Dann v Kendrick [2004] NTSC 39

PARTIES:	JOSHUA RUEBAN DANN v SUZANNE LOUISE KENDRICK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 6 of 2004 (20321231)
DELIVERED:	5 August 2004
HEARING DATES:	5 August 2004
EX TEMPORE JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	J. Franz
Respondent:	R. Brebner

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

Dann v Kendrick [2004] NTSC 39
No JA 6 of 2004 (20321231)

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 Darwin

BETWEEN:

JOSHUA RUEBAN DANN
Appellant

AND:

SUZANNE LOUISE KENDRICK
Respondent

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 5 August 2004)

[1] On 5 February 2004 the appellant pleaded guilty in the Court of Summary Jurisdiction to having assaulted Ming Mark Yeo and to a circumstance of aggravation, namely that he caused the complainant bodily harm. The maximum penalty for the offence is imprisonment for five years.

[2] The circumstances of the offending were that on 8 October 2003 the appellant had been drinking with a co-offender at Rapid Creek. Later that day they travelled to Darwin City and attended a number of nightclubs and hotels. They continued to consume alcohol during the course of the day and the night.

[3] At around 3 am on 9 October 2003 the appellant and his co-offender were refused entry to a hotel in Smith Street. They then walked back to Mitchell Street via Knuckey Street. As they turned into Mitchell Street the victim, who was unknown to them, was walking towards them. As they passed, the appellant extended his right elbow forcing the victim into the doorway of "Global Gossip" Internet café. The appellant then punched the victim to the right cheek causing him to lose his balance and fall to the ground. The glasses of the victim became dislodged and broken.

[4] Whilst he lay on the ground the appellant delivered a punch and proceeded to kick him. The co-offender joined in the assault and delivered a further blow to the body of the victim. They were interrupted by a passing security guard and left the scene. Shortly afterwards the appellant was arrested and taken to the watchhouse.

[5] The learned sentencing magistrate correctly described the assault as both vicious and cowardly. He went on to say:

> "And I remind myself that this was not an isolated backhander as it were, by a stupid young man to someone and that was the end of it. This violence continued for some time (and) saw violence inflicted

> on a passing pedestrian, not only when he was standing, but when he was on the ground. (It) only ceased when a passing citizen stopped this young man from his continued quest of violence."

[6] In further describing the assault his Worship made the following observations:

> "Now, I've found that it was only one kick and another attempted kick. And that the kick hit this man in around the top of his body, but I have not found that he actually kicked him in the head or face. But, it was a seriously cowardly and brutal thing to do. The man is on the ground just about defenceless. You have already attacked him and you have put the boot in and that occurred."

[7] The injuries suffered by the victim included swelling to the right eye area, a laceration to the outer eye area, swelling to the right cheek area, a laceration to the lower lip, a chip to an upper tooth and a loose second tooth, grazes to palms, elbows and knees, a cut to the left large toe, a large graze to the left shoulder blade area and general soreness and bruising. In a victim impact statement the victim spoke of fearing he would never be able to walk anywhere at night without fear. He referred to nightmares and his need to consult a psychologist. Clearly the assault had, not unexpected, serious repercussions for the victim.

[8] The learned sentencing magistrate imposed a sentence of imprisonment for nine months which he suspended after the appellant had served two months. The appellant appeals against that sentence on three remaining grounds. Ground 2 of the notice of appeal was not pressed. The grounds of appeal remaining are:

1. The learned magistrate erred in that he placed excessive weight on the aspect of general deterrence;

2. The learned magistrate erred in that he failed to adequately take into account prospects of rehabilitation; and

3. The learned magistrate erred in that the sentence was manifestly excessive in all of the circumstances of the offender and of the offending.

Ground 1 – General deterrence

[9] The learned magistrate referred to the need to consider rehabilitation and the interests of the offender and the community in that regard. In submissions on appeal the appellant conceded that general deterrence was a matter for consideration in determining an appropriate sentence. It was submitted that general deterrence was achieved by the head sentence of nine months imprisonment. There is no challenge to the appropriateness of that head sentence. However it was submitted that rehabilitation of the appellant should have been the overriding sentencing objective in this matter and, in light of his good prospects, the sentence should have been wholly suspended.

[10] In dealing with the issue of general deterrence his Worship made the following observation:

> "There are other principles to do with sentencing that are set out in the Sentencing Act and they are to do with general deterrence. In my view, a message must go out to drunken louts and louts generally that this kind of violent behaviour in Mitchell Street and in the Central Business District late at night, will not be tolerated by the

community. And the courts will do what they can to send out a loud message to that effect."

[11] In my respectful view the observations of his Worship were entirely appropriate and unexceptional. There is nothing to suggest that undue weight was given to the aspect of general deterrence.

Ground 2 – Rehabilitation

[12] It was submitted that the issue of rehabilitation should have been the overriding sentencing consideration in this matter and reference was made to the judgment of Kearney J in *Mason v Pryce* (1988) 34 A Crim R 1 and other authorities to similar effect. The observation in those cases apply to "appropriate cases".

[13] It was submitted that the appellant's personal circumstances were such that rehabilitation should have been a priority for his Worship.

[14] In his sentencing remarks his Worship referred to the appellant's good prospects for rehabilitation. The appellant was, at the time, a young man aged 20 who, when he sobered up, realised the enormity of his conduct. He was immediately contrite and demonstrated remorse. His Worship noted that the appellant was fairly well educated, was looking to improve his education and was an active member of a Christian church. He had undertaken counselling. He concluded that the appellant was previously of good character.

[15] His Worship said:

> "I do take into account that he has shown and continues to show manifest contrition and remorse and he indicated a plea of guilty at a very early opportunity and that is to be taken into account in his favour as well and I do so. Additionally, he is 20 years old, he is a young Aboriginal boy from urban parts of Perth, fairly well educated and wants to get more education.
>
> He has got only a couple of traffic offences and his past, or such that his record is insignificant. That together with the character references shows him to be a young man of positive good character and his future and his rehabilitation, and his future potential for good for his community and for all of the community is to be encouraged.
>
> I am told and accept that he has sought counselling, that he has become an active member of a Christian church which his family have always been anyway, and he has in the past. I am told that he is about to take up further study to qualify himself at university, and all those things are to be encouraged by way of appropriate sentence in my view."

[16] However, his Worship then went on to explain that he had given careful thought to whether the sentence ought to be suspended completely or partially and regarded the aspect of general deterrence as requiring a term of actual imprisonment. It cannot be said that his Worship did not advert to all of the relevant considerations.

[17] The finding of his Worship was not surprising given the nature of the offending on this occasion. The attack on the victim was upon a person unknown to him, who was going about his business without offence. It was an unprovoked attack upon a stranger. His Worship noted, as he was entitled to do, the prevalence of such assaults in the Darwin City area. He observed that the appellant was affected by alcohol and was in company

with another. He recorded the serious aspect of the assault as being the delivery of a kick to the victim whilst he was already on the ground and that the appellant was positioned to deliver a second kick when he was interrupted by a security guard.

[18] I note the comments of Bray CJ in *Birch v Fitzgerald* (1975) 11 SASR 114 commencing at 116:

> "Nevertheless there are offences in which 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 Honour went on at page 117:

> "Violence has increased, is increasing and ought to be diminished particularly violence by young men towards each other. It may be that the incidence of such violence will be reduced if it is brought home to those likely to resort to it, that if they do they may very well be punching, striking, butting or kicking themselves into gaol.
>
> I am not of course saying that all such first offenders ought to be sent to gaol. There is a wide range for the proper application of judicial discretion. I do not know what sentence I would have imposed if I had been in the learned special magistrate's seat. I might well have done what he has done. I might have thought a suspended sentence for a longer term, or a large fine would have met the case. But I cannot say that in sentencing a first offender of good character to 2 months imprisonment for an unprovoked assault of this severity in these circumstances he exceeded the bounds of the sentencing discretion confided to him by the law."

Those remarks are applicable in the present case.

[19] As was observed by the Court of Criminal Appeal in *Bloomfield v R* (1999) NTCCA 137 there is a point where the seriousness of an offence must override the mitigating factor of youth. In this case that was the view of the sentencing magistrate. I am unable to say that he was in error in his conclusion. I am unable to conclude that the learned magistrate failed to adequately take into account prospects of rehabilitation. No error has been demonstrated.

[20] Submissions were made before me that his Worship did not discuss the mental condition of the appellant when dealing with the issue of rehabilitation or with the need for general deterrence. As appeared in my discussions with counsel, no real issue was made of any mental condition suffered by the appellant in the proceedings before his Worship. There was passing reference to depression and to an adjustment disorder, but no elaboration was attempted.

[21] There was no submission to his Worship that any mental condition contributed in any real way to his offending. There was no submission that his circumstances were such that his case was not an appropriate vehicle for considerations of general deterrence. His Worship did not err in this regard.

Ground 3 – Manifest excess

[22] The final ground of appeal is that the sentence imposed was manifestly excessive in all of the circumstances of the offender and the offending. It was not contended by the appellant that the head sentence should be altered

but, rather, that a fully suspended term of detention was called for. The matters to which I have just referred were called in aid of that submission.

[23] The principles to be applied on an appeal against sentence are well known. It is fundamental that the exercise of the sentencing discretion by the magistrate is not to be disturbed on appeal unless error in that exercise is shown. There is a presumption that there is no error. It is incumbent on the appellant to show that the sentencing discretion of the magistrate has miscarried. It is not necessary that some definite or specific error should be identified. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. The sentence must be shown to be not just excessive but manifestly so. It is not enough that the Court of Appeal may have imposed a different sentence. Error of the kind that I have described must be shown on the part of the sentencing magistrate.

[24] In this case I am unable to agree with the submission of the appellant that the sentence was manifestly excessive. The offending of the appellant was serious and called for a sentence of the kind imposed.

[25] The appeal is dismissed.

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