1936) 55 CLR 499 at 505.

[4] On occasion it may not appear how the sentencing magistrate has reached the result embodied in the sentence subject to appeal, but, if upon the facts it is unreasonable or plainly unjust, the Supreme Court may infer that in some way there has been a failure to exercise properly the discretion that the law reposes in the Court of Summary Jurisdiction. In such a case, although

the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred: *House v The King* (supra) at 505. For a substantial wrong to be established, the appellant must show that the sentence was clearly and obviously and not just arguably excessive: *Cranssen v The King* (1936) 55 CLR 509 at 520. There is a strong presumption that the sentence imposed is correct: *R v Anzac* 50 NTR 6 at 11.

The appellant's argument

[5] The appellant argues that the fact the appellant was a serving police officer at the time he committed the offence is extraneous to the offence for which he has been convicted. The offence was not committed during the performance of his duty as a police officer and he did not misuse his position as a police officer when he committed the offence. The appellant simply visited the victim's home as a friend pursuant to a standing invitation to do so. He was not undertaking police business at the time he committed the offence. He did not go to the victim's home under the pretext of doing police business. The offence was committed on the spur of the moment. There is no trust involved in such a visit.

[6] Finally, the appellant argues that the sentence imposed was manifestly excessive. It is not argued that the sentence imposed is out of line with what is commonly accepted. It is not a disparity case. It is a case in which the appellant argues that the excess of the sentence is obvious. In this

regard the appellant relies on the appellant's age, his previous positive good character, the hardship that he will incur as a result of a conviction, the risk he faces in prison and the fact that the offence is at the lower end of seriousness for an offence of this type. The offence was of momentary duration and involved touching outside of the victim's clothing.

The facts

[7] The facts of the offending are as follows. The victim, a married woman, lived with her husband at a house in Patterson Crescent, Alice Springs. On Sunday 15 May 2005 she arrived home at approximately 4.30 pm. She had spent part of the day working for St Johns Ambulance volunteers at an off road racing event. Her parents were at home. She showered and changed into an old baggy t-shirt and basketball shorts. The sleeves of the t-shirt came down to about her elbows and the shirt itself almost to her knees. Her parents left the premises. She remained at home waiting for her husband to arrive home from work.

[8] At approximately 7.50 pm she heard tapping on the front window of her house. She opened the front door and was startled by the appellant who was a male police officer with whom she and her husband were acquainted. He was in civilian clothes. Upon recognising him she invited him inside. The appellant had a standing invitation to visit the victim and her husband. However, this was the first occasion he had visited them. The appellant was not on duty. He gave the victim a kiss on the cheek on entering the house

and the victim asked the appellant to take a seat. They sat on sofas in the living area of the victim's house. They had a general discussion about a number of matters. The victim told the appellant that her husband was due home from work shortly. The appellant told the victim that he was just checking up on things in the neighbourhood.

[9] After a short time the appellant told the victim that he was going to leave. He got up and went towards the door. As he did so he observed a collage of photographs on the wall near the door and he commented that he wanted to do something similar for a friend. They walked over to the photographs and the appellant complimented the victim on the quality of the photographs. When he did so he placed the palm of his hand on the victim's back and he rubbed his hand up and down. He commented on the fact that victim was not wearing a bra. She said that it was her house and she did not need to wear a bra at home. The victim began to feel uncomfortable. However, she did not convey this fact to the appellant. The appellant then made a hand gesture indicating that the victim should lift up her t-shirt so he could see her breasts. The victim declined to do so. She was shocked at what the appellant had done and she wanted him to leave her house. The appellant stated that he had to leave and walked towards the door.

[10] The victim unlatched the security door. As the appellant walked towards the security door he went to kiss the victim again. As the appellant moved his head towards the victim she realised that he was not directing the kiss to her cheek. She moved her head to try and avoid being kissed on the lips and the

appellant ended up kissing her on the bottom lip with an open mouth. The victim felt the appellant's tongue on her lip. As the appellant took a step outside the door he commented, "it is cold tonight," and he looked directly at the victim's breasts. The victim ignored the comment and the appellant reached out and grabbed her left breast with his right hand. He cupped her left breast with his right hand and rubbed her nipple with his thumb. The victim then told the appellant to "bugger off". He made a further sleazy comment and then left the premises.

[11] At no stage did the victim flirt with the appellant or encourage him to behave in such a manner. The victim did not give the appellant permission to grab her breast. She objected to him doing so.

[12] The next day the victim made a complaint to police and she was asked by police if she was prepared to engage in a pretext telephone conversation with the appellant in the hope of obtaining a recorded admission from him about his criminal conduct. The victim said that she was prepared to do and such a telephone conversation between the appellant and the victim took place and was recorded. During the course of the pretext conversation the appellant apologised for his actions.

[13] The appellant was charged with the indecent assault of the victim and a trial proceeded in the Court of Summary Jurisdiction. The victim was cross examined during the course of the trial by the appellant's counsel to the effect that the appellant did not grab her left breast. The appellant gave

evidence at the trial that he did not indecently assault the victim. The appellant said he did not grab the victim's breast. He squeezed her left arm when he said goodbye. He said that the apology he gave to the victim during the pretext conversation was for the sleazy comments he made to the victim when he visited her house.

[14] The victim was believed and the appellant was disbelieved by the sentencing magistrate and the appellant was convicted of the crime of indecent assault of a female. Following his conviction the appellant was sentenced by the Court of Summary Jurisdiction to three months imprisonment to be suspended after seven days. An operational period of 12 months was specified under s 40(6) Sentencing Act.

[15] As a result of the crime that was committed by the appellant the victim has a lack of trust in strangers. She has become reserved with people she knows. At night she has become jumpy when she hears any sound. She is not able to sleep properly. She has been sad and is experiencing mixed emotions. She feels insecure when she is at home alone.

The remarks of the sentencing magistrate

[16] During the course of his remarks on sentence on 14 October 2005 the sentencing magistrate made the following comments:

> "The offence is aggravated by the fact that he (the appellant) was a serving police officer and that he misused his position in that regard, in that he was aware that the victim inherently trusted him because of that fact together with the fact that he was a friend of her husband. It might reasonably be thought that he was in a quasi position of trust

> to that extent. That is balanced somewhat as the loss of his career as a police officer is a considerable impost that represents significant punishment in itself."

[17] It is said by Counsel for the appellant that it is the making of these remarks by the sentencing magistrate that establishes the errors relied on in the first, second and third grounds of appeal.

[18] The remarks of the sentencing magistrate that are said to be in error were preceded by the following remarks:

> It was put by counsel for the prosecution that the offending was serious and that the defendant's remorse must be balanced against his evidence at the hearing where he failed to acknowledge the offence. It was put that the offence is aggravated for sentencing purposes by the fact that he was a police officer and at the time he gave the impression that he was acting in a quasi-official capacity by telling the victim that he was checking on the neighbourhood. The prosecution counsel also referred to the victim impact statement, noting that the offence had a significant impact on the victim and further submitted that imprisonment was warranted in the circumstances.
>
> In my view, while the offence is at the lower end of seriousness for an offence of this type in that it was of momentary duration and involved touching outside the victim's clothing, it is nevertheless inherently serious. Although momentary it followed a period where the defendant was attempting to groom the victim to accept his advances and a course of inappropriate albeit not criminal behaviour on his part.

[19] All of these remarks of the sentencing magistrate, including the remarks said to be made in error, form part of his Honour's remarks in relation to the objective seriousness of the offence and the moral culpability of the offender. To understand what is meant by the remarks it is necessary to give

further consideration to the facts, and to the submissions made by both counsel at the time of the submissions on sentence.

[20] The salient facts are as follows. The victim is a finance support officer in the Department of Health. Her husband is a prison officer. The appellant is 43 years of age. He has been a police officer for many years. He had known the victim and her husband for about two years at the time he committed the offence. The victim and the appellant first met when her husband was working at a motor dealership in Alice Springs. She was having lunch with her husband at his place of work when the appellant dropped in. After this meeting the victim and the appellant became acquaintances. The appellant carried out some of his duties in the suburb of Larapinta which is where the victim and her husband live. He attended a public meeting which the victim and her husband also attended about the level of crime in Larapinta. However, they did not see each other socially. About two weeks before 15 May 2005 an aboriginal man assaulted an aboriginal woman in the vicinity of victim's front lawn and the victim and her husband went to the police station to make a statement about the incident. The appellant was at the police station when the victim and her husband made their statements about the assault by the aboriginal man on the aboriginal woman. He came and spoke to them. He spoke to them separately as they were making their statements in separate rooms at the police station. The appellant told the victim if she ever needed any assistance when her husband was not at home she could give him a call. The

victim's husband gave the appellant his email address and he asked the appellant if he could email a copy of his statement about the incident in the vicinity of his front lawn to him. The appellant agreed to do so and the victim's husband invited the appellant to drop around for a drink at anytime that suited him. The victim and the appellant exchanged emails. The first email was from the appellant to the victim. It was just a quick hello. After that email the victim, the appellant and others occasionally exchanged jokes via email. The jokes were sent by group email to a number of people.

[21] As I have stated above when the appellant arrived at the victim's house at 7.50 pm on 15 May 2005 the victim invited the appellant in and he kissed her on the cheek. He asked her if her husband was at home and whether he was on day or nightshift. The victim invited the appellant to sit down and a conversation ensued about the problems the victim and her husband had been having with their neighbours and about the efforts that her husband was making to overcome the problem including letters that he had written to members of Parliament. It was the victim's testimony that during this conversation the appellant told the victim that prior to coming into her house he was checking on the neighbourhood and just making sure the neighbours next door weren't giving her a hard time. The appellant disputes that he made this statement. His evidence was that he was out for a recreational walk and he decided to take up the invitation to drop in and visit. According to him during the general discussion with the victim he merely asked how the victim's neighbours were going. The sentencing

magistrate preferred the testimony of the victim to that of the appellant. The victim and the appellant also discussed a football match between the police and prison officers and an interview for a job that the victim was about to undertake. These conversations were followed by the events referred to in paragraphs [9] and [10] above.

[22] It is not in issue between the parties that on the evening of 15 May 2005 the appellant had gone for a recreational walk out to the Desert Park and ultimately up Patterson Crescent and that he dropped in on the victim in accordance with her husband's invitation to drop in and visit the victim and her husband.

[23] What appears to have happened is that when the appellant found the victim at home alone he endeavoured to put himself in the best light by showing concern for the victim and her husband and by informing her that as a police officer he was keeping an eye on things in their neighbourhood. He then made various sexual advances on the victim including rubbing the victim's back, commenting about the fact that she was not wearing a bra and kissing her on the lips. All of these advances were not responded to or demurely declined or attempted to be avoided by the victim. The victim behaved in a demure manner because of the appellant's position as a police officer and the nature of his relationship with the victim and her husband. The appellant must have appreciated his advances were being declined. Yet he proceeded to grab the victim's left breast in circumstances where the victim had behaved in a trusting way by inviting him into her house for a chat

while they awaited the arrival of her husband. She had obviously done so because of their acquaintance and the appellant's assistance and offers of assistance to the victim and her husband as a police officer. The appellant then behaved in an opportunistic and predatory manner in circumstances where the victim's vulnerability had been created by the nature of the relationship that had developed between them and her trust in him. The appellant would not have had the opportunity to do what he did but for the fact that the victim trusted him. Part of that trust was based on the fact that the appellant was a police officer who had assisted and offered to further assist the appellant and her husband as a police officer. The appellant clearly breached that trust when he behaved in a predatory manner while the victim was in a vulnerable situation.

[24] During the plea in mitigation in the Court of Summary Jurisdiction it was submitted by Mr McBride on behalf of the appellant on the issue of trust that "he (the appellant) has been a police officer for many years and in that role he has gained the trust of the community as the community generally trust police officers and he has been helpful to them." It was also said by Mr McBride that "he breached a trust, he breached a friendship, he breached his role in the community perceived as a law abiding citizen, a law abiding police officer. He breached that and I acknowledge that."

[25] Counsel for the respondent submitted that an aggravating feature of the offending is that the appellant's conduct, as a police officer, is a breach of trust. Counsel for the respondent said that although the appellant was not on

duty that evening, when he attended at the house he gave the impression that he was checking on the neighbourhood and acting in a quasi official capacity.

Conclusion

[26] The factual issues raised by the first, second and third grounds of appeal were substantially conceded by Mr McBride who appeared on behalf of the applicant in the Court of Summary Jurisdiction. These factors were rightly conceded.

[27] If the sentencing magistrate simply meant that crimes by police officers are always to be treated more seriously than crimes by other citizens he would be in error. While it is true that police officers take an oath or make an affirmation to see and cause the peace to be kept and preserved and to prevent, to the best of their powers, all offences against all laws in force in the Northern Territory, each offence by a person who is a police officer must be looked at in the context of its particular circumstances.

[28] Likewise the sentencing magistrate would be in error if he meant that the appellant had planned the offending and had misused his status as a police officer to gain entry into the house for the purpose of perpetrating the crime on the victim. There was no evidence to support such a conclusion and it was common ground between the parties that this was not the case.

[29] However, in my opinion the sentencing magistrate intended to convey by his remarks no more than what I have stated in paragraph [23] above. He did

not fully adopt the submissions made on behalf of the respondent. It is apparent that a relationship of trust did exist between the victim and the appellant and that the appellant took opportunistic and predatory advantage of a social situation that arose because of the trust that existed between the appellant and the victim. A trust that was created in part by the fact that he was a police officer who had assisted and offered to further assist the victim and her husband. The appellant used his position as a police officer to put himself in the best light and when that and the other sexual advances he made were unsuccessful he simply assaulted the victim by grabbing her left breast. He did so in circumstances where the victim was extremely vulnerable because she had trusted him and allowed him to come into her home at night while she was alone. Such conduct is more morally culpable than conduct where such a relationship and such circumstances do not exist. While the offence is at the lower end of seriousness for such an offence, it is an objectively serious offence.

[30] Further the sentencing magistrate did not give the moral culpability of the offender or the objective serious of the offence undue weight. He had regard to all other sentencing factors. He stated:

> I take into account the matters put on his behalf with the exception of the extent of his remorse. Although he cannot be penalised for exercising his right to have the matter proceed to hearing. He does not attract the benefit of the discount to which he would have been entitled had he pleaded guilty. In that regard he went further in this case then merely putting the prosecution to proof. He entered the witness box on his own behalf and gave evidence which I ultimately did not accept, denying the commission of the offence. This can only

> be taken to be a clear indication of a lack of remorse in the true sense for the hurt that he has occasioned the victim.
>
> …
>
> This offence attracts the operation of s 78BB of the Sentencing Act which requires that following a finding of guilt the court must record a conviction and must impose a term of actual imprisonment or one that is suspended partly but not wholly. It was put on behalf of the defendant that I should consider imposing a sentence that provides for the defendant's release on the rising of the court. I might have given serious consideration to such a disposition had this matter proceeded by way of a guilty plea that allowed some leeway for its utilitarian value and the remorse that would have been inherently demonstrated, however, that was not the case here.

[31] In other words by not pleading guilty the appellant lost the leniency and mercy that otherwise may have been afforded him by the sentencing magistrate. Such a decision was within the sentencing magistrate's discretion. The sentencing magistrate was also entitled to have regard to general deterrence. Such offences committed while a woman is at home alone at night cause considerable distress and outrage in the community.

[32] For the above reasons the first, second and third grounds of appeal cannot be sustained.

[33] As to the fourth and final ground of appeal consideration should first be given to the maximum penalty that may be imposed for such an offence. The maximum penalty for the offence is 5 years imprisonment. The maximum penalty that can be imposed by the court of summary jurisdiction is 2 years imprisonment. In addition the offence is a sexual offence. Section 78BB of the Sentencing Act provides that where a court finds an

offender guilty of a sexual offence, the court must record a conviction and must order that the offender serve a term of actual imprisonment; or a term of imprisonment that is suspended by it partly but not wholly.

[34] It should not be forgotten that a person is in custody as soon as the sentence is pronounced: *R v Harrop* [1979] VR 549 at 552. Thus a sentence to the rising of the court is a sentence of imprisonment: *White v Brown* (2003) 175 FLR 325 per Mildren J at 328.

[35] The head sentence is one twentieth of the maximum penalty that may be imposed. The period of actual imprisonment is seven days. Having had regard to all of the relevant factors including the appellant's previous positive good character, his age, the fact that this is a first offence, the hardship that imprisonment will cause to the appellant as he is a police officer and the appellant's loss of employment, I am not satisfied that the sentence was clearly and obviously excessive. The criminal act was a predatory act committed in circumstances where the victim's vulnerability was created by the trust that she had in the appellant's integrity as a known acquaintance and as a police officer. The appellant was not entitled to the leniency that he may have otherwise received had he pleaded guilty. For these reasons the fourth ground of appeal cannot be sustained.

Order

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