Pullman v Murphy [1999] NTSC 109

PARTIES:	MELISSA ANNE PULLMAN v RAYMOND MURPHY AND LEANNE SHAREE PULLMAN v RAYMOND MURPHY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM JUVENILE COURT EXERCISING TERRTITORY JURISDICTION
FILE NO:	JAs 57 & 58 of 1999
DELIVERED:	18 October 1999
HEARING DATES:	24 September 1999
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Appellant:	E. Morris
Respondent:	J. Whitbread

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

Judgment category classification:	C
Judgment ID Number:	bai990016
Number of pages:	15

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Pullman v Murphy [1999] NTSC 109

IN THE MATTER OF
the Juvenile Justice Act

AND IN THE MATTER OF an Appeal against sentences imposed by the Juvenile Court at Darwin

BETWEEN:

JA 57 OF 1999
(9910092)

MELISSA ANNE PULLMAN
Appellant

AND:

RAYMOND MURPHY
Respondent

JA 58 OF 1999
(9910260)

LEANNE SHEREE PULLMAN
Appellant

AND

RAYMOND MURPHY
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered October 1999)

[1] The appellants were separately charged and each pleaded guilty before the Juvenile Court to a charge of unlawful assault.

[2] On 14 July 1999, the learned Chief Magistrate convicted the appellant, Leanne Pullman ("Leanne") of unlawful assault contrary to section 188(1) of

the *Criminal Code*. She was ordered to participate in an approved project under a community service order for a period` of 40 hours, to be completed within three months of the date of the order. On the same date, the learned Chief Magistrate convicted the appellant, Melissa Pullman ("Melissa") of aggravated unlawful assault contrary to section 188(2) of the *Code*. The circumstance of aggravation was that the victim of the assault suffered bodily harm. The learned Chief Magistrate ordered Melissa to participate in an approved project under a community service order for a period of 48 hours, also to be completed within three months of the date of the order.

[3] On 24 September 1999, I upheld appeals against sentence by Leanne and Melissa. In the case of both appellants, I ordered that the decision of the learned Chief Magistrate to record a conviction be set aside. In relation to Leanne, I reduced the number of hours which she was required to participate in an approved project from 40 hours to 20 hours. In the case of Melissa, I confirmed the order that she was to participate in an approved project for 48 hours. I indicate that I would publish my reasons in due course. I now do so.

Background

[4] The learned Chief Magistrate first heard the plea, facts and mitigation with respect to Melissa and then stood the matter down to hear the plea, facts and mitigation with respect to Leanne. His Worship then delivered a single set of extempore reasons for sentence relating to both Melissa and Leanne.

[5] Both assaults arose in the course of the same incident and were committed against the same victim, Holly Duncan.

[6] In the case of Leanne, the undisputed facts, briefly stated, were that on 4 May 1999 at Palmerston High School oval, Leanne approached Holly Duncan and after a heated verbal argument struck her once to the head with a clenched fist. The victim stumbled backwards and did not fight back.

[7] In the case of Melissa, the facts initially agreed by Mr Davis on behalf of Melissa, were that on 4 May 1999 at Palmerston oval, after a brief verbal argument, Melissa struck Holly Duncan twice to the jaw with a clenched fist. The victim did not fight back. The victim suffered injuries to her mouth, damage to her mouth and trauma which resulted in her moving to a different school.

[8] In the course of submissions made in mitigation on behalf of Melissa, disputes arose between the prosecution and defence as to:

(a) events leading up to the assault – defence counsel disputed that Melissa was the aggressor, having sought out the victim; and

(b) the impact of the offence on the victim as a result of the assault.

[9] The dispute as to the impact of the offence arose in the context of a victim impact statement (Exh P1) from Holly Duncan tendered by the prosecution. The dispute as to events leading up to the assault arose when Mr Davis sought to make submissions in mitigation to the effect that the victim had to

some extent “provoked” Melissa (but not so as to amount to a defence under s34 of the *Code).*

[10] The learned Chief Magistrate indicated that it would be necessary to hear evidence if the disputes could not be resolved. After discussion, the matter was adjourned to another day when the prosecution called the victim, an eye-witness to the assault and the victim’s mother. Both the victim and the eye-witness gave evidence as to the assaults by Melissa and Leanne and events leading up to those assaults. Neither was cross-examined as to the substance of this evidence. The victim and her mother gave evidence as to what impact the assaults had had on the victim and both were cross-examined by Mr Davis as to this evidence with a view to showing that the victim had exaggerated the impact of the assaults in her victim impact statement.

[11] The learned Chief Magistrate’s combined reasons for sentence and findings may be summarized as follows:

(a) Melissa and Leanne were part of a group which ganged up on the victim, abused her and then attacked her;

(b) the seriousness of the attack was increased by reason that a gang was involved;

(c) the victim had no opportunity to escape;

(d) the assaults were accompanied by threats of further action if the victim informed the authorities of the assailants' identities;

(e) the victim sustained "quite severe injuries" involving both physical and psychological injuries;

(f) the victim and the eye-witness were truthful;

(g) Melissa and Leanne had not sought to attack the version of events put forward by the victim and the eye-witness;

(h) Melissa and Leanne deserved credit for pleading guilty at the first opportunity;

(i) personal rehabilitation outweighed general deterrence in sentencing juveniles;

(j) school bullying is a community problem and in that context the assaults were serious because of the circumstances in which they took place an the injuries caused;

(k) it was appropriate to record convictions in the case of both Melissa and Leanne, but detention was inappropriate because of the offenders' young ages and early pleas of guilty;

(l) Melissa was ordered to participate in an approved project for a longer period than Leanne because:

(i) Melissa returned and struck the victim a second time; and

(ii) Melissa caused the injury to the victim.

Grounds of Appeal

[12] Ms Morris, who appeared for Melissa and Leanne on the appeals (but not in the court below) relied on three grounds of appeal in relation to both appellants:

(a) that the learned magistrate placed too much emphasis on general deterrence;

(b) that the learned magistrate failed to take into proper account the principles of sentencing juvenile first offenders; and

(c) that the learned magistrate erred by imposing a sentence based on a set of facts not agreed or admitted by the appellant.

[13] It is convenient to turn first to appeal ground (c) above.

Reliance on facts not agreed or admitted

[14] This ground was added, by leave without objection from Ms Whitbread, counsel for the respondents, at the outset of the appeal hearing.

[15] I note immediately that in relation to Leanne, Ms Whitbread conceded on behalf of the Crown that the learned Chief Magistrate erred in taking into account evidence admitted only in the proceedings against Melissa.

[16] Leanne and Melissa were charged separately and it was not the Crown's case that they acted jointly or in concert in assaulting the victim. The evidence

of the victim, her mother and the eye-witness to the assault was adduced only in relation to Melissa. There was no application for such evidence to be considered in relation to Leanne. The learned Chief Magistrate was clearly in error in relying on such evidence to make findings against Leanne.

[17] In relation to Melissa, Ms Morris submitted that the evidence called was limited to exercise of defence counsel's right (pursuant to s49A(10)(a) of the *Juvenile Justice Act*) to cross-examine the maker of a victim impact statement. In the present case, the defence disputed certain aspects of what the victim had said in her victim impact statement as to the impact of the assaults. In Ms Morris' submission, the evidence was not called in relation to the circumstances of the offence or events leading up to the assault of the victim by Melissa and the learned Chief Magistrate was in error both in allowing such evidence to be given and in relying on such evidence to make findings adverse to Melissa.

[18] Ms Morris submitted that if the learned Chief Magistrate was not prepared to accept the version of the facts alleged by the prosecution and admitted by the defendant, he should have informed counsel and have indicated that he would require to hear evidence. In support of that submission, Ms Morris, relied on the judgment of Kenny JA in *R v Duong* [1998] 4 VR 68 at 77:

> "Procedural fairness requires that if a judge proposes to depart from an agreed statement of facts which has formed the basis of a guilty plea, and to rely instead upon facts which are not contained in, or to be inferred from, the agreed facts, the judge should inform the parties in order that they may be given a sufficient opportunity to challenge

the material on which the judge is proposing to rely and, if appropriate, to withdraw the pleas. In *Mielicki* at 79 the court said:

> 'In the course of his judgment [in *Chow*], Kirby P. also observed (at 599…)
> "The entitlement of the accused who is asked to plead normally extends to an entitlement to know the facts alleged against him or how those facts will be reflected in proof of the charge. If those facts are presented in a way different from that agreed between the prosecutor and the accused, justice will usually require that the accused should be allowed to change an earlier plea: see *Stanton v Dawson* (1987) 31 A. Crim. R. 104.'"

[19] With respect, I agree with the observations of Kenny JA. Such an approach has been applied in the Territory. Kearney J in *M v Waldron* (1988) 56NTR 1 at 5 held:

> "At the end of the day, it is for a sentencing magistrate to decide which version of the facts he accepts, but he is obliged to give the defendant the opportunity to support by evidence the version of the facts put forward by counsel, if he does not accept it: see *Law v Deed* [1970] SASR 374 at 378, and the illustration provided by *R v Ahmed* (1984) 80 Cr App R 295."

[20] In the present case, it is clear that defence counsel wished to cross-examine the victim as to aspects of her victim impact statement concerning the impact of the assault. However, it is equally clear that the prosecutor had taken issue with what defence counsel had submitted in mitigation concerning events leading up to the assault and, in particular, defence counsel's assertions that Melissa was not the aggressor and that the victim has to some extent "provoked" Melissa.

[21] Following a short adjournment to see if the two areas of dispute could be resolved, defence counsel said:

> "In respect of the victim impact statement, regrettably it'll be necessary for the victim to attend and give evidence in respect of her statement."

The prosecutor, addressing the learned Chief Magistrate said:

> "Essentially, sir, we're hearing on the facts."

[22] In the light of this exchange, it may well be that defence counsel considered that any evidence was to be confined to the dispute about the impact of the assault on the victim, while the prosecutor considered that evidence to be called was intended to resolve not just that issue, but also the dispute about whether Melissa was the aggressor.

[23] Any such confusion about the purpose for which evidence was to be called was not assisted by the learned Chief Magistrate's opening remarks at the resumed hearing some eight days later:

> "Now as I recall we indicated, Mr Davis, it all came out of your wishing to exercise your right to cross-examine the victim on her victim impact statement…".

[24] This remark would seem to lend weight to Ms Morris' submission that the evidence to be called was to be limited to exercise of defence counsel's right to cross-examine the maker of a victim impact statement. However, whatever may have been in the mind of Mr Davis (and the learned Chief Magistrate) at the time, the intention of the prosecutor to call evidence as to the circumstances of the assault and events leading up to the assault must have become immediately apparent when the prosecutor called an

eye-witness to the assault and led evidence of that assault. No objection to this evidence was made by the defence, nor was there any objection when the victim gave evidence of the circumstances of the assault and events leading up to it. The fact that Mr Davis chose not to challenge the version of events given by the victim and the eye-witness cannot assist the appellant now. The opportunity for the defence both to challenge the prosecution's version of events and to call evidence in support of the defence's version of events was available.

[25] The matter, however, does not stop there. In opening his submissions in mitigation, Mr Davis said:

> "There may be some dispute as to exactly what happened but nonetheless there's clearly an assault."

[26] Mr Davis then continued with submissions as to the circumstances of the assault by reference to the evidence of the victim and the eye-witness. He also made submissions unsupported by evidence, as to what had led up to the assault. In the circumstances, there was a clear acknowledgement by Mr Davis that it was open to the learned Chief Magistrate to make findings of fact, based on the evidence which he had heard, as to the circumstances of the assault and events leading up to it which went beyond the initial summary of facts which had been admitted by the defence.

[27] There is no substance in the complaint that the learned Chief Magistrate erred by imposing a sentence based on a set of facts not agreed or admitted

by Melissa. The dispute as to the circumstances of the assault and events leading up to that assault arose from submissions made by Mr Davis in mitigation. That dispute was the subject of evidence called by the prosecution. The defence made no challenge to the evidence of the victim and the eye witness and called no evidence on behalf of Melissa (despite Mr Davis having earlier indicated his intention to call Melissa to give evidence: see p.10 of the transcript). In the circumstances, it was open to the learned Chief Magistrate to make findings of fact as to the circumstances of the assault by Melissa and events leading up to it.

Sentencing Juvenile Offenders

[28] The complaint that in sentencing both Melissa and Leanne the learned Chief Magistrate placed too much emphasis on general deterrence may conveniently be dealt with in the context of the broader appeal ground that there was a failure to take into account the proper principles for sentencing juvenile first offenders.

[29] The proper approach to the sentencing of juveniles is well known and well established. The following passage from the judgment of Martin CJ in *M v Hill* (1993) 114 FLR 59 at 66 provides a helpful summary of the manner in which the Juvenile Court should tackle the difficult and sensitive task of sentencing juveniles:

> "Furthermore, it is well entrenched in the criminal law that there is an essential difference between children and adults when they come before a court exercising criminal jurisdiction. It is often the case,

as here, that the offending is explicable, in part, at least, by difficult personal circumstances, immaturity and the growing-up process: see the remarks of Burt CJ in *Noddy v The Queen* [1980] WAR 132 at 133. To all that is to be added, in respect of this appellant, a particular intolerance to racial slurs. Judges of this Court have often had occasion to reiterate the relevant portions of the preamble to the *Juvenile Justice Act* 1983 (NT) which ways that it is an Act relating to:'… the punishment of juvenile offenders … with the intention that juveniles be dealt with in the criminal law system in a manner consistent with their age and level of maturity (including their being dealt with, where appropriate, by means of admonition and counselling) …'. Having referred to that purpose of the Act Maurice J in *Simmonds v Hill* (1986) 38 NTR 31 went on (at 33) to observe that:

> 'In the Juvenile Court the retributive aspect of sentencing is, at best, of secondary importance. Even lower in the scale, if, indeed, it has any place at all, is deterring others. The overwhelming concern is the young offender's development as a law abiding citizen. The court should be at pains to ensure that its sentences do not alienate its young clients. Particularly is this so in the case of a first offender. Here there is a real risk that an incentive to good behaviour has been removed, namely the desirability of a clean record in what for young people just leaving school is a very difficult labour market indeed.'"

[30] The remarks of Martin CJ were adopted by Kearney J in *M v Waldron* (1988) 90 FLR 355. His Honour also referred to *R v Homer* (1976) 13 SASR 377 at 382:

> "… in the case of a juvenile … the court is trying to find out what is the best means of turning this delinquent juvenile into a responsible law abiding adult and that has really nothing to do with the seriousness of the crime … and no useful comparison can be made between an order made under a non-punitive system and a sentence imposed on an adult."

[31] I would also endorse the observation of Martin CJ in *Hill* at 67:

> "The punitive and deterrent aspects of the sentencing process should not be allowed to prevail so as to possibly destroy the results of (the) process of rehabilitation."

[32] I emphasize that in applying the above principles each case should be dealt with on its merits. In particular, even in the case of a juvenile, deterrence and punishment as sentencing objectives in the particular circumstances of an offender and an offence may assume considerable significance. In *Yardley v Betts* [1979] 1 A Crim R 329, King CJ and Mitchell J at 333 recognized that:

> "Deterrence possesses particular significance in case of unprovoked violence."

[33] In *Sullivan v Pulford* (1989) 99 FLR 126 at 129 Angel J agreed with a special magistrate's opinion that, in the particular circumstances, an offence of aggravated unlawful assault committed by a 16-year-old first offender of good character was:

> "… one in which the deterrent aspect of punishment should take priority over that of rehabilitation."

[34] In the case of Leanne, the learned Chief Magistrate was entitled to have regard to the unprovoked nature of the assault, the fact that the victim was punched in the head with a closed fist and the substantial deleterious effect on the victim's sense of security and well-being. In such circumstances, having regard to the age of Leanne (15 years) her early plea and previous good character, a community service order was well within the range of a sound exercise of sentencing discretion. However, the learned Chief

Magistrate erred in recording a conviction. A conviction for an offence of violence would be likely to have a very substantial effect on Leanne's future employment prospects. In Leanne's circumstances and in the circumstances of her offence, the recording of a conviction was likely to discourage her rehabilitation and become a source of continuing resentment.

[35] In the case of Melissa, who was 16 years old at the time of the offence, similar considerations to those referred to above apply, albeit with less force, given the learned Chief Magistrate's findings as to the circumstances of the offence based on the evidence of the victim and the eye-witness. In Melissa's case, in addition to the unprovoked nature of the assault, the learned Chief Magistrate was entitled to have regard to the fact that Melissa struck two blows (one resulting in bodily harm), that threats were made to the victim and that a gang was involved in isolating then abusing the victim. In such circumstances, notwithstanding Melissa's youthful age, early plea and previous good character, the recording of a conviction was arguably available within an appropriate exercise of judicial discretion. However, because of the manner in which the learned Chief Magistrate delivered a single set of reasons for sentence in which findings of fact were wrongly made against Leanne, I consider it would be unfair to distinguish between the two sisters in terms of recording a conviction against one but not the other. I am in little doubt that the niceties of the laws of evidence and procedure would not persuade Melissa that she had been treated fairly if she, but not her sister, was to suffer a conviction. In the very particular

circumstances, I consider that Melissa should receive the same treatment as Leanne in terms of no conviction being recorded.

[36] The learned Chief Magistrate's decision to impose a community service order on Melissa was within the limits of a sound exercise of sentencing discretion. However, having regard to the differences in the offences to which Melissa and Leanne pleaded guilty and the respective facts found against them, I considered that such differentiation was not adequately reflected in the number of hours each was required to serve under community service orders. Accordingly, I decreased the number of hours required of Leanne from 40 to 20 hours to reflect the different offences and facts proved against the two sisters.