*Westphal v OJ* [2011] NTSC 33

| | |
|---|---|
| PARTIES: | WESTPHAL, Lindsay<br><br>v<br><br>OJ |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| ` | |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | 21007844 |
| DELIVERED: | 21 April 2011 |
| HEARING DATES: | 1 April 2011 |
| JUDGMENT OF: | RILEY CJ |
| APPEAL FROM: | Mr BAMBER SM |

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Appellant: | CW Roberts |
| Respondent: | MJL Preston |

*Solicitors:*

| | |
|---|---|
| Appellant: | Director of Public Prosecutions |
| Respondent: | MJL Preston |

| | |
|---|---|
| Judgment category classification: | C |
| Judgment ID Number: | Ril1105 |
| Number of pages: | 9 |

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

*Westphal v OJ* [2011] NTSC 33
No. 21007844

BETWEEN:

**LINDSAY WESTPHAL**
Appellant

AND:

**OJ**
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 21 April 2011)

[1] This is a Crown appeal against sentence. The respondent pleaded not guilty to having indecently assaulted his female victim in circumstances where she suffered harm and also to having deprived her of her personal liberty. He was found guilty after trial in the Court of Summary Jurisdiction.

[2] The circumstances of the offending, as found by the learned Magistrate, were that the victim was in Australia on a visa and was looking for work in hotels in Alice Springs. As she was walking she was offered a lift by the respondent. She initially declined and then, after some persuasion on the part of the respondent, accepted. Instead of going to her intended destination she was driven by the respondent to a remote location off the

Stuart Highway. The assault which occurred at that location consisted of him touching her breast, slapping her to the back of the head and forcibly holding her arm so as to cause minor bruising. The holding of the arm and the slapping of the head occurred as she sought to escape from the vehicle. She was held for a short time in the vehicle in circumstances which amounted to deprivation of liberty. She then managed to break free from the respondent and get out of the car. She initially walked away and then, when she saw the respondent get out of the car, ran away. Although the injuries suffered by the victim were described as "minor" the experience for her was traumatic.

[3] The respondent gave evidence at the hearing and provided a quite different version of events. His evidence was rejected by the learned Magistrate.

[4] In the course of the sentencing remarks the learned Magistrate noted that the respondent was a juvenile at the time of the offending but had since become an adult. He did not have a criminal history; he had employment and a supportive family. In a pre-sentence report it was concluded that he was not in need of supervision. Character references presented on his behalf led the learned Magistrate to conclude that he was a young man living a useful, productive life in a well-adjusted family. His Honour went on to say in relation to the recording of a conviction:

> The major difficulty I have had in this case is determining whether to impose a conviction or not. Basically for the reason that I may have indicated in my comments to counsel for the prosecution, I do think this is a case where the defendant has made a big mistake as a 17-

> year-old, however given the nature of the charges, it could be a mistake that does affect him for the rest of his life if every time there is an enquiry as to whether he has a conviction, he does have to put it on his record. I do think that may be not in the interests of society. I do accept that the references that he has provided give me some considerable confidence that he will keep a good behaviour bond, learn a lesson from the whole process that he has been before the court and not re-offend.
>
> So despite the submissions of the Crown that this is a case which at the very least called for a period of detention albeit suspended, I do, for reasons I have stated, feel somewhat unusually that this is a case where despite those reasons given by the Crown and for the reasons I have tried to enunciate, I am going to impose not a suspended sentence but a good behaviour bond.

[5] The learned Magistrate proceeded pursuant to s 83(1)(f) of the *Youth Justice Act*, and without recording a conviction, imposed a bond on the respondent's own recognizance in the sum of $2000 to be of good behaviour for the period of two years.

[6] The maximum penalty for the offence of aggravated assault was imprisonment for five years. The maximum penalty for the offence of deprivation of liberty was imprisonment for seven years.

[7] The appellant has appealed on four grounds namely:

1. that the learned Magistrate erred by giving inadequate weight to the objective seriousness of the offences,

2. that the learned Magistrate erred by placing too much weight on the youth of the respondent,

3. that the learned Magistrate erred in failing to exercise his discretion to record a conviction in respect of the offences, and

4. that the sentence imposed was in all the circumstances manifestly inadequate.

**The seriousness of the offence.**

[8] There is force in the submission that this was moderately serious offending. It involved actual violence on a female and also an indecent assault. The assault was committed by the respondent upon a victim who was not known to him and who was, to a degree, vulnerable being a young female tourist in a foreign environment and trapped in his vehicle. The respondent gained the trust of the victim and enticed her to enter his vehicle. Once inside the vehicle he drove her to a remote location. He then indecently assaulted her by touching her breast and he physically forced her to remain inside the vehicle. Actual harm, of a minor nature, was suffered by the victim. The offending only came to an end when she escaped and ran away. The respondent did not desist of his own accord.

[9] The respondent did not demonstrate any remorse or contrition for his actions. He did not accept responsibility. He was not entitled to the leniency extended to those who do accept responsibility for their actions. The offending was to some extent planned in that the respondent lured the victim into the motor vehicle and then immediately drove to an isolated location where the attack took place.

[10] The information before the Court was that the appellant was aged 17 years and six months, he was in stable work and earning a regular income. He did not suffer from any psychological or behavioural problems which may have ameliorated the sentence.

**The recording of a conviction**

[11] The principles applicable to the imposition of a conviction upon a youth offender have been discussed in two recent cases in this Court. The first of those was *DD v Cahill*[1] where I suggested the following approach to the decision whether to record a conviction against a young person:

> The decision whether or not to impose a conviction on a young person requires careful consideration by a court. In relation to adult offenders there is some guidance to be found in the *Sentencing Act*. Section 8 of that Act requires a court, in deciding whether or not to record a conviction, to have regard to the circumstances of the case including the character, antecedents, age, health or mental condition of the offender; the extent to which the offence is of a trivial nature; and the extent to which the offence was committed under extenuating circumstances. Section 8 does not apply to the Youth Justice Court. The *Youth Justice Act* itself does not provide any guidance as to the matters to be taken into account in determining whether or not to record a conviction. The decision involves an exercise of discretion. However the discretion must be exercised judicially and, in that process, all of the relevant surrounding circumstances must be considered including factors of the kind identified in s 8 of the *Sentencing Act*.

[12] The second case was the recent discussion by Barr J in *Verity v SB*[2] where his Honour pointed out that the *Youth Justice Act* gives effect to the desirability of avoiding the social prejudice and potential oppression

[1] *DD v Cahill* [2009] NTSC 62.
[2] *Verity v SB* [2011] NTSC 26.

occasioned to young persons by the recording of a conviction. His Honour said:

> **[34]** In youth sentencing, therefore, a conviction is not a condition precedent to the imposition of even the most serious punishments. The power of the Youth Justice Court to punish, even severely, without recording a conviction, suggests that the Youth Justice Court may appropriately take into account quite separate and distinct considerations on the question of whether or not to record a conviction to such considerations as the seriousness of the offence.
>
> **[35]** The *Youth Justice Act* enables the court in the case of youth offenders, to an extent which would not be possible in the case of adult offenders, to reconcile, on the one hand, the principle of holding the offender accountable and imposing condign punishment and, on the other, the rehabilitation principle of enabling the offender to move on after being punished without a conviction to hinder full re-integration into the community.[16]
>
> **[36]** In sentencing, therefore, the Youth Justice Court should consider in the facts of each case whether sentencing principles lead to the need to record a conviction, bearing in mind that recording a conviction falls nowhere expressly on the scale of sentencing options set out in s 83(1) *Youth Justice Act*. Rather than asking why a conviction should not be recorded, the court might well ask itself why a conviction should be recorded. The offender's age, maturity, character and previous offending would always be relevant. The nature of the offence and the seriousness of the offence would both be relevant considerations. It may also be relevant to consider the provisions of the *Criminal Records (Spent Convictions) Act* to assess the legal effect of a conviction or other sentencing order. As Riley J said in *DD v Cahill*, all of the relevant surrounding circumstances must be considered.
>
> **[37]** However, in exercising its sentencing discretion, the court should be alive at all times to the differences between youth sentencing and adult sentencing with respect to the recording of convictions. The question always has to be asked whether a conviction, "a significant act of legal and social censure" and "a formal and solemn act marking the court's and society's disapproval of wrongdoing", is required in addition to the wide range of sentencing options, some severe, which are available without conviction under the *Youth Justice Act*.

[13] In the present case it is readily apparent that the learned Magistrate took into account all relevant matters relating to the recording of a conviction. His Honour determined that such a penalty was not called for in the circumstances of the respondent. I see no error on the part of his Honour in so concluding.

**Manifest Inadequacy**

[14] The principal thrust of the submissions was that the sentence was, in all the circumstances, manifestly inadequate. The appellant argued that the failure to record a conviction, in conjunction with the imposition of a bond as the aggregate sentence for the respondent's offending, whether looked at individually or in conjunction, resulted in a sentence that was manifestly inadequate in all the circumstances. The sentence did not achieve an appropriate balance between rehabilitation and other important sentencing considerations provided for in the *Youth Justice Act* including the need to effectively hold the respondent accountable and encourage him to accept responsibility for his behaviour. The appellant submitted that the sentencing orders, irrespective of the non-recording of a conviction, were so far "outside the range" as to be manifestly inadequate. The appellant submitted that a sentence incorporating the recording of a conviction, or a period of suspended detention, or a combination of both, would have been a more appropriate disposition and would still have promoted the rehabilitation of the respondent.

[15] The appellant submitted that, in the absence of a conviction, the sentence was manifestly inadequate. The inadequacy should have been addressed by resort to the remaining sentencing options available to the Court under the provisions of s 82 of the *Youth Justice Act*.

[16] The general principles that must be taken into account under the *Youth Justice Act* are set out in s 4 of the Act. The Act provides, inter alia, for a balancing between, on the one hand, the need for a youth to be held accountable and encouraged to accept responsibility for his behaviour and for him to be made aware of his obligations under the law and of the consequences of contravening the law whilst, on the other hand, assisting the youth to be integrated into the community, preserving and strengthening family relationships and not causing the youth to be withdrawn unnecessarily from his family environment. The punishment of a youth must be designed to give him an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways.

[17] In the present case the respondent did not accept responsibility for his conduct and did not demonstrate remorse. The offending itself was of a moderately serious kind but more towards the bottom of the scale of seriousness for such offending. In my opinion the penalty imposed was manifestly inadequate. A sentence which gave greater emphasis to holding the respondent accountable for his conduct was called for. The sentence should have reflected the need to make the respondent aware of his

obligations under the law and, importantly, that consequences attach when the law is contravened in this way. In all the circumstances the offending required more than a good behaviour bond. Pursuant to s 83 of the *Youth Justice Act* a range of other penalties was available to the learned Magistrate and one or more of them should have been utilised to meet the requirements of s 4 of the Act.

**Crown Appeal**

[18] The principles governing Crown appeals are not in doubt. They have been discussed in many decisions including *The Queen v Riley* [2006] NTCCA 10. Having determined that the sentence was manifestly inadequate I need to consider whether this is one of those "rare and exceptional" cases where I should set the sentence aside and re-sentence the respondent. In view of all the circumstances including, especially, the youth of the respondent, it is in my opinion inappropriate to do so. It is sufficient to note that the penalty imposed was manifestly inadequate without the need to resentence the particular respondent in this particular case.

[19] The appeal is dismissed.

---