Daymirringu v Davis [2002] NTSC 45

PARTIES:	BRIAN DAYMIRRINGU
	v
	STUART AXTELL DAVIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA51 of 2002 (20104816)
DELIVERED:	13 August 2002
HEARING DATES:	8 August 2002
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	C. Musk
Respondent:	G. Dooley

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Office
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Daymirringu v Davis [2002] NTSC 45
No.JA 51 OF 2002 (20104816)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Maningrida

BETWEEN:

BRIAN DAYMIRRINGU
Appellant

AND:

STUART AXTELL DAVIS
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 13 August 2002)

[1] The appellant appeared before the Court of Summary Jurisdiction at Maningrida on 30 May 2002 at which time he pleaded guilty to having unlawfully assaulted his wife, Marissa Gaykamanu. The assault was accompanied by circumstances of aggravation being that the victim was a female and the appellant a male and, further, that she was threatened with an offensive weapon namely a cigarette lighter. The maximum penalty for that offence is imprisonment for five years. The appellant was sentenced to a

term of imprisonment of seventeen months suspended after five months. He now appeals against that sentence.

[2] The principal ground of appeal is that the sentence was, in all the circumstances, manifestly excessive. Further grounds of appeal contend that the learned sentencing Magistrate failed to give sufficient weight to the appellant's lack of prior convictions or to his prospects for rehabilitation. It was submitted that his Worship attributed too much weight to deterrence in the sentencing process.

[3] The circumstances of the assault were that during the course of an argument between the appellant and his victim regarding their daughter, the appellant punched the victim on the right cheek with a clenched fist on five occasions. He left the room but the victim followed and continued the argument. The appellant then picked up a cigarette lighter, which he lit causing the metal casing to become heated and he pressed the hot metal against the victim's face on six occasions causing the skin to burn and leaving U-shaped burn marks on her face. He also pressed the hot metal of the lighter against the victim's left forearm and right upper arm again leaving U-shaped burn marks. His Worship was provided with photographs of the burn marks on her face and arm. The information provided to his Worship was that the punches to the face of the victim caused her to suffer tenderness in her right cheek. It was said that the injuries suffered as a result of the burning did not leave permanent scarring.

[4] The learned sentencing Magistrate was informed that the appellant was aged 27 years and had not previously been in trouble with the law. At the time of the offending the relationship between the appellant and his wife was strained. The argument arose out of accusations the victim made against the appellant relating to infidelity and in particular infidelity with a female described as "his poison cousin". This was said to be a serious and offensive allegation. After the appellant struck the victim he attempted to leave the scene by going to the bedroom but the victim followed him. He then picked up the lighter, lit it and held it towards her telling her to "stop it or else". The victim stood there in a defiant manner and he pressed the lighter against her causing the injuries described.

[5] It was submitted to his Worship that this was "an impulsive, spontaneous offence, not a crime of premeditation." Whilst that may be so to some extent it is clear that there was time for the appellant to think about what he was doing. He was not lashing out but rather deliberately applying the heated metal of the lighter to the face and arms of his victim. He did not desist after he had burnt her once but reapplied the hot metal on a number of occasions. She simply stood there in defiance whilst he burnt her again and again. After the event the appellant apologised to the victim and they slept in the same bed that night. How that came to be is not explained. The next day she left the appellant and they have been apart ever since.

[6] His Worship heard from the victim and noted that she made serious allegations against the appellant concerning other matters that were

subsequently not pursued. His Worship noted that in the course of her evidence on these matters she "went to water". Having observed the victim and having heard her evidence his Worship indicated that he was able to accept that there "came a point in his life when he had had about enough of this woman's talk."

[7] In sentencing the appellant to imprisonment for seventeen months, suspended after he had served five months, his Worship made the following observations:

> "For want of evidence to the contrary, I accept that the injuries inflicted with the cigarette lighter were inflicted on a single heating of the implement and I simply say that granted such metal heats up quickly, it also, I would have thought, cools fairly quickly. He has never been in trouble before.
>
> He has inflicted this on this woman for reasons simply of jealous nagging. He's spent the equivalent of a month in remand. He has pleaded guilty to this charge and I do not believe there was ever any question that – any question about that, that there be a plea. It was the other charges that were in dispute.
>
> He is therefore entitled, by his plea, to a significant discount. He has also, during the time that he has been free, lived an ordinary decent life by all accounts. His father has been able to supervise him a bit closer. He has not been any trouble to the authorities.
>
> There is no suggestion that he has been in breach of any domestic violence order or anything of that sort. He is getting on with his life. He is still greatly missing his daughter but he is getting on with his life, living with his second wife and her child at Ramingining.
>
> And as I say, he has been through some form of ceremony within the community. These allow me, I believe, to provide for a greater discount than a plea of guilty 14 months after the event would normally permit. I think ordinarily and on [a] contest, this assault on

> his wife might well have been worth something very close to the limit of this Court's jurisdiction which is 2 years; maybe a bit either way. Allowing discount I am taking as the head sentence 18 months.
>
> Allowing for the time he has spent in custody, I am imposing a head sentence of 17 months commencing today. It has been put to me that that sentence ought to be suspended forthwith, taking into account the month spent in custody. It has been put to me by the prosecution that that is significantly too short and I agree that it is significantly too short.
>
> There may not be much need for personal deterrence in this case, the woman has separated herself by many miles from him, but there is (inaudible) for general deterrence and there is the inescapable fact that this was a cruel attack on the woman using as he did hot metal which might well have left permanent tissue or skin damage.
>
> I think, ordinarily, he should serve at least 6 months and bearing in mind that he has served a month, I order that the sentence be suspended after he serves 5 months."

[8] The principal ground of appeal is that the sentence was manifestly excessive. The other grounds of appeal were essentially argued as elements of that ground. The sentencing remarks reveal that his Worship took into account the appellant's lack of a criminal history and his good prospects for rehabilitation. His Worship gave specific consideration to aspects of rehabilitation. He took into account the appellant's remorse, his conduct in living "an ordinary decent life" and staying out of trouble with the authorities since his release on bail. He referred to the ceremony that had been conducted within the community arising out of the misconduct of the appellant. A substantial part of the head sentence of seventeen months imprisonment was suspended reflecting the matters favourable to the appellant including his remorse and his prospects for rehabilitation.

[9] His Worship noted that there was not "much need for personal deterrence in this case" but, as was appropriate, addressed the need for general deterrence. In my view he gave appropriate weight to matters of deterrence both personal and general.

[10] In the course of her submissions counsel for the appellant argued that his Worship failed to give adequate weight to the provocative nature of the remarks made by the victim when he described her conduct as "jealous nagging". At the hearing of the appeal it was submitted that his Worship should have regarded the conduct of the victim as seriously culturally offensive to the appellant. No submission to that effect had been made to, or developed before, his Worship. In my view his Worship did not undervalue the seriousness of the situation as described to him and he attributed appropriate weight to it.

[11] The general principles applicable to an appeal based upon the ground that a sentence is manifestly excessive are well known. In the absence of identified error an appellant seeking to establish that a sentence was manifestly excessive must show that the sentence was not just arguably excessive but that it was so "very obviously" excessive that it was "unreasonable or plainly unjust": *Raggett, Douglas & Miller* (1990) 50 A Crim R 41 at 47; *Salmon v Chute* (1994) 94 NTR 1. The presumption is that there is no error in the sentence. It is not enough that this Court would have imposed a less or different sentence. There must be some reason for regarding the sentencing discretion as having been improperly exercised:

Cranssen v The King (1936) 55 CLR 509 at 519-520. The sentence itself may afford convincing evidence that in some way the exercise of the sentencing discretion has miscarried.

[12] The courts in the Northern Territory and those in other jurisdictions have repeatedly expressed concern as to the level of violence occurring in some Aboriginal communities. Assaults by males upon females, often with offensive weapons, are regrettably all too familiar in such communities. It has been repeatedly observed that the courts must do their utmost to protect the community and, in particular, the women in the community from such abusive behaviour. The courts must and will do what they can to deter the use of violence. For example see *Inness Wurramara* (1999) 105 A Crim R 512.

[13] Whilst the assault upon the victim in this matter was of short duration it involved repeated acts. She was struck with a fist to the head on five occasions and then subjected to burning with the hot metal of a cigarette lighter on six occasions. Both the appellant and the victim were fortunate that the injuries to her face and arm were not of a more permanent nature. As was observed by his Worship the burning of the victim demonstrated "a certain amount of deliberateness" rather than a response where the prisoner had lashed out in answer to a situation. His Worship correctly described the situation as involving "the inescapable fact that this was a cruel attack on the woman using as he did hot metal which might well have left permanent

tissue or skin damage". His Worship said of the appellant: "he branded her".

[14] In my opinion it cannot be said that the sentence imposed upon the appellant was unreasonable or plainly unjust. Whilst the sentence may have been towards the upper part of the permissible range I am not satisfied that it fell outside the range appropriate to the circumstances of the offence or of the offender. In my view there is no reason to regard the sentencing discretion as having been improperly exercised. No error has been demonstrated and the appeal must be dismissed.

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