PARTIES: NAJPURKI, Peter

v

LUKER, Peter

TITLE OF COURT: SUPREME COURT (NT)

JURISDICTION: SUPREME COURT (NT)

FILE NO: No 76 of 1993

DELIVERED: 6 August 1993

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JUDGMENT OF: Martin CJ.

CATCHWORDS:

Criminal Law - Appeal against sentence - Grounds for interference - Test - Miscarriage of discretion - Error or manifestly excessive sentence -

Criminal Law - Judgment and punishment - Sentence discretionary - General aspects of punishment - Purpose of sentence - Primary objective is protection of community - General deterrence - Firming up -

Peterson (1984) WAR 329, 332, followed.
Birch v Fitzgerald (1975) 11 SASR 114, 116, followed.
R v Ciccone (1974) 7 SASR 110, 113, followed.

REPRESENTATION:

Counsel:

Appellant: R Davies
Respondent: J Lawrence

Solicitors:

Appellant: DPP
Respondent: NAALAS

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 76 of 1993

BETWEEN:

PETER NAJPURKI
Appellant

AND:

PETER LUKER
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 6 August 1993)

This is an appeal against the sentence which was imposed in the Court of Summary Jurisdiction upon the appellant's plea of guilty for that he did unlawfully assault Susan Wangi Wangi and that the assault involved circumstances of aggravation namely that she thereby suffered bodily harm, that the appellant was a male and she a female, and that she was threatened with an offensive weapon, namely a knife accordingly to s188 of the Criminal Code. Any person who unlawfully assaults another is liable to a maximum penalty of imprisonment for one year, but if any of the circumstances of aggravation are present then the maximum penalty is increased to five years, or upon summary

conviction, to imprisonment for two years. Any of the circumstances of aggravation alleged in this matter would have the effect of increasing the maximum penalty. The appellant was sentenced to imprisonment for 18 months, and it was directed that the period prior to which he would not be eligible to be released on parole be eight months.

The grounds of appeal (as amended) are that:

1. The sentence was manifestly excessive.

2. The learned Magistrate erred by giving undue weight to the principle of deterrence.

3. The learned Magistrate erred in failing to give effect to the prospect of rehabilitation of the appellant.

4. The learned Magistrate failed to give sufficient weight to the evidence of good character adduced on behalf of the appellant.

5. The learned Magistrate erred by failing to convict before ordering a pre-sentence report.

The facts as found by his Worship and set forth in his reasons before sentencing the appellant, and which are not disputed, are as follows. On 24 March 1993 the

appellant was drinking at the Pularumpi Social Club and an argument developed between him and his wife, the victim of his assault. That argument concerned an affair that the wife had had with the appellant's brother. The argument was heated and the two of them went home where more alcohol was consumed, and whilst there the appellant's brother arrived between about 10.30 and 11.30pm. The appellant assaulted his brother and then turned his attention to his wife. He got a hunting knife, which he kept in his bedroom, and approached his wife who was in that room and blocked her exit from it. He then slashed her across the left side of her face which caused a deep cut about four inches in length and she sustained another cut to her left wrist as she tried to protect herself. The cut to her face was so serious that she was flown to Darwin for surgery. The appellant could not recall much of the incident when spoken to by police, apart from the fact that he was angry with his wife because she had been sleeping with his brother.

The knife was not placed in evidence and there is no description of it. Photographs of the victim were in evidence before his Worship and I have seen them. Taken the day after the assault they show a nasty wound running from a point low on the victim's left cheek and running across to just under her bottom lip.

The appellant was brought before the Court of Summary jurisdiction at Nguiu the following day. He was

represented by counsel, and immediately entered a plea of guilty to the charge. His Worship ordered the preparation of a pre-sentence report which was considered upon the adjourned hearing on 6 May. That report was considered by his Worship, who referred to a number of features in it in the course of his reasons for the sentence he imposed. It disclosed that the appellant was a 45 year old traditional Aboriginal who commenced his relationship with the victim about 20 years previously, and to whom there were born two children, aged 20 and 16. They were married about six years ago. They appear to have lived a fairly stable life together. The appellant had been a drinker for most of his adult life, and the victim also commenced drinking about 16 years ago. Of recent times alcohol use within the family had increased, however, the appellant was not regarded by members of the community as being a violent person and the author of the report reported that the offence was regarded as being out of character for him. He had no prior convictions.

Unlike many people with his background and circumstances he has engaged in worthwhile employment for most of his adult life and was regarded as being a good and reliable worker. As might be expected the relationship between the appellant and wife has since broken down. He acknowledged his heavy drinking habit and expressed himself to be aware that his behaviour in that regard must change, and consented to attend an alcohol rehabilitation programme.

As to the cause of his assault, he admitted that he was jealous of his brother. The author of the report, a probation and parole officer, concluded that if a prison sentence was to be imposed upon him, it should be partly suspended to allow him to face the consequences and accept responsibility for his actions, that he be subjected to a period of supervision under the Director of Correctional Services and obliged to attend a rehabilitation programme upon his release.

In his address prior to sentence, counsel for the appellant stressed all the matters which might be put in mitigation of the offence, paying particular regard to the circumstances in which it was committed, and the offender's personal circumstances including his age, good character and his remorse for what he had done. The fact that he had immediately cooperated with police and pleaded guilty to the offence was also put forward as a basis for extending leniency.

His Worship went into the matter in some detail in his sentencing remarks, and, as previously indicated, took into account, though not reciting all of them, the features of the pre-sentence report and the submissions made on behalf of the appellant. He expressed himself to be satisfied that, contrary to many other people he had dealt with, the appellant was in fact suffering from remorse and that he was a person who would be unlikely to re-offend. He

noted that he had already suffered the break up of his relationship with his wife. His Worship complained about lack of up to date information concerning the injury to the victim, for example, as to the healing of the wound, noting he had no up to date medical report, but made it clear that the absence of information did not work against the appellant, but rather in his favour meaning, it seems, that notwithstanding the severe nature of the injury disclosed in the photograph taken immediately after the incident, his Worship could not assume that the victim had suffered any long term physical or emotional harm beyond a scar which could well be unsightly and serve as a reminder to her of the assault. Some comment was made, in argument before this Court, that his Worship, in the course of his remarks, referred to the cost to the community occasioned as a consequence of the assault, in this case the cost of bringing the victim from where she was injured to Darwin for medical treatment, that treatment and her return. I do not understand his Worship to have treated that as an aggravating factor in itself, but rather, as acknowledging that there is such a cost involved, but as a concomitant to the injury. His Worship acknowledged the reason for the assault being the provocation (in its general meaning not its special and technical meaning given to it by the law), but rejected that as being an excuse which might allow some leniency to be given to the defendant. To his Worship's mind the community had an interest in ensuring that violent behaviour "especially violent behaviour involving the taking

up of a knife" is put down.

> "Whether or not a partner is unfaithful the community expects people to solve their problems without resort to violence and without resort to taking knives to other people. I have sympathy for the defendant, but to my mind the sympathy cannot be translated into leniency. To my mind there has to be a sentence which shows the community will not tolerate the taking of a knife to another person. To my mind this matter is too serious. The principle of general deterrence outweighs the question of rehabilitation of the defendant."

After expressing similar views in different ways his Worship said that the sentence was designed to reflect general deterrence and proceeded to impose the sentence the subject of the appeal.

Upon the appeal argument was directed principally towards the specific errors alleged which, in general terms, may be summarised as claiming that the learned Stipendiary Magistrate failed to give appropriate weight to the various factors which he took into account in the sentencing process. Now it is trite, but nevertheless worth remembering, that when sentencing a person, a Magistrate or a Judge is exercising a discretion and, on normal principles, a discretionary judgment made at a hearing is not set aside by a Court on appeal unless the Court is of the opinion that the Magistrate or Judge has taken into account things that he should not have taken into account or has failed to take into account things he should have, or has made some error in law. If an error cannot be detected,

nevertheless the exercise of discretion may be set aside if the Magistrate or Judge imposed a sentence which was so manifestly excessive that there must have been an error in the sentencing discretion.

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 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 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."

As to the balance between deterrence and rehabilitation, the remarks of the Full Court of the Supreme Court of South Australia in R v Ciccone (1974) 7 SASR 110 at 113, remain apposite.

> "The criminal law is intended for the protection of the public against criminals, for the punishment of those who commit offences, and the deterrence of others who might be minded to offend in like manner. One of the matters which a judge always considers is whether an accused person will respond to leniency and to supervision. If he does so respond, there is one less member of the criminal class, the public are to that extent protected, and the accused and others are encouraged to lead honest lives. However, as has been many times pointed out there are four general aspects of punishment: retribution, deterrence, prevention and reformation; and it is for the sentencing judge addressing himself to the accused, and having considered the matters put in mitigation and other matters including the prevalance of the offence, the accused's past conduct, his age, and the likelihood of his responding to reformative process, to decide in the exercise of a sound judicial discretion what ought to be done in the case of that particular accused".

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 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. The fixing of a non-parole period is concerned with deterrence, and although it confers a benefit on the prisoner, it serves the interests of the community rather than those of the prisoner. The nature of the crime will be relevant because a more serious offence will warrant a greater minimum term due to its deterrent effect upon others. Although the

appellant in this case has only demonstrated his propensity to be a danger to his wife in particular circumstances, nevertheless, it demonstrates that in appropriate circumstances he is capable of taking up a weapon and lashing out with the potential of not only causing actual bodily harm, but, as may have happened in this case, of causing much more serious injury or death. A strike with a knife which produced the injury sustained by the victim in this case, if administered only a few inches away from that where it was in fact inflicted, could well have caused fatal consequences. Had the knife struck only a few inches below where it did, the appellant may well have been dealt with for homicide.

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 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 of a 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.

The remaining ground of appeal has no substance. The pre-sentence report was not only received into evidence without objection, but relied upon by the appellant.

It has not been demonstrated that his Worship fell into specified error, and after anxious consideration of the sentence imposed, it would not be appropriate to find that the sentence failed to conform to established standards to such a degree as to be regarded as manifestly excessive.

The appeal is dismissed.