PARTIES:	WAYNE ASHLEY
	v
	ROBERT BRUCE MATERNA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA1/1997 (9622181)
DELIVERED:	21 August 1997
HEARING DATES:	12 August 1997
JUDGMENT OF:	Bailey J

CATCHWORDS:

Appeal – s163 Justices Act – Principles for the imposition of a sentence – Mitigating Factors – Whether the learned magistrate failed to give due weight to the cultural context in which the offence was committed.

Aboriginal Customary Law – Alleged practice of a brother striking his sister when swear words are used by her husband in her presence – such practice now obsolete – Magistrate entirely correct in affording no substantial weight as mitigation in the particular circumstances of the present offence – Appeal dismissed.

Legislation

Criminal Code 1983 (N.T.) ss188(2(a), (b) and (m)
Justices Act 1928 (N.T.) s163

Cases

Munungurr v R (1994) 4 NTLR 63 – Referred
Neal v R (1982) 7 A Crim R 129 at 145 – Referred
Ngatayi v R (1979) 30 ALR 27 at 36-37 – Referred
R v Mamarika, etc (Unrep) Supreme Court of NT, sentence of Mildren J, SCC No. 76 of 1995, delivered 17 July 1996 – Referred
R v Miyatatawuy (1996) 6 NTLR 44 at 49 – Referred
Walker v NSW (1994) 182 clr 45 AT 49 – Referred

REPRESENTATION:

Counsel:

Appellant:	Ms C Gibson
Respondent:	Ms A Fraser

Solicitors:

Appellant:	KRAALAS
Respondent:	DPP

Judgment category classification:	B
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BAI97022

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

No. JA1/1997
(9622181)

BETWEEN:

WAYNE ASHLEY
Appellant

AND:

ROBERT BRUCE MATERNA
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 21 August 1997)

On 18 December 1996 the appellant was convicted upon his own plea of guilty by the Court of Summary Jurisdiction of one charge of aggravated unlawful assault, contrary to section 188(2) of the *Criminal Code*. The circumstances of aggravation were that (a) his victim suffered bodily harm; (b) his victim was a female and the appellant was a male; and (c) his victim was threatened with an offensive weapon, namely a 1.3 metre x 10 centimetre stick.

The maximum sentence for this offence is imprisonment for five years.

The learned magistrate, Mr McGregor SM, sentenced the appellant to 18 months imprisonment and fixed a non-parole period of nine months.

By notice of appeal dated 19 December 1996, the appellant gave notice of his intention to appeal against the sentence imposed upon him relying upon three grounds. At the hearing of the appeal before this Court on 12 August 1997, Ms Gibson, on behalf of the appellant, abandoned two of those grounds and the appeal proceeded upon the basis of the single ground:

> "That the learned magistrate failed to give due weight to the cultural context in which the offence was committed."

The Crown's summary of facts was in these terms:

> "At about 6.00 p.m. on that evening, the defendant walked up to the victim who was seated down beside a camp fire. The defendant struck the victim without warning across the top of the head with a stick. She was knocked semi-conscious and was not taken to hospital until the next morning. She required hospitalisation for an internal (sic) period of about four weeks. Treatment has been received and is still continuing. The victim suffered a massive fracture of the skull.
>
> At no time did the defendant have permission to strike the victim. Police attempted to speak with the defendant about the matter; however he refused to assist with inquiries. The (inaudible) was still receiving treatment at the time of the (inaudible) of this precis."

In answer to a question from the learned magistrate, it would appear the victim, the appellant's sister, claimed to have been in hospital for three weeks rather than the four weeks referred to in the Crown's summary.

In addition to the Crown's summary of facts, evidence was called from two witnesses as to the background to, and the appellant's motivation for, the offence. The first witness, Alexander Thompson, is the husband of the victim, Dorcas Thompson. He was called on behalf of the prosecution. His evidence was to the effect that the appellant, the victim and himself were part of a group drinking alcohol. Mr Thompson had said something to the victim, his wife, which he was not supposed to say in the presence of her brother (the appellant), according to Aboriginal customary law. Mr Thompson had sworn at his wife. Prosecution counsel at trial then continued:

> "Q: And is it normal for the brother to punish somebody?
> A: Well, it's like – it's all – it's – in nowadays now it's – it's sort of – sort of fading away those things – not like in the early days. They used to hold it really strong and hard. The only time people can do that now – I can tell you the truth. When they have that alcohol in their body, then that's the only time they use that – that method – you know – because (inaudible) hit her now, but when sober nothing – that's not – that doesn't happen.
>
> Q: But is it right?
> A: Well, I haven't seen anything – anybody done that. I had a lot of – lot of woman has been swear, but when the brother (inaudible) – brother don't do nothing because he's sober."

Mr Thompson was not cross-examined by trial counsel on behalf of the appellant.

The second witness, called on behalf of the appellant, was Raymond Jeffries who is a senior elder of Ngukurr, the location of the relevant offence.

Mr Jeffries was asked, by trial counsel for the appellant, Mr O'Connell, about the consequences, if any, under Aboriginal customary law which flow from a man swearing at his wife in the presence of his wife's brother. I set out the relevant part of the transcript in full:

> "Q: Are you able to tell the court – is there a law that, if a man swears at his wife in front of his wife's brother, that that brother has to do something?
> A: That what's happening, yeah. In the old – if – usually that – they (inaudible) from the 50s to the 60s and now we don't use that sort of thing because of (inaudible) when European system came and didn't give us chance to let our own culture go.
>
> Q (HIS WORSHIP): Yes?
> A: And that's why – you know – once – people can't start doing those things like – you see – a man swear to his – to someone else's sister and the fellow gets up and hit her sister. You can't do it these days now because that man gets up and hit that man then you got – you got your laws there – you know. You got coppers. They come and pick it up – pick them up – you know.
>
> Q: Yes?
> A: And that's – that's (inaudible) our cultures – you know.
>
> Q: So that's part of your culture, but ---?
> A: Yeah.
>
> Q: you can't do it any more because ---?
> A: Some people can. Some people can.
>
> Q: Yes?
> A: But it's a matter of people – people in the offices understands our – our way of living – you know.
>
> Q: Yes?
> A: Our system.
>
> Q:(HIS WORSHIP): Alec says they only do it when they're drunk these days; is that right?

A: Yeah, that – they do it when they're drunk, but sometimes – some people – some men just gets up and walk away – you know.

Q: Yes?
A: When the sisters are swearing – you know.

Q: Is that the right thing to do or should they do something about that?
A: A man can't just get up and hit another man like Wayne did because if (inaudible) it's got to go to the lock up – you see.

Q: The lock up. But what about---?
A: In our – in our ways, that – that woman who that man swore to and she get hit from the brother – it's – that's his – that's her punishment – you know. She got to take that.

Q: So that's okay in Aboriginal way?
A: Yeah, it's okay in Aboriginal way.

Q: (HIS WORSHIP): In the old Aboriginal way?
A: Yeah.

Q: Is that still okay today if there was no police or anything?
A: Yeah, that's quite – that can still happen today.

Q: (HIS WORSHIP): If we took away the white fellow law; took away the Barunga law; took away the police and took away alcohol, maybe that would be the way again; is that right?
A: Yeah, I (inaudible). You'll find a system – our system is sort of different – you know.

Q: Yes?
A: I mean, it doesn't go round and round like that – you know. It just goes straight through – you know.

MR O'CONNELL: No further questions, sir.

THE PROSECUTOR: I just have one, just to clear my mind.

Q: If a man swears at his wife, does the brother then have to hit that – his sister, does he?

A: I mean – you know – anybody can swear. I mean, anybody can swear to a woman

Q: Yes?
A: When there's no brother around – you know.

Q: Right?
A: It's all right – they can swear at each other.

Q: But if – – –?
A: But a man's got to make sure that's – when swearing to his sister – make sure his brother not there – you know.

Q: So, because Alec swore at his wife, does that mean Wayne had to hit his sister?
A: Yeah, because Wayne was there.

No further questions."

In addition to this evidence, submissions were made by trial counsel as to the appellant's personal circumstances. In brief, the appellant is a 39 year old father of three who works as the manager of an Aboriginal community. Together with his wife he is responsible for the care of his invalid younger brother who is confined to a wheelchair. The appellant has a number of previous convictions, including five for assault and two for breach of domestic violence orders. These resulted in fines, a suspended sentence and terms of imprisonment of ten days, one month and six months. The most recent conviction of the appellant was in 1992 (for exceed 0.08) while the assaults date back to 1986 and before. The breaches of domestic violence orders occurred in 1990 and 1991.

The learned magistrate's extempore reasons for sentence are relatively brief. I reproduce them here, with the addition of numbering to the paragraphs for ease of reference:

"1. You've done significant injury to Dorcas Thompson, but she appears to be fully recovered after some three weeks in hospital. You struck her once on the head with a stick, causing a fractured skull and some loss of consciousness which eventually resulted in her being taken to hospital.

2. The reason you struck her is difficult for a white person to follow. I have received evidence from her husband and from Raymond Jeffries. Her husband, Alexander Thompson, who speaks really good English told me that he had said something to her which he should not have said in the presence of her brother. You were at another camp fire; heard what happened or heard some of what happened or heard about what happened and you went over at once and struck her and this apparently is the way things use to be, but it's being dying out since the 50s or 60s says Mr Jeffries, who was called by you to support your case.

3. I've already wondered whether what's behind this is that a man would not speak to his wife in such a way unless she had done something to provoke him. Of course that's mere speculation on my part and stands for nothing, but Mr Thompson assures me that this woman had done nothing and you went across and you at once struck her.

4. Now this may be conduct by Mr Thompson which justifies action of this nature by you in Aboriginal law, but quite clearly as a matter of public policy the court cannot take it into account except perhaps in the most minor way. It may explain; it cannot excuse and it gives little material on which a court can base a sentence more lenient than such an attack in the wider community would merit.

5. Women, including Aboriginal women, stand equal to men in the law of the Northern Territory and, if Aboriginal traditional laws do come to receive recognition in whatever form by the general law of the Territory, I think it is highly unlikely, in view of international treaties that Australia has signed, if a law such as has been explained to me will have any standing because it is – I regret to have to say this to you in the presence of elders, but it is, in my view, of such a

nature that people in many countries would hold it to be discriminatory and I believe the Discrimination Boards of this country and missions and whatever would call it discriminatory.

6. It's also a matter of regret, Mr Ashley, that given that I'm dealing with a man who has several previous convictions for assault – there are five here in the period between

Technical fault due to power failure

7. My view is that a sentence of a number of months imprisonment is required, Mr Ashley, so that people who are given to knock people on the head with sticks will think very carefully before they do it for whatever cause.

8. This woman has suffered a serious injury. I'm not saying she would have died without medical assistance. I don't know. You have had many brushes with the law relating to assaults. On the other hand, of course, as I say, you pleaded guilty. You acted in accordance with your notion of customary law, influenced no doubt by the fact that you were drunk, and you have a responsible position and you are responsible in the care for your invalid brother.

9. Sometimes those family matters are so strong that they will militate against what would otherwise be an inevitable long prison sentence. I don't believe they're so strong in this case."

It can be seen, by reference to paragraphs 2, 4 and 5 that while the learned magistrate appeared to accept that the striking of the victim by the appellant may have been in accordance with Aboriginal customary law, he did not accept that this was a mitigating factor "except perhaps in the most minor way". Later in his reasons, the learned magistrate recognised that the appellant had "acted in accordance with your notion of customary law" (paragraph 8).

Ms Gibson, on behalf of the appellant, emphasises that she does not seek to argue that the appellant's action in striking his sister was justified or excused under the *Criminal Code*. She accepts that the appellant's plea of

guilty is consistent only with his acceptance that his conduct was wrong according to the prevailing laws of the Territory. Ms Gibson submits, however, that while the appellant's action in assaulting his sister according to Aboriginal customary law cannot amount to a defence, it is a matter which can and should be given real weight as a mitigating factor in the sentencing process.

Ms Gibson referred me to a number of cases where the Supreme Court has recognised Aboriginal customary law as relevant to the sentencing process. These include *R v Miyatatawuy* (1996) 6 NTLR 44, *Munungurr v R* (1994) 4 NTLR 63 and *R v Mamarika etc*, Supreme Court of Northern Territory, sentence of Mildren J, unreported decision, SCC No. 76 of 1995 delivered 17 July 1996. Such cases are principally concerned with the extent to which the courts, in fixing an appropriate sentence, can have regard to a community's wishes as to how conflicts or disputes which have culminated in criminal offences should be resolved or to punishment which may be suffered by a convicted Aboriginal arising from the application of customary law.

Ms Gibson does not seek to suggest otherwise. However, she does submit that a sentencing court can and should give weight to Aboriginal customary law as a mitigating factor when it is relevant to an offender's motives and not simply any consequences he may suffer as a result of such customary law or how a community might wish to deal with a matter which has resulted in conviction of an Aboriginal.

Ms Gibson notes that in *R v Miyatatawuy*, supra, Martin CJ, at p49 observed:

> "….it seems to me that facts and circumstances arising from this offender's aboriginality remain relevant (Brennan J, *Neal v R* (1982) 7 A Crim R 129 at 145). They arise from the operation within aboriginal communities of practices affecting her. The Courts are entitled to pay regard to those matters as relevant circumstances in the sentencing process. For the most part the cases have to do with physical injury, inflicted or anticipated to be inflicted upon the offender...However, as shown in *Munungurr v R* (1994) 4 NTLR 63, this is not always the case."

These general comments were made in a context quite different from the present. However, I note that in *Neal v R*, supra, Brennan J of the High Court concluded his judgment with similarly wide-ranging sentiments:

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion at first instance or for the Court of Criminal Appeal."

On behalf of the respondent, Ms Fraser submits that the learned magistrate's approach was correct. She emphasises that while the authorities have given some recognition to Aboriginal customary law in the sentencing process, this has been confined to taking account of a community's wishes as to disposition and potential punishment of an offender arising from the application of Aboriginal customary law. In the respondent's submission,

evidence of Aboriginal customary law in the present case was relevant only to the appellant's motives in committing the offence and to the objective circumstances of how the offence came to be committed. Ms Fraser submits that there is no basis to use such evidence as mitigation. In short, Ms Fraser submits that the learned magistrate was correct to observe: "It may explain; it cannot excuse...".

Ms Fraser referred me to the following passage of Mason CJ in *Walker v NSW* (1994) 182 CLR 45 at 49:

> "It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle (*Racial Discrimination Act* 1975 (Cth), p10). The general rule is that an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters (*Bennion, Statutory Interpretation,* 2nd ed (1992), p255). The rule extends not only to all persons ordinarily resident within the country, but also to foreigners temporarily visiting. And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose. The presumption applies with added force in the case of the criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated. So, in *Quan Yick v Hinds*, Griffith CJ when dealing with the more general question whether the entirety of Imperial law was in force in Australia stated ((1905) 2 CLR 345 at p359):
>
> > 'It has never been doubted that the general provisions of the criminal law were introduced by the [*Australian Courts Act* 1828 (Cth)].' (9 Geo.IV c.83)
>
> Even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. In *Mabo [No. 2]*, the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law. English criminal law

> did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo [No. 2]* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people."

In the respondent's submission, the present offence is a serious assault by the appellant, who is a man with an extensive previous record for assaults. The appellant's plea of guilty acknowledges his moral and criminal responsibility and the learned magistrate was correct to place little or no weight upon the evidence suggesting a basis in Aboriginal customary law for the offence.

Conclusions

In *Ngatayi v R* (1979) 30 ALR 27 at pp 36–37, Murphy J observed:

> "The existence of two systems of law side by side, the prevailing one and aboriginal customary law, with their very different attitudes to guilt and responsibility, creates serious problems and the question how far our laws should apply to aboriginals and how far their law should be allowed to apply to them is controversial."

Nearly twenty years after these words were spoken and notwithstanding the case of *Walker*, supra, the question identified by Murphy J remains both controversial and not susceptible of any obvious and generally acceptable answer.

The present appeal raises important and difficult issues – although for reasons which I refer to below, this appeal is not an appropriate vehicle to attempt any resolution of such issues.

In the present case, as I have indicated, the learned magistrate appeared to accept that the appellant had acted in accordance with his notion of customary law. In the light of the available evidence, that may be seen as a generous finding – although I hasten to add that I would be very slow to differ with the learned magistrate on such a matter having regard to the exceptionally long-standing and wide-ranging experience of Mr McGregor SM.

According to the victim's husband (Mr Thompson) the practice of a brother striking his sister when swear words are used by her husband in her presence is, in practical terms, obsolete in recent times. According to his evidence, such conduct occurs now only when the assailant is under the influence of alcohol. For my part, I would not be prepared to recognise any aspect of customary law which is said to arise only where an aggressor was intoxicated – and particularly in the present context of such an intoxicated person allegedly being entitled to assault a morally blameless female for the conduct of her husband. Recognition of such a practice could not be accepted in any civilised society and would necessarily be rejected by all reasonable persons whether or not from a traditional Aboriginal background.

The evidence of Mr Jeffries, which I have set out earlier in these reasons, to my mind takes the issue little further. Mr Jeffries' evidence confirms the existence in earlier times of a customary practice entitling a brother to assault his sister if her husband swears in her presence. However, like Mr Thompson, in answer to a question from the bench, he appears to confirm that the practice

occurs in modern times only when the aggressor is intoxicated. Mr Thompson's evidence is also clearly to the effect that, in modern times, it is well known and accepted that the practice in question is contrary to the prevailing system of law in the Territory and the commission of an assault in the relevant circumstances is likely to be visited with criminal sanctions.

At best, the evidence suggests to me that an assault of the type committed by the appellant **was** permissible under Aboriginal customary law, but **is now** obsolete – and is generally recognised and accepted as being obsolete.

It may well be that Mr McGregor's reference to the appellant having acted in accordance with his notion of customary law was intended only to be a recognition of an historical, but obsolete, justification for the assault. Such an interpretation would accord with the evidence of Mr Thompson and Mr Jeffries. Consequently it would also, of course, render any present day reliance on Aboriginal customary law in the present context as a mitigating factor to a matter of no, or almost no, significance on any view of the appropriate principles for the role of customary law in sentencing.

The appellant has pleaded guilty to the offence and so recognised his criminality. It can in no sense provide substantial mitigation of that criminality to pray in aid a customary law which has become obsolete.

The above analysis proceeds upon the basis that the evidence was sufficient to establish the existence of a relevant "customary law" – albeit now

obsolete. I consider that assumption is itself open to serious doubt. It was not suggested that Mr Thompson was qualified to give evidence as to the existence of relevant Aboriginal customary law. In the case of Mr Jeffries, examination of his status, experience and qualifications in this regard was at best perfunctory. Even if he was qualified to give such evidence (as to which the learned magistrate made no specific finding) I consider that the evidence he gave fell far short of establishing the alleged customary law with sufficient precision for a court to act upon (even assuming, which I doubt, it would be prepared to do so).

Nowhere in his evidence did Mr Jeffries claim that a brother was **obliged** to assault his sister in the relevant circumstances (and in this regard I do not consider the leading question asked by prosecution counsel at the end of his cross-examination is entitled to any weight having regard to the rest of Mr Jeffries' evidence). Nowhere in his evidence did Mr Jeffries testify (nor was he asked to) as to the consequences, if any, of a brother failing to act in accordance with the alleged customary law. In the absence of evidence as to the obligatory nature of the alleged law and the consequences for non-compliance, elevation of a morally indefensible practice to the status of 'customary law' to which courts could or should have regard would be to invite ridicule of the courts and make a mockery of the fundamental principle that all people stand equal before the law.

The learned magistrate drew attention to the grossly discriminatory nature of the alleged customary law and expressed his doubts that such a 'law' could

ever have any standing as a matter of public policy. There can be little argument with the validity of such comments, but for the reasons I have sought to express, it is unnecessary to canvass such matters. I consider that the evidence fell far short of establishing the alleged practice as a 'customary law' – but even if I am wrong in that assessment, the evidence was consistent only with the practice having become obsolete.

In the circumstances, it is unnecessary to canvass ways in which Aboriginal customary law may be relevant to the sentencing process beyond the scope of matters which have been previously recognised as potential mitigation by courts.

I am satisfied that the learned magistrate did not fail to give due weight to the cultural context in which the offence was committed. His sentencing remarks make clear his appreciation of the cultural context of the offence. However, having recognised that cultural context, the learned magistrate was entirely correct to afford this factor no substantial weight as mitigation in the particular circumstances of the present offence.

The offence was a serious aggravated assault which resulted in the victim receiving hospital treatment for several weeks. The appellant had a history of previous violence, albeit his more serious convictions were several years ago. Defence counsel at trial conceded that a term of actual imprisonment was the only appropriate sentence and sought partial suspension of such a sentence. As I have indicated, the only appeal ground relied upon must be rejected. The

learned magistrate’s reasons for sentence disclose no misapprehension of the relevant facts or law. I do not consider that the sentence imposed was in any other way wrong in principle or manifestly excessive. Accordingly, this appeal must be dismissed.