McCarthy v Trenerry [1999] NTSC 29

PARTIES:	McCARTHY, Karita Jan
	v
	TRENERRY, Robin Laurence
TITLE OF COURT:	NORTHERN TERRITORY SUPREME COURT
JURISDICTION:	NORTHERN TERRITORY SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 47 of 1998
DELIVERED:	30 March 1999
HEARING DATES:	15 March 1999
JUDGMENT OF:	MARTIN CJ.

REPRESENTATION:

Counsel:

Appellant:	M Jones
Respondent:	A Fraser

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	mar99007
Number of pages:	10

mar99007
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

McCarthy v Trenerry [1999] NTSC 29
No. JA47 of 1998

BETWEEN:

KARITA JAN McCARTHY
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 30 March 1999)

[1] The appellant was convicted on 21 May 1998 for that on 1 January 1998 she unlawfully assaulted Kim Hawthorne accompanied by a circumstance of aggravation, in that Kim Hawthorne suffered bodily harm. She was sentenced to imprisonment for eight months, that term to be suspended after she had served one month, a period of two years being fixed for the purposes of s40(6) of the *Sentencing Act* 1996 (NT). The appeal is against sentence, but no specific error is assigned to the learned Magistrate beyond grounds relating to the relative weight he attached to various factors in the sentencing equation. She claims that the sentence was manifestly excessive.

[2] In *Gronow v Gronow* (1979) 144 CLR 513, Stephen J at p519 said:

> "The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion. When no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge."

See also the extracts from *Lovell v Lovell* (1950) 81 CLR 513 at p534 in *Gronow*. Notwithstanding the differences in the jurisdiction there under consideration and this, it seems to me that those remarks are nevertheless applicable.

[3] It is sought to introduce evidence upon the appeal (s176A *Justices Act* 1928 (NT)). I will return to that after a short review of the circumstances taken into account by his Worship when sentencing the appellant.

[4] As to the circumstances of the offence, his Worship reiterated the admitted facts. The appellant was walking down a Darwin street when she and other people with her encountered Ms Hawthorne. It was in the early hours of New Year's Day, and the appellant was affected by alcohol. Ms Hawthorne hailed either the appellant or the group, of which she was a part, with a whistle and wished everyone a happy New Year. The appellant seems to have interpreted the whistle and wish as being sarcastic in some way because she believed that Ms Hawthorne, who had previously been one of

her oldest and best friends. to have had an affair with the appellant's fiancee about two years previous to these events. (In the meantime, the appellant had suffered something in the nature of a nervous breakdown and left Darwin, she had overcome her difficulties and had returned, undertaken studies and obtained a job as a mental health worker.) The appellant's response to the whistle and call from Ms Hawthorne was to go to her and punch her "really hard" in the eye, which punch smashed her spectacles and caused injury to her face. The attack continued with the appellant continuing to hit Ms Hawthorne around the face even when she had gone to ground. The appellant was physically restrained from continuing the assault, but even after that she returned to the fray and continued to belt Ms Hawthorne. Another person may have joined in that attack. The appellant also suffered some degree of injury in the fray.

[5] The victim suffered what his Worship described as "really horrific injury, especially the injury to her eye" evidenced in photographs which he saw. She required specialist treatment to protect the eye. Her eyesight was completely recovered by the time of the hearing. His Worship viewed the bodily harm which had been caused as being towards the top of the range. His Worship spoke of what he had observed as a Magistrate regarding the noticeable increase in the numbers of assaults coming before the Court of Summary Jurisdiction committed by women, where alcohol had played a significant part, and assaults taking place in public streets. He indicated

that there seemed to be very little reason to treat assaults by women in the circumstances of the case before him any differently than assaults by men. He said that the assault was a serious disturbance of the peace of the community when it happens.

[6] As to the circumstances of the offender, his Worship noted that she was 24 years old, the mother of two children, aged five and two years and that she was then pregnant, the child being expected at the end of August, three months or so ahead of the date upon which she was sentenced. He noted that after the "bad patch" which occurred after the nervous breakdown she had gained qualifications in doing extremely useful work. His Worship referred to the very favourable references which were before him, and noted that the appellant thought there may have been some justification for her attack. She had not previously offended, the nature of the offence would seem to be out of character and she had pleaded guilty at the first practicable opportunity. Her readiness to give evidence in the case concerning the other person who may have joined in the assault was noted as had been her previous cooperation with police. In his Worship's view, the appellant was remorseful for "this vile and destructive assault", and added that there was "as much in your favour as there could be".

[7] His Worship paid regard to a number of decisions of this Court on appeal from sentences imposed in the Court of Summary Jurisdiction.

[8] His Worship was firmly of the view that the appellant and others in the community should understand that the type of assault committed was "absolutely intolerable" being destructive and hurtful to the victim, those who see the assault happening and those who see the victim afterwards. The learned Magistrate was clearly and emphatically of the view that personal and general deterrence were to be given significant weight.

[9] In conclusion, his Worship said that only a substantial prison sentence could reflect the abhorrence of the community for such an assault and that the real question was whether, given the matters weighing in favour of the appellant, it would be proper to suspend all of that sentence or a great majority of it. In the result, the sentence of eight months imprisonment to be suspended after one month was imposed.

[10] His Worship expressly paid regard to all of the matters which were urged in favour of mitigation of penalty on behalf of the appellant in the hearing before him. He was not wrong to categorise the seriousness of the assault and the circumstances in which it occurred as he did. I am not satisfied that his Worship erred on the material before him.

[11] It will be noted that at the time of sentencing the appellant was pregnant and that the baby was due towards the end of August. It is sought to place before this Court evidence from a doctor that the baby was born on 1 June, somewhat prematurely, was doing well at the end of November 1988 and was then being breast-fed. There was no evidence as to the position in that

regard at the time the matter came on for hearing in this Court on 15 March. The infant was then about eight and a half months old. The doctor offered the opinion that it is not ideal for a baby to be separated from its mother, and that the prison environment would not be an ideal one for the baby. That, of course, is accepted, it was hardly a matter for evidence.

[12] Section 176A provides that unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal, the Court shall admit it if:

> (a) it appears to it that that evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal;
>
> (b) it is satisfied that the evidence was not adduced in those proceedings and there is a reasonable explanation for the failure to adduce it.
>
> (c) (These procedural requirements are not relevant in this matter).

[13] The proposed evidence is likely to be credible. It would have been admissible in the proceedings from which the appeal lies if the event had taken place. Had the event taken place prior to the sentencing, then it would go to an issue the subject of the appeal, that is, the severity of the sentence.

The evidence was not adduced in those proceedings because the event had not then occurred.

[14] This is not a case such as *Smith v Torney* (1984) 29 NTR 31 or *Bates v Haymon* (1988) 90 FLR 55 where the evidence sought to be introduced upon appeal was evidence which could have been placed before the Court at first instance. Here the evidence is of an event after the appellant was before that Court, but I do not consider that, of itself, is fatal to the appellant's tender of the proposed evidence. It provides a reasonable explanation as to why the evidence was not adduced before the Court of Summary Jurisdiction.

[15] There is extensive authority to support the proposition that it is permissible for a Court on appeal to have regard to events occurring after sentencing. Although the decisions to which reference will be made did not arise upon statutory provisions such as s176A, what has been decided in relation to those provisions fall within the scope of the Territory statute.

[16] Most of the cases have to do with events occurring after sentencing which show the true significance of facts which were in existence at the time of sentencing, for example, *Smith*, a decision of the Court of Criminal Appeal of South Australia, (1987) 27 A Crim R 315 where King CJ at 316 said:

> "The proper purpose of fresh evidence on an appeal against sentence is to bring before the court facts which were in existence at the time of the imposition of sentence, but were not known to the sentencing

> judge or to explain facts which were before the sentencing judge so as to put them in a new light."

That was a case to do with the appellant's ill health, a matter to which reference was made in *McDonald* in the Court of Criminal Appeal, New South Wales, (1988) 38 A Crim R 470. In similar vein, *Jones*, another decision of that Court, (1993) 70 A Crim R 449 and in the Victorian Court of Appeal see *Morgan* (1996) 87 A Crim R 104 and *R v W.E.F.* (1998) 2 VR 385.

The limitation on the evidence of post sentence events which can be received was demonstrated in *Babic* (1998) 2 VR 79. The appellant had injured his back about two months after being sentenced and asserted that as a result he had been in such pain as to be unable to cope with the everyday rigours of prison life. At p257 Brooking JA, with whom Winneke P and Ashley AJA agreed, said that was:

> "an attempt to rely on an event after sentence as in itself showing that the sentence has turned out to be excessive. The court cannot (on the basis that the point is one of admissibility, not one of practice in relation to the exercise of discretion) receive evidence of subsequent events sought to be led for this purpose."

[17] For cases in which evidence of events occurring after sentence are not restricted to "ill health" matters see *Rostom* (1995) 83 A Crim R 58.

[18] In Queensland the Court of Appeal has held in *R v Maniadis* (1997) 1 Qd R 593 at 597 that evidence of events occurring after the date of sentence are

generally unlikely to show that the sentence imposed was unwarranted, unless that evidence shows what the state of affairs was at the time the sentence was imposed.

[19] I have referred to what fell from King CJ in *Smith* as to the distinction between cases in which fresh evidence was given of facts which were in existence at the time of sentencing or which put facts which were before a sentencing Judge in a new light, on the one hand, and fresh evidence of subsequent events, on the other. Malcolm CJ referred to that distinction in *Anderson* (1997) 92 A Crim R 348 at 350 as did Steytler J at p360. With respect, with that I agree. (*Anderson* is a particularly poignant case in which the Court took into account the fact of serious illness suffered by a member of the offender's family.

[20] The purpose of an appeal is to review the decision of the Court at first instance in the light of the evidence before that Court. The qualified provisions enabling evidence to be introduced on appeal must be related to the time when sentence was passed, either to make up for a deficiency in that evidence which could have been brought forward at that time, or to better explain the evidence which was before that Court. That is the judicial function upon appeal.

[21] The evidence sought to be admitted in this case does not fall within the rules. It is of a subsequent event, one that was anticipated, but not one which puts the facts before his Worship in a new light. The fact before his

Worship was that the appellant was then pregnant. That matter was taken into account by his Worship. It has now come to an end.

[22] The evidence sought to be put forward under s176A of the *Justices Act* will not be received.

[23] The appeal is dismissed.

[24] I note that in *Babic* at pp80-81, *W.E.F.* at p388 and *Anderson* at pp349 and 556 reference is made to the possible course of an application to the executive arm of government in relation to events occurring after sentence which cannot be taken into account by a court on an appeal.
