PARTIES:	PHILLIP HUDDLESTON
	v
	KATRINA JANE HATZISMALIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA138 OF 1997 (9719873)
DELIVERED:	20 July 1998
HEARING DATES:	23 June 1998
JUDGMENT OF:	Kearney A/CJ

CATCHWORDS:

Appeal – Justices – Appeal against sentence – 'Manifestly excessive' ground – Desirability of providing statistical information to appellate court, to indicate current range of sentencing for the particular offence – Inutility of comparing facts of other cases – significance of general deterrence when sentencing for offences involving violence towards women – Variable significance of victim's wishes when sentencing -

Criminal Code (NT), s188(2).
Sentencing Act (NT), ss5(2)(b), (c) and (e), 40, 53(1), 58.

R v Jonathan Chula (unreported, Supreme Court (Angel J), 20 May 1998), considered.
Najpurki v Luker (1993) 117 FLR 148, considered.
Gadatjiya v Lethbridge, (unreported, Supreme Court (Mildren J), 28 February 1992), referred to.
Amagula v White (unreported, Supreme Court (Kearney J), 7 January 1998), considered.
Yardley v Betts (1979) 1 A Crim R 329, approved.
Mawson v Nayda (1995) 5 NTLR 56.

Hammond (1996) 92 A Crim R 450, approved.
Griffiths v The Queen (1977) 137 CLR 293, applied.
Everett v The Queen (1994) 181 CLR 295, applied.
Coulthard v Kennedy (1992) 60 A Crim R 415, approved.
Jane Miyatatawuy (1996) 87 A Crim R 574, referred to.
Rowe (1996) 89 A Crim R 487, referred to.
H v The Queen (1995) 81 A Crim R 88, approved.

REPRESENTATION:

Counsel:

Appellant:	M.A. Hird
Respondent:	J. Blokland

Solicitors:

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

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

No. JA138 OF 1997 (9719873)

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 Ngukurr

BETWEEN:

PHILLIP HUDDLESTON
Appellant

AND:

KATRINA JANE HATZISMALIS
Respondent

CORAM: KEARNEY A/CJ

REASONS FOR JUDGMENT

(Delivered 20 July 1998)

The appeal

This is an appeal against a sentence imposed on the appellant by the Court of Summary Jurisdiction at Ngukurr on 4 November 1997, after he had pleaded guilty to an aggravated unlawful assault on his wife on the afternoon of

Monday 19 May 1997. He was sentenced to 18 months imprisonment; his Worship directed that he serve 4 months, and that service of the remaining 14 months be suspended on condition he be of good behaviour for a period of 3 years, and under supervision for 12 months. The offence is provided for in s188(2) of the *Criminal Code*; it carries a maximum punishment of 5 years imprisonment when dealt with on indictment, and 2 years when dealt with summarily. The aggravating circumstances charged and admitted were 3 in number: that the victim suffered bodily harm; that she was a female and the appellant a male; and that she was threatened with a dangerous weapon, namely, scissors.

The plea before his Worship

(a) *The facts*

On the afternoon of Monday 19 May 1997, the appellant, his wife Janette Murungun and 2 others, had been drinking at Roper Bar. The four of them consumed a significant quantity of alcohol in the course of the afternoon. The appellant then decided it was time to return to Ngukurr. He told his wife that he wanted her to go with him. She refused, saying that she wished to continue drinking at Roper Bar. The appellant, intoxicated, then left Roper Bar and drove to Ngukurr. There he became angry over time as his wife failed to appear, and jealous about her. He took a pair of scissors and returned to Roper Bar with the scissors in his boot. He confronted his wife there, asking her to return to Ngukurr with him. She again refused. He lost control, took out the scissors, and in the heat of the moment, whilst his wife (for some unexplained reason) was on her hands and knees facing the ground, he stabbed

her in the lower back twice with the scissors, using one scissor blade. She fainted. “Full of remorse”, as his Worship found, the appellant took his wife to the Ngukurr clinic; from there she spent about 4 days in Katherine Hospital. The appellant made full admissions to the police. The wounds had to be stitched; the victim recovered in a few days.

(b) *The submissions*

Mr O’Connell then of counsel for the appellant pointed to the following ameliorating facts: that the appellant and victim had been together for 14 years, had a ‘very good’ relationship, and had 2 young children; they had lived all their lives in Numbulwar; they had never had any physical arguments before; the victim had suffered no long term injury to her health; the appellant had no history of prior offences of this nature; his attack on his wife had not been prolonged; the wounds had healed, and she suffered no after-effects; the offence had occurred while the appellant was extremely intoxicated; he was at all times co-operative with police, had made full and honest admissions to them, and pleaded guilty; he was “immediately remorseful”, taking the victim for medical attention, and apologising to her the next day; his apology was accepted, she had forgiven him, and they were reconciled the day after the assault; the two of them had now put this matter ‘behind them’, and got on with their marriage.

Mr O’Connell also indicated that the appellant worked as a Home Liaison Officer with the Education Department. His supervisor was impressed with his capacity for work and spoke of him as ‘a shining light’, an excellent role

model for young people in the community; accordingly, if the appellant was sent away from his community for any length of time, it would have "enormous adverse repercussions" for his family, and for the students at the school.

In the light of these matters, Mr O'Connell submitted that a sentence of imprisonment, entirely suspended, was appropriate, both in the interests of the appellant and of his community.

(c) *His Worship's sentencing remarks*

In sentencing ex tempore, his Worship said that he had taken into consideration the appellant's personal circumstances. He said, inter alia:

> "It's an ordinary pair of scissors, not a small pair. … he used one blade to make the wounds [in the centre back, and right side lower back]. Probably, I would think, about the bottom of the ribs, on the right side. I've seen many a fatal blow struck in the vicinity of that blow. … [had a sharp pointed knife been used] we would have been looking at something far more serious than aggravated assault.
>
> … the Supreme Court has said, many times, … that *we are not tolerating offences with weapons. And, as a matter of general deterrence, it is quite clear that what Phillip Huddleston did, calls for a prison sentence. It's also, I believe, quite clear, that, generally speaking, some of that prison sentence, should be served.*
>
> There are some peculiar matters in this case. First of all, he has expressed remorse right from the start. He has done what he can, to help the woman; he's taken her back, and she has taken him back. That last bit is perhaps nothing particular. She's given evidence today on his behalf; she doesn't say that she needs him back to help her with the younger child, but she makes it perfectly clear, that she is happy with him, in the bosom of the family.

> Many a woman, of course, will say that she doesn't want her man to go to gaol; and sometimes that is because of fear, but quite often it is because the couple does still have tender feelings, the one for the other. … she doesn't want him to go to gaol on account of what he did.
>
> In this case, it is not put that she feels that she was in any way responsible [for the assault on her]. … had she decided that she would go with him [to Ngukurr] … no doubt none of this would have happened." (emphasis added)

His Worship then referred in some detail to the views of the principal of the Numbulwar Education Centre, which were strongly in favour of the appellant, and concluded on that aspect:

> "[The appellant] is the sort of person that all communities need; he gives hope in situations that often seem hopeless. Trusted by all, and earned the trust.
>
> The principal's amazed at what has happened. The principal says that, 'Phillip is filled with remorse and shame, and is determined to stay away from situations where he will be tempted by alcohol again'. The principal ends:
>
> > 'I believe that if Phillip was sent away from this community for any time at all, it would have enormous repercussions on his family, and on the students at the school. His daily contribution to this community and school is highly valued. He is one of the few people who can offer any form of guidance and leadership.'
>
> Not surprisingly, in view of that, the supervision assessment that I have, indicates no problems at all. *That still leaves the question, whether it is sufficient for the whole community to totally suspend a term of imprisonment*." (emphasis added)

His Worship then referred to the use of the scissors as a weapon, saying:

> "… [The scissors are] quite capable of [being used for stabbing]. And he has struck with it, sufficiently hard to cause the damage that I've seen. And it wasn't done in a fleeting moment of rage. …

> While he was going off [to Ngukurr] he was ruminating over things, he got the scissors and came back with them. Didn't use them at once, but quite clearly had them there for the purpose if necessary, and had found it to be necessary. *I have no doubt that this is an … aggravated assault up around the top of the scale [for sentencing] of this court.*
>
> I don't believe I need to refer it on to the Supreme Court although I note that magistrates are only allowed to gaol for up to 2 years [under s188(2) of the Code]. And the 2 years that was intended when Parliament enacted the Code is 16 months under the present regime." (emphasis added)

I interpose that the last sentence is somewhat difficult to follow; possibly "16 months" and "2 years" have been transposed, in transcription. The power of a Court of Summary Jurisdiction under Code s188(2) is to sentence to a maximum of 2 years imprisonment. When the Code was enacted in those terms, the existence of the 'remissions for good behaviour' scheme meant that a prisoner sentenced to 2 years imprisonment would in practice serve only 2/3 of that term – 16 months. Remissions are now abolished; cf. s58 of the *Sentencing Act*. A prisoner sentenced to 18 months imprisonment, for example, will serve that 18 months, subject to any suspension of the service of the whole or part of that term under s40 of the *Sentencing Act*, or to the grant of parole by the Parole Board where a non-parole period is fixed under s53(1) of that Act. His Worship continued:

> "I guess Parliament knew what it was doing, and realised it was extending our jurisdiction. I have no doubt that I can deal with it within my [sentencing] limits. [That is, by a sentence of up to 2 years imprisonment].
>
> *But I have also no doubt that … I should impose a term to be actually served, so that the Numbulwar Community and the general community is in absolutely no doubt that what this man did was so wrong that it will be dealt with very firmly by the authorities."* (emphasis added)

His Worship then imposed the sentence under appeal.

It was clear that his Worship, in sentencing as he did, had given consideration to the principles and guidelines in the *Sentencing Act*.

The appeal

The grounds of appeal were as follows:

1. the sentence imposed was manifestly excessive in all the circumstances;
2. the learned magistrate erred in that:
   (a) he gave undue weight to the principle of general deterrence;
   (b) he failed to give due weight to the personal circumstances of the appellant; and
   (c) he failed to give due weight to the wishes of the victim as regards sentence.

However, the submissions of Mr Hird of counsel for the appellant were mainly directed at grounds 1 and 2(b). He made certain concessions, viz:

(i) the offence was serious in its nature, involving the use of a weapon;
(ii) the assault was unprovoked;
(iii) the appellant by obtaining the scissors beforehand had

considered whether or not he should arm himself with some sort of a weapon;

(iv) the appellant gave some thought to the possible use of the weapon in circumstances which might arise;

(v) when he inflicted the wound on the victim, she was in a vulnerable position in that she was drunk and on her hands and knees;

(vi) the victim was hospitalized for 4 days as a result, though her long term health was not affected; and

(vii) the imposition of a sentence of imprisonment was 'inevitable', because of the need for general deterrence.

The thrust of his submission was that service of the 18 months sentence should have been fully suspended, rather than 14 months of it.

I turn to the grounds of appeal, seriatim.

1. The sentence was manifestly excessive

In considering this ground, some guidance may be gleaned from the following authorities.

In *R v Jonathan Chula* (unreported, Supreme Court (Angel J), 20 May 1998) the defendant was imprisoned for 4 years (3 years non-parole) for an assault on his wife with a hammer causing bodily harm. The maximum

sentence was 5 years imprisonment; the Magistrate had declined to deal with the charge summarily, and sent the defendant to the Supreme Court. The learned sentencing Judge observed that –

> "The past history of the [defendant] demonstrates that he is given to wanton violence, without provocation, particularly against this victim … there is a grave risk of future like-offending."

His Honour said:

> "It is very important that the community … understand that this type of offending will not be tolerated, and that Aboriginal women in communities, who require the protection of the law, shall have it and that male Aboriginals who attack female Aboriginals, whether they are wives or not – particularly with weapons – will be severely dealt with.
>
> Time and again the courts have said that violence between male and female will simply not be tolerated. The Criminal Code says so and the courts will enforce it, as is their duty. There is no reason for them – that is, the courts – to think that violence of the type visited by the prisoner on his wife is the fault of the victim, or to be tolerated. It is to be severely punished.
>
> … the primary duty of the court in the present case is to protect the community, … and the women in the community, and in particular, in this case, the particular victim, from further violence."

In *Najpurki v Luker* (1993) 117 FLR 148, the Chief Justice on appeal confirmed a sentence for an aggravated assault involving bodily harm, of 18 months' imprisonment (8 months non-parole), where the appellant had slashed his wife across the face with a hunting knife, causing a deep cut 4" in length. It required surgery. The intoxicated appellant was of previous good character, suffering from remorse, and unlikely to re-offend. His Honour said at 151-3:

151 "it is plain that his Worship approached the sentence which he felt

obliged to impose upon the basis that the need for general deterrence outweighed the many other factors of significance affording mitigation to the appellant. That is not to say that a sentence imposed under those circumstances should be more severe than the nature of the offence and
152 the circumstances of its commission calls for, but rather, that it is appropriate to give less weight to mitigating factors which may be found going to the circumstances of the offender. Proceeding in that way results in what has been called a "firming up" of the sentence, and results in one which more closely fits the crime which: "If the offender thinks about it in advance, is in reason predictable and certain, each of those qualities being central to the idea of deterrence" per Burt CJ in *R v Peterson* [1984] WAR 329 at 332. As Bray CJ said in *Birch v Fitzgerald* (1975) 11 SASR 114 at 116:

> "… there are offences in which, as it seems to me, the deterrent purpose of punishment must take priority. When people act under the influence of liquor, passion, anger or the like so as to constitute themselves a physical danger or potential physical danger to other citizens it may well be that a sentence of imprisonment will be appropriate, even in the case of a first offender of good character, in order to impress on the community at large that such behaviour will not be tolerated."

…

His Worship's emphasis upon general deterrence was clearly brought about by his concern for the protection of the community, which, after all, is the primary objective in criminal sentencing. That is, the community could only be properly protected if persons who behave in the manner the appellant behaved were sentenced to a period of imprisonment such as would bring home to those who may be minded to act in a similar manner that incarceration for a significant period would in all likelihood be the result.

Until such time as it is demonstrated to me that people who are minded to take up a weapon with a view to assaulting some person with whom they have a grievance are not deterred by the knowledge that others who have done similar things have spent time in gaol, then the element of general deterrence remains a meaningful factor in the sentencing process for such offences. If it is emphasised by the courts often enough and firmly enough then the message must start to get through, or be reinforced, that the community and individuals within it will be to some extent relieved of the threats, the real tragedy and distress caused by assaults with offensive weapons. That has been a concern of this Court for many years and
153 reference to its records in relation to the sentencing of persons convicted

> of offences such as this discloses that it is by no means out of the ordinary for substantial head sentences to be imposed, with the fixing of a non-parole period of a significant time being determined as the period which justice requires that the offender must serve having regard to all the circumstances of the offence. …
>
> A review of the sentences imposed in this Court for unlawful assault involving the use of weapons such as a knife, a rock, broken bottles, a nulla nulla or other implements capable of inflicting serious wounds show that although the sentence imposed by his Worship may be at the upper end of the scale, it was not out of the range of disposition of the offenders. There can be no doubt that his Worship was as well aware of the frequency of offences of this general type when considering the sentence to be imposed on this appellant. It is undoubtedly the case that the Courts of Summary Jurisdiction are called upon to deal with offences of this nature more often than in this jurisdiction. It has not been shown that the learned stipendiary magistrate's discretion miscarried nor has it been shown that the sentence which he imposed was manifestly excessive. It may well be at the higher end of the scale, but even if this Court were inclined to impose a lighter sentence that is not the test.
>
> Assaults with weapons which have the capacity to maim, mutilate, disfigure, incapacitate or disable another are the most serious kind. *Such an assault is aggravated if the person perpetrating it goes out of his or her way to become armed with the weapon, and it is worse if the person upon whom the assault is perpetrated is defenceless for whatever reason*. Too often, situations such as this can be hidden under the euphemism of "domestic violence" as if, it having occurred in a domestic situation, rendered it less criminal. That is not the case" (emphasis added)

See also *Gadatjiya v Lethbridge*, (unreported, Supreme Court (Mildren J), 28 February 1992) at pp10-13, referring to the need for individual assessment and treatment, when sentencing in cases of assault.

Mr Hird also referred to what was said in *Amagula v White* (unreported, Supreme Court (Kearney J), 7 January 1998). In that case the appellant had been convicted of 81 prior offences of unlawful entry and other dishonest offences, six assaults in 1985 and three aggravated assaults in 1985 and 1990.

He was sentenced to 6 months' imprisonment for an aggravated assault on his wife with a direction that he serve 2 months, service of the remaining 4 months being suspended for 18 months, upon certain conditions. The assault had been prolonged, and in different localities; various weapons had been attempted to be used, including a branch of a tree, a wheel spanner, a knife, a stick, and a length of aluminium pipe, though the victim had not suffered harm. The sentencing Magistrate took into account the 'extreme prevalence' of domestic violence in that community (Groote Eylandt). On appeal against the severity of sentence, fresh evidence was received showing that the parties had now been reconciled, and the victim did not want the appellant to be imprisoned. In the result the appeal against sentence was dismissed.

In *Amagula v White* (supra), I referred to the general desirability for many offences of providing an appellate Court with statistical information relating to the current range of sentencing for the offence in question in the court below, when the ground of appeal is that the sentence was manifestly excessive. I explained that -

> "… this is because whether a sentence is manifestly excessive is properly determined objectively by reference to a standard established by comparable cases, and accepted by the appellate court. See *Golder v Pryce* (unreported, Supreme Court (NT) (Kearney J), 24 December 1997) at 6-8 and 16; *Mawson v Nayda* (unreported, Supreme Court (Kearney J), 31 October 1995) at 10-11; *Ryan and Vosmaer* (1988) 33 A Crim R 288 at 293; *Rory* (1992) 64 A Crim R 134 at 138; *R v Bird* (1988) 91 FLR 116 at 130-1; and *Yardley v Betts* (1979) 1 A Crim R 329 at 331-2.
>
> Only when the appellate court is satisfied that a sentence is definitely in excess of the current sentencing range, can an appeal be allowed on the 'manifestly excessive' ground. It is not a ground which admits of lengthy argument; see *Taylor* (1985) 18 9 Crim R 14 at 17, and *Johnston* (1995) 80 A Crim R 203 at 205 per Crockett ACJ."

In this appeal no such statistical information was provided. Of course, assaults "vary very greatly in seriousness" as King CJ pointed out in *Yardley v Betts* (1979) 1 A Crim R 329 at 334; however, even in that case of assault, a schedule of penalties imposed in other cases was before the Court (see 332) and King CJ commented favourably on that approach at 331.

The general principles relating to appeals against sentence are well-established; see, for example, the authorities cited in *Mawson v Nayda* (supra) at p8.

While it is useful to ascertain the normal *range* of sentencing for a particular class of offence where such a range can be shown to exist, when considering this ground of appeal it is pointless to seek to compare the *facts* of this case with those of other cases. Such comparisons are irrelevant, when the issue is whether a sentence is manifestly excessive; the purpose of citing other sentences in a particular category of offence is to establish what the *range* of sentencing is for that category. See generally *Hammond* (1996) 92 A Crim R 450 at 456-7 and 466-7. The High Court has made it clear that sentences which depart from accepted sentencing *standards* constitute an error in principle which should be corrected; see *Griffiths v The Queen* (1977) 137

CLR 293 at 310 per Barwick CJ, and *Everett v The Queen* (1994) 181 CLR 295 at 300.

In my opinion it cannot be said that the sentencing disposition in this case was manifestly excessive, although the head sentence of 18 months was in the upper part of the range permissible in all the circumstances.

2. Undue weight to the principle of general deterrence

This ground was not developed in the appellant's submissions. I accept the respondent's submission that his Worship did not fall into this error. General deterrence is a prime consideration when sentencing for this type of offence; see the observations of Angel J in *R v Chula* (supra) at p38, and of the Chief Justice in *Najpurki v Luker* (supra) at 152.

3. Failure to give due weight to the personal circumstances of the appellant

His Worship's reasons indicate that he took into account (amongst other matters) the appellant's personal circumstances, in particular:

(a) that he had no prior record for offences of violence;

(b) his co-operation with the police;

(c) the fact that his victim had reconciled with him, and was happy living with him;

(d) his good work record and his capacity for work; and

(e) the very positive evidence of his good character.

Mr Hird relied on s5(2)(b), (c) and (e) of the *Sentencing Act*, as pointing to a suspension of the entire sentence in light, in particular, of the principal's views (see p5). The question of the weight to be given to a prisoner's personal circumstances is but one of the factors to be taken into account in the complex task of sentencing. It is clear from his Worship's remarks that very much to

the forefront of his mind was the question whether service of the sentence of imprisonment should be *fully* suspended. It is clear that his Worship considered that despite the appellant's favourable personal circumstances the need for general deterrence pointed to part of the sentence being "actually served". It cannot be said, in my opinion, that his Worship's judgment in that regard was erroneous in that it lay outside the proper exercise of his sentencing discretion.

The need for general deterrence is a significant factor in sentencing for offences involving violence towards women; such offences are not less serious because the assault occurred in a domestic setting. It was open to his Worship to take account of the appellant's very favourable personal circumstances by suspending service of the great majority (almost 80%) of the term of imprisonment imposed.

4. Failure to give due weight to the victim's wishes

As to this ground, each case depends on its own circumstances: see *Coulthard v Kennedy* (1992) 60 A Crim R 415 at 417.

In *Amagula v White* (supra) I discussed at pp8-9 some of the authorities - *Coulthard v Kennedy* (supra), *Jane Miyatatawuy* (1996) 87 A Crim R 574 and *Rowe* (1996) 89 A Crim R 487 – relating to the significance to sentencing of the fact that the victim – particularly, the offender's wife – has forgiven the

offender, and specifically seeks a disposition other than immediate imprisonment. In essence, as noted above, the significance of that factor depends upon the particular case; the need for general deterrence is a countervailing consideration, and this also applies in offences involving domestic violence. I note that in that case I rejected a submission that a sentence of immediate imprisonment was imposed *only* in cases which involved stabbing or broken bones; in any event, there was a stabbing in the present case.

I note that in *Jane Miyatatawuy* (supra) at 580 Martin CJ said:

> "I am not satisfied that the wishes of the victim of an offence in relation to the sentencing can usually be relevant. … [The wishes of the community of such the victim is a member] may not be permitted to override the discharge of the judge's duty, but have been taken into account as a mitigatory factor."

See also *H v The Queen* (1995) 81 A Crim R 88 at 98-104 per Malcolm CJ, noting the dilemma for a sentencing judge in such a case – the need for the Courts to show that victims of domestic violence will be protected by the law, while at the same time taking account of the victim's position, and the need that "full regard should be paid to the prospects of rehabilitation [of the offender] and the maintenance of the family unit where that is possible." I do not consider that it can be said that his Worship failed to give due weight to this consideration.

Conclusions

I do not consider that any of the grounds of appeal have been established. Mr Hird faced the difficult task of establishing that taking into account the appellant's "exemplary" character and his contributions to the community, the application of the sentencing guidelines in s5 of the *Sentencing Act* meant that the *only* proper disposition was that the sentence of imprisonment, properly imposed, should have been *fully* suspended. I do not consider that that is so. Further, the sentence of 18 months imprisonment as a head sentence imposed lay within a proper exercise of his Worship's discretion. The suspension of service of almost 80% of that sentence, to take account of matters favourable to the appellant, also lay within that discretion.

Orders

The appeal is dismissed and the sentence imposed on 4 November 1997 is affirmed.

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