Deacon v Tudor-Stack [2003] NTSC 15

PARTIES:	ANDREW ALBERT TASMAN DEACON
	v
	PAUL FRANCIS TUDOR-STACK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA73/02 (20207638)
DELIVERED:	7 March 2003
HEARING DATES:	22 January 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:
APPEAL - JUSTICES - appeal against sentence - intentionally disturb the Legislative Assembly while in session - whether the magistrate erred in determining the sentence without regard to the matters personal to the appellant - whether the magistrate erred in finding that the appellant's offence was 'a most serious offence' - whether the magistrate erred in placing undue weight on general deterrence - whether the magistrate erred in imposing a sentence which was manifestly excessive - Justices Act 1928 (NT).

Criminal Code 1999 (NT), s 61(a)
Sentencing Act 2002 (NT), s 43, s 113(1)
Trespass Act 1987 (NT)

Watson v Trenerry and *Williams v Trenerry* (1998) 122 NTR 1, *Hoare v R* and *Easton v R* (1989) 167 CLR 348, *Dinsdale v R* (2000) 202 CLR 321, applied.

REPRESENTATION:
Counsel:

Appellant:	S. Cox
Respondent:	R. Wild QC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

Deacon v Tudor-Stack [2003] NTSC 15
No. JA73/02 (20207638)

BETWEEN:

ANDREW ALBERT TASMAN DEACON
Appellant

AND:

PAUL FRANCIS TUDOR-STACK
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 7 March 2003)

[1] This is an appeal against sentence imposed by a magistrate on the appellant on 2 August 2002.

[2] The appellant entered a plea of guilty to a charge that on 14 May 2002 at Darwin in the Northern Territory of Australia did intentionally disturb the Legislative Assembly while it was in session on Tuesday 14 May 2002. Contrary to Section 61(a) of the Criminal Code Act.

This offence carries a maximum penalty of three years imprisonment.

[3] The learned stipendiary magistrate having found the offence proved proceeded to conviction. He sentenced the appellant to a period of four

months imprisonment suspended after the appellant had served 14 days and specified a period of two years during which the appellant is not to commit another offence punishable by imprisonment if he is to avoid being dealt with under s 43 of the Sentencing Act.

[4] In addition to the penalty imposed by the court, the appellant has been served with a notice under the Trespass Act 1987 dated 14 May 2002, warning him against trespassing on premises of Parliament House building within one year of the date of the notice.

[5] The grounds of appeal are as follows:

1) The learned stipendiary magistrate erred in determining the sentence without regard at all to the matters personal to the appellant.

2) The learned stipendiary magistrate erred in finding that the appellant's offence was "a most serious offence".

3) The learned stipendiary magistrate erred in placing undue weight on general deterrence.

4) The learned stipendiary magistrate erred in imposing a sentence which was manifestly excessive.

[6] The agreed facts presented to the learned stipendiary magistrate were as follows (tp 3-4):

> "During the morning of Tuesday 14 May this year [2002], the defendant and group of 11 other protestors went to Parliament House

to observe proceedings in the Assembly. The proceedings were regarding new laws concerning so-called drug houses. For the historical record, sir, the result of the debate that day ultimately led to a law which came into operation today.

The defendant and the group sat in the upstairs public gallery which overlooks the Assembly. The gallery is enclosed with soundproof glass. At about 11:45 am the defendant and the group left their seats and left the gallery and the defendant in company of the group went downstairs to what's called the 2nd level where they opened the main entrance door to the Legislative Assembly Chamber which was then in session. That door was closed but not locked.

The defendant and eight others - being the group of nine that are in the information - then entered the Assembly Chamber. One of them - not this defendant - was shouting out calling the words 'police state'. Some of the others proceeded to walk through the Assembly holding up and waving placards whilst calling out. Three of the others climbed up onto tables and chairs on the floor of the Assembly and while doing so they continued shouting and waving placards.

This defendant remained in the Chamber for about three minutes just inside the door through which he had entered. As a result of the group's actions the Assembly was interrupted and proceedings were, in fact, suspended due to the disturbance. Madam Speaker expressed her concern for the safety of members of the Assembly and asked the members to leave the Chamber. However, due to the noise caused by those who were calling out, the members of the Assembly were unable to hear Madam Speaker's order.

Security officers requested the group to leave the building. Some of the group refused and had to be forcibly escorted. It's acknowledged that this defendant left unescorted. Police attended and seized some of the placards - which I won't be tendering any of those today - and a video tape which was made at the time and will be produced to the court in a minute. Entry to the Legislative Assembly by persons other than members and staff is by invitation only. None of the defendant's group had permission to enter the Legislative Assembly.

On 19 May this defendant was spoken to by police. He declined to participate in a record of interview and the matter has proceeded from there to now by way of summons. "

[7] In addition to these facts it was not in dispute that the appellant was spoken to outside the Legislative Assembly. He was cooperative in that he gave his name and address.

[8] A video tape of the incident was played to the learned stipendiary magistrate as it was to this Court. The video runs for 4½ minutes.

[9] The video depicts a serious disruption of the proceedings in the Legislative Assembly. Some members of the intruding group are shouting and yelling, jumping onto the benches and waving placards. During the incident the debate taking place in the assembly concerning the new drug law had to be suspended.

[10] The respondent conceded in this Court as they did before the magistrate that this appellant's part in the disturbance was relatively minor.

[11] There are a number of matters revealed on the video that are relevant to the appellant's involvement in this offence.

[12] The appellant was in the tail-end of the group who entered the Legislative Assembly. He stepped inside the door but did not go down the stairs with the others onto the floor of the Assembly. The appellant remained just inside the door of the Chamber for about three minutes. He was seen holding a green placard. He did not shout or wave the placard about. He watched proceedings for about three minutes and left.

[13] The participation of the other protesters was much greater. The video shows others entering the Parliament. A number of them jumped onto the main central table. One protester sat in the Speaker's Chair. Other protesters

who did go down the stairs onto the floor of the Assembly were shouting, swearing and waving placards about.

[14] Counsel for the appellant referred me to the Court of Appeal decision of *Watson v Trenerry* and *Williams v Trenerry* (1998) 122 NTR 1 and to a number of passages in that decision including at pp 6 - 7 Angel J said:

> "The peaceable combination of people in public places for the purposes of expressing opinions and of protest against political decisions is but the exercise of the ordinary civil freedoms of opinion, of speech, of assembly and of association. These freedoms reflect the importance our society places on open discussion and the search for truth, the need for diversified opinions to be known and for the strengths and weaknesses of those opinions to be identified, the right to criticise, the value of tolerance of the opinions of others, and the social commitment to the value of individual autonomy, all vital to the health of any democratic system of open government. A peaceful demonstration or protest, whether by assembly or procession in a street, is nowadays accepted by members of the community as a safety valve for the community and potentially at least as an agent for change and for the good. An ordinary incident of any assembly or procession through the streets is some inconvenience to others. Protests test tolerance of difference and of inconvenience. There may be some noise. Members of the public may witness and hear messages they did not wish to see and to hear. They may consider such messages to be anathema. There may be a gross affront to some sensibilities. Nonetheless peaceable protests are to be tolerated in the recognition of the freedom of others to hold different opinions, to speak, to assemble, and to associate. As Bray CJ said extra-curially on one occasion, "Diversity is the protectress of freedom" (1971) 45 ALJ 586. In short, peaceful demonstrations and protests (whether by way of procession or assembly) are the lawful exercise of freedoms which, while necessarily imposing on others, are tolerated in the absence of associated unlawful acts. While there is, strictly speaking, no juristic right to demonstrate or to protest, these are residual freedoms to do that which is not prohibited by law. Unregulated by express statutory provisions, any restrictions on demonstrators or protestors are to be found in the law of public nuisance and in the criminal law. These residual freedoms are not absolute to be exercised without restraint for they are to be exercised subject to other freedoms and the freedom of others. None of this is

> to deny the need for public order "without which liberty itself would be lost in the excesses of anarchy" ….."

and at p 10, Mildren J said:

> "In the Northern Territory it is not against the law to protest at the actions of a foreign government or its armed forces or to burn the flag or the flag of its army, as such, as a means of political protest. Whatever we may think of this type of political protest, or the message it conveys, is not to the point. Nor are we in the least concerned by any clamour by politicians or the popular press that people who do these things should be prosecuted. But, because it is of the nature of things that protestors are sometimes prosecuted by the authorities, and there are sometimes serious misgivings about the motives for such prosecutions, the courts must be careful to decide cases such as this according to principles of strict legalism. …"

[15] Ms Cox, on behalf of the appellant, acknowledged there was no issue as to whether the appellant was guilty or not. He had pleaded guilty to the offence. However, it is the submission on behalf of the appellant that it is an offence that has to be seen in the overall expression of free speech whilst acknowledging that on this occasion the appellant has overstepped the mark.

[16] Counsel for the appellant had made submissions to the learned stipendiary magistrate to the effect that it could be seen from the video the appellant was not a major participant. He was a follower. His Worship was informed that initially the group sat in the glass screened visitors area and then went down into the chamber. It had been put to the learned stipendiary magistrate the appellant was one of the last through the door. He pulled out a placard which was under his shirt which stated "Legalise marihuana". The appellant had not been shouting. He held the placard but did not wave it around. He

just stood at the entrance. He did not move towards the speakers table or towards where any of the members of the Assembly were sitting. The learned stipendiary magistrate was informed that a security guard took the placard from the appellant. It was further submitted to his Worship that one of the female members of the Assembly said words to the effect "Don't you know drugs kill people in the communities"? It was further submitted before the learned stipendiary magistrate that at this point the appellant felt embarrassed and no longer wished to disturb the Assembly. The learned stipendiary magistrate was informed that the appellant saw another protester was being held by a security guard. He went to the security guard and said "Let me take him outside". The guard released this protester and the appellant left the Assembly taking the other protester outside with him. These matters which were put to the learned stipendiary magistrate on behalf of the appellant were not in dispute.

[17] It was further submitted that the appellant has never been involved in active protest before. He was drawn to this particular protest because he is a cannabis smoker.

[18] The appellant is 25 years of age. He has lived in the Northern Territory for 11 years. He completed Year 10 at Nightcliff High School. He worked at Big W Supermarket chain for three years. He has had employment with Guardian Security for a number of years. He had a reference from Mr Ian Spooner, Managing Director of Guardian Security who attested to the fact the appellant had worked as a security officer on a casual basis for several

years. The references state he is a reliable and honest employee, always prepared to contribute a little extra. In addition he had worked at times without payment of wages providing security services to community and charitable events. The reference further attests to his participation in this demonstration being out of character for him. At the time the offence was committed the appellant was residing at the Bahkita Centre and coming to terms with difficulties he had experienced in his relationship with a young lady. He was taking anti-depressant medication. He is before the Court without prior conviction. As the learned stipendiary magistrate noted (tp 23) "He doesn't even have a traffic prior". He is entitled to credit for his prior good character.

[19] Ms Cox, on behalf of the appellant, referred to a number of comments made by the learned stipendiary magistrate which in the submission of counsel for the appellant were extreme, including the following statement (tp 20):

> "So as I say his involvement in the actual protest or whatever it was was less than some of his fellows. That's not to say that his actions were minor. There are, in my view, fundamental organisations which are inherent to our whole system of government. There is the parliament and there is the courts. Both of those systems are fundamental to our whole system and in my view deserve the most serious protection.
>
> Any attack upon parliament or any attack upon the courts, other than an unhappy letter to the editor, such things which are clearly permissible, anyone has the right to disagree, but any physical attack or physical taking over of parliament or the courts strikes, in my view, at the very foundation of our whole system of government. It is an offence of the most serious character.
>
> It would be easy to simply look at the matter in terms of what the defendant did. In my view that would be erroneous. It must be remembered that the defendant was acting in company. He knew he

> was in company. He went there with a group. If people act in company then they must understand that some members of the group with whom they chose to associate may be more active or take a more serious role than they themselves contemplated.

and (tp 22):

> "In my view this particular offence has the potential to strike at the heart of the system so deeply and badly that a sentence of imprisonment is the only sentence which would be appropriate in the circumstances. I'm treating it as a most serious offence. To do otherwise would, in my view, serve no deterrent and would encourage others to attack parliament or the courts the possibility of impunity. That cannot be encouraged or allowed."

[20] Ms Cox submitted that the appellant had suffered a penalty because under the Trespass Notice he was also banned from going to the library a place he previously enjoyed attending.

[21] This Court was informed that of the group of protesters this appellant is the only one to have entered a plea of guilty. The others have been mounting various challenges to the charges and been involved in committal hearings and appeals, whereas the appellant has been prepared to acknowledge his wrongdoing at the first reasonable opportunity. I accept the appellant is entitled to full credit for his plea of guilty and his cooperation with the authorities. The learned stipendiary magistrate stated that the appellant was to be given a discount for the early indication of a plea of guilty and the actual plea of guilty.

[22] On behalf of the appellant it was submitted that the learned stipendiary magistrate placed too much weight on the aspect of general deterrence. On

this issue his Worship made the following comments in his reasons for sentence (tp 23-24):

> "It has been said over many years that a fully suspended sentence of imprisonment is still a sentence of imprisonment. Yes, it is, but it does not, in my view, have the same element of general deterrence as a sentence of imprisonment which is served either wholly or in part.
>
> An offence of this type I think that general deterrence must play a very important role. I'm mindful that, having given the most serious consideration to the fact that a person who has never been before the courts before, should very rarely serve an actual period of imprisonment on their first time before a court. That should be saved for the most serious and grave of matters.
>
> I have been mindful not to allow thoughts of general deterrence to completely override my other considerations and I have been mindful to consider that whatever penalty I impose it must be the minimum penalty which would do justice to the situation.
>
> At the end of the day in the exercise of my discretion I've had to consider whether a sentence of imprisonment fully suspended would meet the gravamen of offence, bearing [in] mind the personal circumstances of this defendant.
>
> In my view in the exercise of my discretion it would not. It would not, in my view, sufficiently deter others or others to think before taking similar action. This court must not be seen to be encouraging others to invade parliament or to invade the courts. Parliament and the courts must be places which are free and safe."

[23] Counsel for the appellant submitted this is the first case under this provision of the Criminal Code to come before the Court since the introduction of the Criminal Code in 1984. I accept that there is no evidence this is a prevalent offence. Nevertheless, I accept that it is still part of the sentencing process to consider the deterrence of any future such offending. I consider the learned stipendiary magistrate fell into error in over emphasising this aspect of the sentencing process.

[24] *Hoare v R* and *Easton v R* (1989) 167 CLR 348 was a case in which the High Court held that the requirement that the court had regard to the fact that a prisoner may be credited with remissions did not provide a basis for increasing what would otherwise be an appropriate or proportional head sentence. At p 354 of this decision their Honours enunciated the following well established principle:

> "… Secondly, a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances (see *Veen v. The Queen* [No. 2] (1988) 164 CLR 465), …"

[25] Ms Cox then put forward an analysis of her research in other jurisdictions. I have summarised this detailed analysis as follows:

[26] No charges relating to Parliamentary sittings being suspended due to disturbance in the chamber had been recorded in the Federal Parliament or New South Wales. In South Australia there had been some incidents but no penalty of imprisonment had been imposed.

[27] In Tasmania protesters have been given warnings, the Speaker leaves the Chair, proceedings are suspended, the protesters ejected and banned for the day and free to return after that. Protesters have not been charged, although apparently security has now been increased. Tasmania does not have any provision similar to s 61 of the NT Criminal Code.

[28] In Western Australia there is no similar legislation to s 61 of the NT Criminal Code. Parliament itself does have powers to deal with any disruption. There were no recorded incidents of persons going onto the floor at a Parliamentary sitting.

[29] There is similar legislation in Queensland to s 61 of the NT Criminal Code. Ms Cox states that the result of her inquiries was that there were no cases where this legislation has been invoked. Persons who are being obstructive have been removed from the Parliament.

[30] Counsel for the Crown, Mr Wild QC, submitted that the results of Ms Cox's investigations as to what occurs in other jurisdictions are not relevant to this matter. It is the contention on behalf o the respondent that the NT Criminal Code has made this an offence punishable by a maximum three years imprisonment. The appellant is required to abide by the law of the Northern Territory.

[31] I acknowledge that the situation in other jurisdictions is of limited relevance. It is relevant in that there was little guidance that could be given to the learned stipendiary magistrate as to the range of penalties that prevailed either in the Northern Territory or in any other State or Territory. There are States which do not have an equivalent statutory offence. Intruders or protesters who disturb the business of Parliament are dealt with by ejecting them from the House. In the Northern Territory there were no precedents put before the learned stipendiary magistrate or this Court on the

basis that there is no record of any persons that have previously been charged under this provision of the Criminal Code.

[32] The task for the learned stipendiary magistrate was a difficult one. It was appalling behaviour on the part of the participants to enter the Chamber of Parliament House and disrupt the proceedings as they did. However, I am in agreement with the submission made by counsel for the appellant that the appellant is entitled to have his sentence reflect his minor participation in the offence. The appellant should be sentenced on the objective circumstances of his offending and sufficient weight given to the matters personal to the appellant. In imposing a sentence of imprisonment I consider the learned stipendiary magistrate erred in that the objective circumstances of the offence and the circumstances personal to the offender were such that a sentence of imprisonment was manifestly excessive (see *Dinsdale v R* (2000) 202 CLR 321).

[33] It is the submission on behalf of the appellant that this Court quash the conviction and re-sentence the appellant. In the circumstances the appellant asks that he be released without conviction on a bond.

[34] Mr Wild QC, on behalf of the respondent, submitted that it was not to the point that members of the House were not threatened. The point is that Parliament as an institution was disrupted. The Speaker ordered that proceedings cease, and the House disrupted which is what s 61 of the

Criminal Code seeks to protect. I accept that it was a serious matter that Parliament be disturbed in this way.

[35] Further Mr Wild QC submits it is important to bear in mind in looking at the offence alleged against Mr Deacon that it was committed in company. I agree that it is the gravamen of this offence that the appellant was in company. The invasion into the Chamber was in strength of numbers. I agree with the submission on behalf of the respondent that the video shows a fracas of some significance. Counsel for the respondent concedes that there is limited participation by the appellant. It is however the respondent's contention that it is his very presence with a placard that makes his offence deserving of an appropriate penalty.

[36] Mr Wild QC referred to the "anxious consideration" given by the learned stipendiary magistrate to an appropriate sentence and to his recognition that the other participants would be deserving of a much more substantial period of imprisonment.

[37] It is the submission on behalf of the respondent that in arriving at a sentence of four months imprisonment, the learned stipendiary magistrate has considered both the circumstances of the offence and of the offender and that this sentence of imprisonment was within his discretion and has not been shown to be in error.

[38] Mr Wild QC further submitted that the attitude of the Crown before the magistrate had been that a fully suspended sentence of imprisonment was

open to the magistrate. In this Court it is Mr Wild's submission that if this Court came to the conclusion that the sentence was manifestly excessive then it would be open to this Court to fully suspend the sentence rather than order any period of actual imprisonment.

[39] The respondent's attitude is that the submission by counsel for the defence of a no conviction bond would be a totally inappropriate disposition.

[40] The submission on behalf of the respondent is that what occurs in other parts of Australia, with respect to dealing with this offence, is of no relevance. The fact is that the Northern Territory has provided for an offence in the Criminal Code which carries a sentence of three years imprisonment. Mr Wild QC contends that prevalence is not the only matter which the court takes into account in deciding whether deterrence needs special allowance for a disposition. It is the respondent's contention that Parliament itself needs protection from people coming before it and exercising what they regard is their rights to free speech in a way which is contrary to law.

[41] I agree that what the appellant did is contrary to law. The appellant has also accepted that by his plea of guilty. I also accept Mr Wild's submission that there should be proper recognition of the seriousness of the offence. People cannot flaunt the law with impunity and express their rights of free speech in a manner which is in breach of the law. The video of the incident shows what appears to be a blatant and intrusive disruption of Parliament which is against the law. That is a matter which must be taken seriously. However,

within that context this appellant must be dealt with on the basis of the circumstances of his offending and matters personal to him. It is not appropriate I make any detailed comment on the actions of the other participants in the group, the charges against the other participants are still pending before another court. I am able to state that the actions of some of the other participants were far more disruptive and warrant a more severe penalty than the appropriate penalty for this appellant.

[42] The charges in respect of the other protesters will be resolved either in the Magistrates Court or the Supreme Court in due course. I am able to conclude from a viewing of the video, as did the learned Magistrate, that this particular appellant's participation in the actual incident was minimal.

[43] I agree with the submission made by the respondent that the serious aspect in respect of this appellant is that he did offend in company and that his very presence lent support to the participation of the group. It is for this reason that I consider it would not be appropriate to quash the conviction.

[44] However, I have come to the conclusion based on the appellant's minimal participation, the fact that he never actually went down onto the floor of the chamber, his actions in leaving before the conclusion of the incident and taking one of the other protesters with him, mean his part in the offending is substantially different to a number of other members of the group.

[45] This combined with the considerations personal to him particularly his prior good character which I have already referred to mean that a sentence of

imprisonment was manifestly excessive and in this respect the sentencing discretion erred.

[46] Accordingly I would set aside the sentence of imprisonment.

[47] I confirm the conviction, I set aside the sentence of imprisonment and in lieu thereof I make the following order:

[48] The appellant is convicted. Pursuant to s 13(1) of the Sentencing Act, he is released upon his giving security himself in the sum of $500 O/R that he will appear before the Court if called on to do so during the period of one year. That he be of good behaviour for a period of one year.

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