

Van Dang v Moore [2007] NTSC 68

PARTIES: VAN DANG, Cong
v
MOORE, David Steven

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION

FILE NO: JA 42 of 2007 (20707626)

DELIVERED: 8 NOVEMBER 2007

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JUDGMENT OF: MARTIN (BR) CJ

APPEAL FROM: Dr Lowndes SM, Court of Summary Jurisdiction, 20707626, 22 July 2007

CATCHWORDS:

APPEAL – JUSTICES APPEAL

Criminal law – going armed in public – assault – appeal against sentence – whether period of imprisonment to be served manifestly excessive – appeal dismissed.

REPRESENTATION:

Counsel:

Appellant: M Powell
Respondent: E Armitage

Solicitors:

Appellant: Northern Territory Legal Aid Commission
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

Van Dang v Moore [2007] NTSC 68
No. JA 42 of 2007 (20707626)

BETWEEN:

CONG VAN DANG
Appellant

AND:

DAVID STEVEN MOORE
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 8 November 2007)

[1] This is an appeal against a total sentence of twenty months imprisonment, suspended after service of nine months. That sentence was comprised as follows:

1. Going armed in public with a red Swiss Army pocket knife in such a manner as to cause fear to a person of reasonable firmness and courage:
12 months imprisonment;
2. Two counts of unlawful assault in circumstances of aggravation that the victim suffered harm and was threatened with an offensive weapon,

namely a knife: an aggregate sentence of twenty months imprisonment to be served concurrently with the first sentence.

- [2] In substance the appellant complains that the total sentence is manifestly excessive and in particular that the period that is to be served is manifestly excessive. Counsel also contended that the learned Magistrate erred in giving insufficient weight to the appellant's medical condition.
- [3] The appellant is now 47 years of age. He was born in Vietnam and raised in a happy and financially stable family. In the mid-seventies following the fall of Saigon, the appellant's family circumstances deteriorated. In 1988 the appellant managed to flee alone to Thailand where he resided in a refugee camp for nearly two years. The appellant arrived in Australia in 1990 and was granted Australian residency approximately 14 to 15 months later.
- [4] Due to a heart condition, the appellant has been unable to work for extended periods. At the time of his offending on 15 March 2007 the appellant had been on a disability pension for a considerable period. The pre-sentence report provided to the Magistrate disclosed that the appellant lives a lonely life centred around church and mixing with other members of the Vietnamese community, but without making close friends.
- [5] The appellant has a long history of substance abuse. He commenced using heroin in 1994 as a means of managing his pain following a heart operation.

He has also used sleeping tablets in conjunction with cannabis and morphine. Alcohol abuse has also become a problem.

- [6] The appellant committed drug offences in New South Wales in 1995 and 1996 and in the late '90s was convicted of malicious wounding and assault.
- [7] The Magistrate was provided with two medical reports concerning the appellant's heart condition. It is unnecessary to canvas the details. In addition to cardiac problems the appellant suffers from osteoarthritis in his spinal canal and associated chronic back and neck pain. The appellant has been depressed for many years and suffers from an anxiety disorder which is essentially focused around worrying about his heart and other medical conditions. He is required to take significant quantities of medication.
- [8] During the evening of 15 March 2007, as was his habit perhaps once or twice a week, the appellant attended at the casino where he consumed a considerable quantity of alcohol. The appellant told the probation and parole officer who prepared the pre-sentence report that he remembers being in a happy mood, but has no memory of events after consuming the last of the alcohol because he was drunk. The appellant says he cannot remember being asked to leave the premises and did not know what happened until he saw a security video of the events.
- [9] According to the agreed facts, at about 9.20 pm the appellant was asked to leave the casino because he was drunk. He was escorted to the front entrance by two uniformed security officers who became the victims. While

being escorted to the front entrance the appellant put his hand into his pocket and took hold of a Swiss army pocket knife attached to his key-ring. The knife had a 6 - 7 centimetre blade. As the appellant was released at the front entrance by the victims, he pulled the knife out of his pocket, turned quickly and began slashing at the victims. One of the victims sustained a 10 centimetre wound over his right lower chest wall which required surgical attention, a 10 centimetre laceration to his right forearm which required 12 sutures and a 2 centimetre laceration to his nose. The second victim sustained a 4 centimetre laceration to his left wrist.

[10] Following a struggle the appellant was restrained and placed in a detention room at the casino until police arrived. When interviewed on 16 March 2007 the appellant declined to answer questions, but commented that he was drunk and did not know what had happened. Although the injuries sustained by the victims were not life-threatening, nevertheless the attack upon the victims was not provoked in any relevant way by the conduct of the victims and occurred after the victims had released the appellant at the front of the premises. It was a very serious attack and it has had significant effects upon the victims. The first victim, who sustained the more severe injuries, was unable to return to work for two weeks and has suffered significant psychological effects upon which it is unnecessary to expand. The second victim has also experienced a psychological reaction and the episode has caused considerable stress to his family.

- [11] The Magistrate correctly classified the offending as serious and placed appropriate emphasis upon the need for general deterrence. His Honour specifically referred to the pre-sentence report and accepted that the appellant is generally sorry for what he did and that the offending was connected to his problem with alcohol. Reference was made to drug dependence. His Honour specifically took into the account the very early pleas of guilty.
- [12] The Magistrate did not specifically refer to the appellant's medical condition, but there is no reason to doubt that his Honour had regard to that condition and gave it appropriate weight. Although the medical condition might make confinement in prison more uncomfortable for the appellant, as the medical report of the consultant cardiologist states there are facilities within the prison system for treatment of that condition.
- [13] On the appeal, counsel frankly acknowledged that there is no evidence to suggest that the appellant is not being treated adequately within the prison. No doubt the appellant's depression and anxiety disorder will not be assisted by incarceration and may be exacerbated, but that mental state is not such that it can be regarded as a significant mitigating circumstance militating against a period of imprisonment to be served. I am unable to discern any error in the approach of the Magistrate.
- [14] As to the aggregate sentence of 20 months for the two offences of assault, in oral submissions counsel suggested that the period was excessive, but not

manifestly excessive. In my view the aggregate sentence of 20 months was well within the range of the sentencing discretion for the offences of assault. As to the sentence of 12 months imprisonment for going armed in public with a Swiss army pocket knife, it is beyond question that such a knife is potentially a very dangerous weapon. The circumstances of this case well demonstrate the danger of carrying such a knife in public, even if the knife is carried without any contemplation of use as a weapon.

[15] The legislature has determined that the protection of the public requires that carrying a knife in public be prohibited and classified as a criminal offence because of the great potential for serious harm and death. The maximum penalty for going armed in public is imprisonment for three years. If the Magistrate allowed a reduction of approximately 25% to reflect the appellant's plea of guilty, his Honour's starting point was in the order of 16 months.

[16] In all the circumstances, and notwithstanding that the appellant did not carry the knife looking for trouble or contemplating using it as a weapon, in my view the sentence of 12 months was not outside the range of the sentencing discretion. Indeed, counsel for the appellant conceded that the sentence was not manifestly excessive.

[17] The appellant's primary complaint is that requiring the appellant to serve nine months before being released on conditions is to impose a sentence that was manifestly excessive. I do not agree. As I have said, the offending was

serious and the appellant's medical condition can be adequately treated within the confines of the prison. This is not a case in which the medical condition is such that considerable leniency is justified when weighed against the objective seriousness of the offending.

[18] The carrying of knives and the use of knives when disputes arise is far too common in our community and experience in the criminal courts well demonstrates the tragic consequences that follow when knives are used in disputes and physical confrontations. General deterrence was of particular importance in the exercise of the sentencing discretion.

[19] The appeal is dismissed.
