PARTIES:	KENNETH JABANUNGA GOLDER v LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA51 OF 1997
DELIVERED:	24 December 1997
HEARING DATES:	11 & 12 December 1997
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Appellant:	F. Carlton
Respondent:	M. G. Fox

Solicitors:

Appellant:	NTLAC
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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kea97043

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. JA51/97

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against a sentence imposed by the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

KENNETH JABANUNGA GOLDER
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: Kearney J

REASONS FOR JUDGMENT

(Delivered 24 December 1997)

The appeal

This is an appeal pursuant to s163(1)(a) of the *Justices Act* against the severity of a sentence of 6 weeks imprisonment imposed on the appellant by the Court of Summary Jurisdiction at Alice Springs on 2 October 1997. I heard the appeal on 11 and 12 December, and rule on it today.

The case in the Court of Summary Jurisdiction

(a) The offence in question

On 2 October 1997 the appellant faced 4 charges before the Court of Summary Jurisdiction in Alice Springs. One, a charge of a traffic offence, was adjourned to a later date, and is of no present concern.

The appellant pleaded guilty to a charge of an aggravated assault (male on female), in that on 24 March 1996 he had tugged on the shirt of a woman in Darwin. He was intoxicated at the time, and simply asking for money. He was fined $500 together with a $20 victim's levy, in default 11 days imprisonment.

He also pleaded guilty to a charge under s188(1) of the *Criminal Code* of aggravated assault on one John Wallace on 10 September 1997. He had punched and kicked the victim to the head, the result constituting aggravation by way of bodily harm. He was sentenced to 3 months imprisonment, service of which was ordered to be suspended, the period for the purposes of s40(6) of the *Sentencing Act* being 1 year.

The appeal relates solely to the sentence on the final charge. The appellant pleaded guilty to a charge of assaulting a police officer Constable Wurst on 12 September 1997, in the execution of his duty, as a result of which he suffered bodily harm. This is an offence under Code s189A(1), aggravated under s189(2)(a), and punishable by 3 years imprisonment on summary conviction. This maximum penalty may be compared with the lower maximum penalty of 2 years imprisonment on summary conviction for common assault

resulting in bodily harm, under Code s188(1); clearly, the legislature treats assaults on police officers while carrying out their duty with special seriousness.

The facts of this offence, admitted by the appellant to be correct, were as follows. He was heavily intoxicated and standing outside the front gate of a house in a camp at Alice Springs, at about 1.05am. Constable Wurst apprehended him there, in order to place him in protective custody; see Division 4 of Part 7 of the *Police Administration Act*. The appellant was led about 40 metres to a police vehicle, searched, and asked to get into the rear cage area. He attempted to walk away. Constable Wurst took hold of him by his rugby shirt. The appellant turned around, struck the officer on the nose with his clenched fist, and decamped; he was arrested a short distance away. Constable Wurst was treated at the Alice Springs Hospital for swelling to his nose and a nosebleed; this was the bodily harm charged.

On 2 October the appellant was convicted and sentenced to 6 weeks' immediate imprisonment. He lodged this appeal against the severity of this sentence, next day.

(b) His Worship's sentencing remarks

In sentencing the appellant for the 3 aggravated assaults mentioned above, his Worship said:

> "… for a person [who] had not been in very much trouble at all prior to this time, you've certainly got yourself into a lot of trouble over a relatively short period of time.

> The offence on 24 March 1996 is an offence … at the lower end of the scale.
>
> [His Worship then dealt with the fright occasioned to the victim, and the need to discourage such conduct; he continued:]
>
> I do take into account your lack of prior convictions in relation to that [offence]. You have no history for violence at all and so I believe that a financial penalty will be appropriate. I take into account your financial circumstances. In relation to that one you'll be convicted and fined $500 together with $20 victim levy, in default 11 days. …
>
> On 10 September 1997 you committed a more serious assault; that is, that you hit and kicked John Wallace simply because someone else said you should. There is far too much violence in Alice Springs. There is far too much violence at the camps and this court must do whatever it can to discourage both you and other people from taking steps to assault other people.
>
> Again, I take into account your lack of prior convictions for matters of violence. You have no history at all of assaults and that's a very important factor that influences me in not making you serve an actual term of imprisonment today. I believe that rehabilitation in this case must play the leading role. So what I'm going to do is to sentence you to a term of imprisonment, but suspend it for a period of one year.
>
> [His Worship then explained the effect of the proposed sentence, and continued:]
>
> … the defendant is convicted, sentenced to 3 months imprisonment suspended for a period of one year."

His Worship then turned to the offence the sentence for which is the subject of this appeal, viz:

> "That brings me then to the assault upon the policeman [on 12 September 1997]. This is a very serious matter in my mind. The policeman was out doing his job. He was acting lawfully, and because you did not like the way that he was doing [it] - he tugged on your clothing - you punched him with a closed fist. You caused his nose to bleed and you caused bruising. You then absconded and you were apprehended.

As I've already indicated, there is a great level of violence within our community and the police in our community do a very difficult job and it's very hard work for them. There is a need for the police to feel confident that this court will support them in the performance of their duties, when they're performing such duties lawfully.

On many occasions police are required to go to dangerous situations without any assistance, without any partners, without any backup and, as I've indicated, they must feel confident that this court will support them in their duties. And those that might be minded to assault police when they are performing their duties should think twice, because if they do they can be fairly confident in the thought they will go to gaol.

You don't have a history of violence, as I've indicated. You don't have a history for assaulting police. But you do now have a history for violence following upon these convictions [for the offences of 24 March 1996 and 10 September 1997] and I note each of the last two matters were prior to this occasion [of 12 September 1997]. You had appeared on 4 April 1997 in the court charged with the assault of 24 March 1996. That was prior to this offence.

I also note that you committed the assault upon [John Wallace] 2 days before the assault of the police officer. So although you don't have any prior convictions for assault or matters of violence, you certainly knew that what you were doing was wrong and you had embarked upon a disregard for the law as far as the infliction of violence was concerned; in one case only 2 days before.

I do take into account your plea of guilty at the first realistic opportunity, and I do take into account the time that you have been in custody awaiting for these matters to be dealt with. But I believe you do need to serve a term of imprisonment both as a personal deterrent and a deterrent to other people.

That will be kept relatively short - in fact, very short - because I do have regard also to the principles of rehabilitation and you're already going to be on a suspended sentence for one year. In relation to this matter you are convicted and you are sentenced to 6 weeks imprisonment. That will date from 11 September 1997."

The submissions on appeal

The sole ground of appeal was that the sentence of 6 weeks imprisonment was manifestly excessive. Ms Carlton of counsel for the appellant advanced 6

submissions in support of this ground; although they appear to allege distinct sentencing errors and therefore to constitute separate grounds of appeal, Ms Carlton relied on them as indicating the reasons the sentence was manifestly excessive.

I doubt the utility of this approach. As *Cranssen v The King* (1936) 55 CLR 509 at 520 makes clear, the ground of appeal that a sentence is manifestly excessive exist because -

> "*The nature of the sentence itself*, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the [sentencing] discretion has been unsound." (emphasis added)

In such a case, the High Court said "it is not necessary that some definite or specific error should be assigned", the "nature of the sentence itself" may reveal error. Where the appellate Court is itself well aware of the current range of sentencing for the particular type of offence, it can determine the question from its own experience. That is why Young C.J. used to say that the question whether a sentence was manifestly excessive was not one which was capable of sustained argument; see *Taylor* (1985) 18 A Crim R 14 at 17. Where the appellate Court lacks that knowledge, it must usually be informed of the current range of sentencing in the court which normally sentences for those offences. That, in turn, points to the production of appropriate statistical sentencing information from that court. Otherwise, the matter would be left to the idiosyncratic and uninformed opinion of the appellate judge.

Ms Carlton did not seek to follow that information path in relation to this offence - although somewhat paradoxically she also relied on the approach in *Ferguson v Chute* (unreported, Supreme Court (NT) (Mildren J), 3 June 1992), a case in which his Honour looked at many sentencing cases. It seems that the Integrated Judicial Information System (IJIS), in operation since 1992, cannot readily provide such information. Matters do not seem to be any better in that regard than they were formerly under the earlier computerized system, PROMIS: see *Mason v Pryce* (1988) 34 A Crim R 1 at 5.

I turn to the appellant's submissions.

(1) Ms Carlton submitted that the learned Magistrate erred in that he placed excessive weight on the fact that the victim of the assault was a police officer acting in the execution of his duty. She cited *Yardley v Betts* (1979) 1 A Crim R 329 for the general proposition that not all serious assaults must result in a sentence of immediate imprisonment; I accept that. As King CJ said at 334 "… cases of assault require individual assessment and treatment." At the same time the Full Court stressed (as I have indicated on p6) that in assessing the penalty for the particular offence, the appellate judge should have regard to the level of penalties customarily imposed for assault, together with all other relevant factors; see pp331-2 where the Court noted that -

> "…an adequately prepared table [of sentences imposed in other cases] can provide the court with a general appreciation of the range of penalties customarily imposed by sentencing courts for a particular type of offence."

The Full Court itself examined sentences imposed for various assaults over a 6-month period and noted (p332) that it was -

> "… clear from the table that the sentencing courts do not apply any presumption in favour of imprisonment as the appropriate penalty for assault."

See also *Ferguson v Chute* (supra) for an analysis of 47 cases of assaults on Police over a period of 18 months, leading Mildren J to conclude that there was at that time "a fairly wide range of sentence for this type of offence", extending to "short custodial sentences in bad cases", these being cases involving use or threatened use of an offensive weapon, or prior convictions for violence.

Ms Carlton rightly conceded that police need special protection by the courts in the execution of their duties and that a sentencing factor in this offence is the need for general deterrence; see *Kumantjara v Harris* (1992) 109 FLR 400 at p409. She submitted that, even so, the cases demonstrate a great range in sentencing for this offence. By way of example, she contrasted *Miller v Huffa* (1980) 24 SASR 595 and *Bull v Tuckey* (1986) 40 SASR 321, cases where youthful first offenders received sentences of immediate imprisonment of 2 months and 1 month respectively for assaulting police - the facts in each case being worse than the present - with *Casey v Hayward*,

(unreported, Supreme Court (NT) (Kearney J), 12 March 1997) where on appeal a 17 year old emotionally disturbed first offender, who had waved a knife around as she verbally threatened Police, was discharged without conviction upon entry into a bond to be of good behaviour for a period of 2 years. In that case I said at p10:

> "In general, the authorities and statistics … show that in order to protect Police officers from assault, as far as it is possible to protect them, a sentence of imprisonment is *often* considered to be appropriate, even though the defendant has no previous criminal record. Nevertheless, normal sentencing principles apply in such cases, and imprisonment should *not* be ordered unless the Court first considers that no other form of punishment or disposition available, is appropriate. In other words, the need for general deterrence must be considered in *all* the circumstances of the particular case, and this consideration must be undertaken *before* the appropriate disposition is decided on. There is no "norm" when sentencing for an assault on a Police officer."

(2) Ms Carlton submitted that his Worship in sentencing the appellant fell into error when he stated (p5):

> "…those that might be minded to assault police when they're performing their duties should think twice, *because if they do they can be fairly confident in the thought they will go to gaol."* (emphasis added)

She submitted that this demonstrated his Worship's erroneous belief that the "norm" for the offence of assaulting police, is a sentence of imprisonment. I indicated during submissions that I rejected this submission. His Worship's general remarks were qualified by the words "fairly confident", and are, in context (see p5), to the same general effect of those by Walters J in *Miller v Huffa* (supra) at 598:

> "Persons who attack police officers in the execution of their duty cannot ordinarily expect leniency, save in a case where the circumstances of mitigation are wholly exceptional. Where police are trying to do their duty of maintaining public order, persons who deliberately assault them in order to impede them in performing their work must ordinarily expect an immediate custodial sentence."

Those remarks must also be understood in their context of a general affray. See also the observations in *Casey v Haywood* (supra) at p9 and the explanation by Mullighan J in *Heatlie v S.A. Police* (1993) 172 L.S.J.S. 94 at 95-97.

The context in which any such "attack" occurs is very important; in this regard Ms Carlton submitted that his Worship failed to consider adequately the particular circumstances of this assault, which showed that it was not of sufficient criminality to attract the sentence imposed, for the following 5 reasons:

(a) there was no evidence that Constable Wurst was without 'backup' or assistance from other police at the time;

(b) Constable Wurst was not in a particularly vulnerable situation as occurs, for example, when police are outnumbered by a rowdy crowd or in a remote situation cf. the facts in *Miller v Huffa* (supra), *Bull v Tuckey* (supra), *Kumantjara v Harris* (supra), *Clark v Trenerry* (1996) 125 FLR 260, and *Robertson v Flood* (1992) 111 FLR 177, all cases where sentences of immediate imprisonment were imposed;

(c) the assault amounted to a single punch, a spontaneous reaction to being grabbed, and involved no persistence;

(d) the injuries to Constable Wurst were not serious; and

(e) no weapon was used by the appellant.

Ms Carlton contrasted the nature of the assault and the injuries inflicted in *Birch v Fitzgerald* (1975) 11 SASR 114, and the many cases such as *Kumantjara v Harris* (supra) where weapons were used. She submitted that his Worship failed to adequately consider factors (a)-(e) in sentencing. The submission is more accurately put in terms that in light of those matters, the sentence, viewed against the current sentencing range, is manifestly excessive.

(3) Ms Carlton submitted that his Worship failed to give sufficient mitigating effect to the personal circumstances of the appellant, in formulating an appropriate sentence; he had had no prior convictions for violence before 12 September 1997 and only one prior conviction, for drinking in a public place. I note that his Worship took account of this aspect in his sentencing remarks; whether he gave it sufficient weight cannot be determined, except as a possible explanation if the sentence is in any event held to be manifestly excessive.

Ms Carlton also submitted that excessive weight was given to the two previous assaults of 24 March 1996 and 10 September 1997, for which sentences were also imposed on 2 October. This was demonstrated by the remarks (p5):

> "... although you don't have any prior convictions for assault or matters of violence, you certainly knew that what you were doing [when you assaulted Constable Wurst] was wrong, and you had embarked upon a disregard for the law as far as the infliction of violence was concerned; in one case [the assault on John Wallace] only 2 days before."

Ms Carlton submitted this placed too much weight on the 2 previous assault offences since, at the time the appellant assaulted Constable Wurst, he did not have the benefit of an existing admonition from the court for those offences. She relied in this regard on *McInerney* (1986) 28 A Crim R 317, per Cox J at 329:

> "A conviction is a formal and solemn act marking the court's, and society's, disapproval of a defendant's wrongdoing, so that *a prior offence may not assume quite the same significance as a prior offence coupled (by the time the instant offence is committed) with a prior conviction.*" (emphasis added)

However, I consider that it is clear from his Worship's remarks that he made no error in this respect. A sentencing court is entitled to look at all relevant aspects of a defendant's behaviour up to the time he is sentenced, and that is what his Worship did.

(4) Ms Carlton submitted that his Worship erred in the way he sought to achieve the sentencing purpose of rehabilitation; see s5(1)(b) of the *Sentencing Act*. She submitted that he considered rehabilitation only *after* deciding on a term of actual imprisonment and then only in relation to the appropriate duration of that term - it was (p5) "... relatively short - in fact, very short - because I do have regard to the principles of rehabilitation ...".

Ms Carlton submitted that rehabilitation as a relevant factor should have been given "a leading role"; further, it should have been taken into account when determining what was the appropriate disposition, rather than later as a factor going merely to the length of a sentence of imprisonment. To apply it in that way was to give it insufficient weight in the circumstances. I consider it was open to his Worship to take rehabilitation into account in the way he did.

(5) Ms Carlton submitted that his Worship erred in not considering a sentencing option other than immediate imprisonment, citing *Freeman v Binnekamp* (1987) 44 SASR 114 at 117, per Von Doussa J:

> "… a stern deterrent warning to the offender and to others can often be achieved by a sentencing package short of actual imprisonment, or even a term of imprisonment which is then suspended. A heavy fine, particularly in the case of a first offender, or an offender without a very relevant prior offence, could achieve that purpose."

I note that a failure to mention other sentencing options is not to be taken to mean that a sentencer did not consider them; see *Napper v Samuels* (1972) 4 SASR 63 at 74 and *Blacksmith v Materna* (unreported, Supreme Court (NT) (Mildren J), 30 August 1996) at p6.

(6) Stemming from (5), Ms Carlton submitted that his Worship erred in considering that a sentence of actual imprisonment was necessary to meet the needs of personal and general deterrence, in that the objective features of the assault on Constable Wurst showed that it was not an offence at that part of the scale of seriousness which required application of the most severe sentencing disposition (s7(j) of the *Sentencing Act)*. His Worship had further

erred, in that having decided to impose a sentence of imprisonment, he did not consider whether service of the sentence should be suspended (s40) as he had, when sentencing for the more serious assault 2 days earlier on John Wallace. These are restatements of the ground that the sentencing was manifestly excessive.

Mr Fox of counsel for the respondent submitted that the onus of establishing that the sentencing discretion had miscarried lay on the appellant, the presumption being that it had not. I accept that. He submitted that the circumstances in which the assault took place, though on first blush minor, were not at the lower end of the scale of seriousness; there must, for example, have been a deliberate clenching of the hand into a fist. He referred to the fact that Constable Wurst had to attend hospital as a result. He noted the significance of a maximum sentence of 3 years imprisonment. He referred to *Wilson v Maxwell* (unreported, Supreme Court (NT) (Martin CJ), 12 January 1995), a case involving (inter alia) an aggravated assault on a taxi-driver, where his Honour said at p18:

> "All cases of assault require individual assessment and treatment (per King CJ in *Yardley v Betts* (1979) 22 SASR 108 at 110) and it may still be the case as his Honour there said, that a judicial policy which was to embody a presumption of imprisonment for even serious cases cannot be justified; however, *aggravated assault in this jurisdiction is usually dealt with by a sentence of imprisonment as a starting point* ..." (emphasis added)

I do not regard the remark emphasized, in its context, as indicating a presumption that the punishment for an aggravated assault is a sentence of

imprisonment; see *R v Hill, R v Chute* (unreported, Supreme Court (NT) (Martin CJ), 17 June 1993).

Mr Fox also noted the sentencing in *Ferguson v Chute* (supra) and the observation by Mildren J at p9, in relation to the offence of assaulting police:

> "... I should add that I consider that there is a trend apparent, a gradual trend, to increase penalties. I note that even in the case of first offenders, the court has imposed suspended sentences of imprisonment."

Mr Fox submitted it was appropriate for his Worship to impose a short, sharp sentence of imprisonment on the appellant to meet the needs of both general and personal deterrence; even though the appellant did not have prior convictions for assault, his recent past had shown a tendency to violence, and thus a measure of personal deterrence was appropriate. He further submitted that a short, sharp sentence would send out a message to like-minded people not to assault police, thus meeting the need for general deterrence.

He also submitted that the offence warranted a custodial sentence. He submitted the time of the offence (1.05 am) and the deliberate nature of the actual striking - the deliberate act of clenching a fist, and the aimed nature of the punch to the nose - were aspects appropriately considered by his Worship in deciding on a sentence of actual imprisonment. I note that Mr Fox's suggestion that the punch was aimed at the officer's nose was not part of the facts alleged and admitted.

In conclusion, Mr Fox submitted that no error was evident in his Worship's sentencing of the appellant, and that the sentence was not manifestly excessive but proportionate to the offence committed.

Conclusions

It is desirable that when the 'manifestly excessive' ground of appeal is relied on, the appellate court be provided with sufficient statistical material from the sentencing court to enable it to determine the usual range of sentencing and the relevant sentencing factors for the offence in question. To provide such sentencing information - essential also for maintaining parity in sentencing - readily and cheaply was one of the purposes for which the IJIS was set up.

Bearing in mind in particular the results of the statistical analysis in *Ferguson v Chute* (supra), and the cases that have come before me, I consider that the sentence of 6 weeks imprisonment in this case was manifestly excessive. There was no suggestion that there was a dangerous situation, that Constable Wurst was without assistance, that the appellant had a weapon, or had a record for violence. In general, a very short sentence of immediate imprisonment on a first offender, where the nature of the assault and the circumstances were like the present, would be at the top of the normal range. The appellant was not in reality a first offender. I note that the assault 2 days earlier on John Wallace was more serious than the assault on Constable Wurst.

This sort of assault on a police officer in the course of his duty is fairly common; see, for example, the facts in *Clarke v Baehnk* (1987) LSJS 229, where a sentence of 6 weeks imprisonment for a sudden punch to a police officer's eye following arrest was reduced to 16 days already served, though otherwise a suspended sentence would have been appropriate. There is a marked distinction to be drawn between an assault in the course of a struggle with police, as here, and acts of gratuitous thuggery directed at police; see, for example, *R v Nawrot* (1988) 10 Cr. App. R.(S) 239, and *R v Moore* (1992) 14 Cr. App. R. (S) 273. To draw such a distinction does not belittle the importance of the proposition which his Worship rightly affirmed, that police officers going about their duty will be afforded the full protection of the law; it merely emphasizes that each case of assault on police requires individual assessment and treatment, and cannot be considered in the abstract.

In this case the appellant has spent 21 days in custody on remand on this charge. I consider that that is adequate punishment, in the circumstances; this was the appellant's first substantial encounter with the criminal justice system, and all that was required was that he hear 'the clang of the prison gate' behind him. Accordingly, the appeal is allowed on the ground that the sentence of 6 weeks imprisonment was manifestly excessive; that sentence is quashed and set aside, and in lieu thereof the appellant is sentenced to the period he has already spent in custody on remand; as he is presently on bail pending appeal, he is to serve no further period in custody.

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