Pappin v The Queen [2005] NTCCA 2

PARTIES:	PAPPIN, Christopher
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA11 of 2004 (20316351)
DELIVERED:	18 February 2005
HEARING DATES:	7 February 2005
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW

Appeal on sentence – specific deterrence – suspended sentence – whether manifestly excessive – whether intoxication a mitigating, aggravating or neutral factor – weight of intoxication as mitigating factor – bail – whether restrictive bail conditions taken into account on sentencing – aggravated assault – range of penalties in Magistrates Court – relevance – appeal dismissed.

R v Bruce and Hollick (1998) 71 SASR 536; *R v Malesevic* (1999) 204 LSJS 32; *R v Allen* [1999] SASC 346; *R v Nguyen* [2004] SASC 405, followed.
R v Sewell and Walsh (1981) 29 SASR 12; *Birch v Fitzgerald* (1975) 11 SASR 114, applied.
R v Lane (1990) 53 SASR 480; *R v Gordon* (1994) 71 A Crim R 459; *R v Walker* (unreported, Court of Appeal Victoria, 31 May 1996); *R v Groom* [1999] 2 VR 159, considered.

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	NTLAC

Solicitors:

Appellant:	M Carey
Respondent:	DPP

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

Pappin v The Queen [2005] NTCCA 2
No. CA 11 of 2004

BETWEEN:

CHRISTOPHER PAPPIN
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 18 February 2005)

Martin (BR) CJ:

Introduction

[1] This is an appeal against a sentence imposed by a Judge of this Court for an offence of aggravated assault. The learned sentencing Judge imposed a sentence of two years and three months imprisonment and directed that after the appellant had served nine months the balance of the sentence be suspended.

[2] The proposed grounds of appeal complain that the sentence was manifestly excessive and that significant errors by the sentencing Judge require interference by this Court.

Facts

[3] At the time of the offence in August 2003 the appellant was aged 18 years and one month. The female victim was a year nine student aged a little over 15 years and five months. The appellant and the victim were not known to each other.

[4] During the evening of Friday 22 August 2003 the appellant consumed a large quantity of alcohol at a nightclub in Alice Springs. He left the club at about 3am and commenced walking home along Gap Road.

[5] The victim spent that Friday evening with two girlfriends. She consumed a quantity of alcohol. The victim told police that at the time she set out to walk home she was a bit drunk.

[6] The victim's route to her home took her along Gap Road. The facts of the offending which were admitted by the appellant were as follows:

> "At around 3:30 am outside the ABC Radio building in Gap Road the offender ran up to the victim from behind, grabbed her by the arms and pulled her backwards, pulling her to the ground. He straddled her, that is sitting on her chest with his legs either side, and put his fingers of his right hand down her throat and also covered her nose with his left hand. The victim struggled and tried to bite his fingers and began screaming. The offender then leaned forward and bit her forcefully on the right cheek of her face and on her right forearm while she was trying to push him from her, and once under her left upper arm and once above her right upper breast through her clothing. All these bites were forceful and photographs were taken of them by the police. Photographs of these injuries being those tendered with these facts. The victim, nonetheless, continued to struggle and scream and at one stage pushed the offender off and attempted to run but the offender held on to her legs and she fell to the ground again. At around this time persons in residential property near the incident had heard the sound of a female screaming and on

> looking out had seen two persons struggling on the ground and three persons rang Police Communications in quick succession to report what was happening. The offender was still struggling with the victim when a marked police vehicle arrived. When police arrived the offender got off the victim and ran but was apprehended by police. The victim also walked away from police, taking off her shirt because of the stinging of the bite marks, particularly on her right upper breast. Police followed her and stopped her and found her in a distressed condition."

[7] The victim sustained bite marks to her right forearm, left upper arm and cheek and above her right breast. As at June 2004 when the victim made her victim impact statement, the victim stated that the bite marks were still visible. She said she felt really scared when grabbed from behind. When the appellant stuck his fingers down her throat the victim could not breathe and felt like vomiting. She thought the appellant was going to kill her. During the attack the victim also thought that the appellant was trying to rape her. In her statement the victim said that she is now scared when she walks anywhere by herself and if she sees older boys or men she crosses the street. She feels scared when at home by herself.

[8] As to the effects on the victim, the sentencing Judge specifically stated that she accepted the matters set out in the victim impact statement. In her concluding remarks her Honour said that the victim had suffered physical and psychological injuries.

[9] The appellant cooperated with the police. He told police he could not really remember what had occurred, but claimed that he had the perception that the

person had tried to take something from him. The appellant told police he was not aware of the gender of the person with whom he fought.

[10] The appellant was born in Victoria. He was one of eight children. There are aspects of his background which excite sympathy. It is unnecessary to canvass the details of those matters.

[11] Significantly, the appellant had not previously been in trouble with the law. Two character references were tendered and the sentencing Judge accepted that the appellant was a person of positive good character. Her Honour also accepted that the appellant's behaviour in attacking the victim was out of character.

[12] The sentencing Judge found that at the time of the offence the appellant was heavily intoxicated. Her Honour also accepted that the appellant drank to excess only on infrequent occasions and that he is not usually a person who becomes violent. Her Honour concluded that there was no rational explanation for why the appellant should suddenly attack the victim and that the attack occurred on the spur of the moment without planning. In her Honour's words, "It was a bizarre, drunken attack."

[13] The appellant pleaded guilty at the earliest opportunity and a reduction of the sentence by 25% was given to reflect the plea. The sentencing Judge accepted that the plea was an expression of the appellant's remorse. Her Honour noted that the appellant had subsequently taken steps to moderate his own behaviour.

Psychological Injury

[14] The appellant submitted that the sentencing Judge erred in finding that the victim had suffered psychological injury. Counsel argued that there was no evidence to support such a finding.

[15] In my opinion this submission is without substance. The sentencing Judge was not engaged in an exercise of making a technical finding or medical diagnosis. She was delivering sentencing remarks in language that would be understood by the appellant and the community. In that context a finding of "psychological" injury was well justified by the victim impact statement which the sentencing Judge specifically accepted. A little over nine months after the attack, the victim was scared when walking anywhere by herself and crossed the street when she saw older boys and men. She was still feeling scared when at home by herself. The sentencing Judge did not require a psychiatric or psychological report to justify a conclusion that the victim had suffered, in lay terms, "psychological injury".

Bail - Curfew

[16] The appellant submitted that the sentencing Judge failed to take into account the period of four months during which the appellant was on bail and subject to a curfew between the hours of 9pm and 6am. Counsel for the appellant put to the sentencing Judge that the conditions were "somewhat akin to being a person on home detention".

[17] The extent to which a sentencing Judge should take into account time spent on bail subject to restrictive conditions such as a curfew or home detention has been the subject of discussion in a number of authorities in South Australia: *R v Bruce and Hollick* (1998) 71 SASR 536; *R v Malesevic* (1999) 204 LSJS 32; *R v Allen* [1999] SASC 346; *R v Nguyen* [2004] SASC 405. It is unnecessary to canvass those authorities in detail. They demonstrate that if an offender has been subjected to bail with restrictive conditions such as home detention for a significant period, although it is permissible for a sentencing court to make some reduction by reason of that curtailment of liberty, the court is not obliged to do so. The case for a reduction may be greater if the stringent conditions of bail were imposed by reason of a more serious charge which was subsequently withdrawn.

[18] In my view the approach taken in the South Australian authorities is consistent with principle. If, by reason of restrictive bail conditions, the liberty of an offender has been significantly curtailed, it is open to a sentencing court to take that fact into account. Generally speaking, however, it will not be an error to decline to do so. The point of error will only be reached if the nature of the curtailment of liberty and the period of that curtailment demonstrate that in substance the offender has already suffered a penalty of significance.

[19] The sentencing Judge was well aware that the appellant had been subject to restrictive bail conditions for a period of four months. There is no basis for an assumption that her Honour did not take that fact into account. In

addition, given the nature of the restrictive conditions and the period during which those conditions applied, in my view a failure to take that matter into account would not amount to an error of principle or fact justifying interference by this Court. The circumstances are not such as to warrant a finding that by reason of the restrictive bail conditions the appellant had already suffered a penalty of such significance that it should be reflected in a lesser sentence.

Intoxication

[20] As I have said, the sentencing Judge found that there was no rational explanation for the attack and described the crime as a "bizarre, drunken attack". Although the grounds of appeal and written submissions complain about this finding, counsel for the appellant properly abandoned any complaint in this regard.

[21] In the context of the finding that there was no rational explanation, counsel for the appellant emphasised the role of alcohol in the commission of the offence. Counsel submitted that as the appellant is a very young person who has not previously offended against the law and whose conduct on the occasion in question was out of character, the causative role of intoxication through the consumption of alcohol was a mitigating circumstance. Alcohol was the only reasonable explanation for the appellant having acted out of character and, at the least, should be seen as reducing the appellant's moral culpability.

[22] As with addiction to other drugs, there is no general rule that intoxication by reason of the consumption of alcohol is an aggravating or mitigating factor; *R v Sewell and Walsh* (1981) 29 SASR 12; *R v Lane* (1990) 53 SASR 480; *R v Gordon* (1994) 71 A Crim R 459; *R v Walker* (unreported, Court of Appeal Victoria, 31 May 1996); *R v Groom* [1999] 2 VR 159. In some circumstances, it may operate on the sentencing process in both ways or it may be a neutral fact. For the reasons that follow, in my opinion in the matter under consideration intoxication operates in both ways.

[23] The appellant drank to excess only on infrequent occasions and was not usually a person who became violent. He was a person of prior good character. By reason of intoxication he acted on the spur of the moment in a manner which was quite out of character. It is this combination of circumstances that justifies the court treating intoxication as relevant to the moral culpability of the appellant and, subject to observations that follow, as having a mitigatory effect.

[24] The fact that intoxication has a mitigatory effect in the particular circumstances of the appellant is not to use intoxication as an excuse. Nor does it necessarily follow that the mitigatory effect of intoxication will be of significant weight. Each case must be determined according to its particular circumstances. For example, considerable weight might be given to intoxication as a factor of mitigation where an offender of previously unblemished character commits a minor offence which was totally out of

character by reason of intoxication. At the other end of the scale, very little weight can be given if, by reason of intoxication, the same person acts out of character but commits a particularly serious crime of violence.

[25] In the context of the appellant's intoxication and his unprovoked and violent attack upon the young female victim, it is appropriate to bear in mind the observations of Zelling J in *Sewell* that in some circumstances intoxication "may swing the penalty towards deterrence". In explaining that observation, his Honour said (15):

> "In crimes of violence one may have some hope of putting rational arguments to deter a sober would-be assailant. The chance is much diminished if the assailant is under the influence of drink or drugs. Certainly an assault by a person under such influence is more frightening to the average person."

[26] The difficulties faced by a sentencing court when sentencing a young offender who commits a serious offence while affected by alcohol are well demonstrated in the remarks of Bray CJ delivered in *Birch v Fitzgerald* (1975) 11 SASR 114. The Chief Justice was concerned with an unprovoked assault committed by a thirty year old offender who was married with two children and had not previously offended. The offender was a person of good character and a man of previously unblemished reputation. In a hotel and under the influence of alcohol, without warning the offender head butted the male victim in the face causing the victim to lose four teeth and to sustain a gash on the back of his neck because his head was forced back and came into contact with a glass which smashed. After observing that the

offender was not a person in need of rehabilitation or supervision and that he was a responsible member of society whose imprisonment would cause hardship to him and his family, in upholding a sentence of two months imprisonment Bray CJ (ll6) made the following observations which were subsequently approved in *Sewell*:

> "Nevertheless there are offences in which, as it seems to me, the deterrent purpose of punishment must take priority. When people act under 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."

[27] In my view, bearing in mind the nature of the attack by the appellant upon the young female victim, the appellant's intoxication was also an aggravating feature of his crime. In balancing the mitigatory effect against the aggravating impact of the appellant's intoxication, it is impossible to be precise as to the end result. Speaking generally, in these particular circumstances I have reached the view that the mitigatory and aggravating effects cancel each other out leaving the factor of intoxication as having a neutral impact upon the sentencing discretion.

[28] There is no complaint about the way in which the sentencing Judge dealt with the relevance of intoxication. Her Honour was plainly aware that intoxication caused the appellant to act out of character.

Manifestly Excessive

[29] The impact of intoxication was, in substance, a central feature of the appellant's case that the sentence was manifestly excessive. In addition, counsel highlighted the appellant's youth and progress towards rehabilitation during a lengthy period on bail. Counsel emphasised the undesirability of imprisoning a young person of prior good character for a first offence.

[30] The force of the submissions of counsel based upon the youth and good character of the appellant must be acknowledged. However, the gravity of the appellant's criminal conduct must not be underestimated. He committed a very serious crime. During the early hours of the morning in darkness, the appellant attacked from behind a vulnerable young female person who was walking home along a major street in Alice Springs. The attack was accompanied by considerable physical violence which resulted in significant injuries. The violence was of a type that was particularly distressing for the victim. She was subjected to a terrifying ordeal during which, with good reason, she thought that her attacker was going to rape and kill her. The attack ceased only by reason of the arrival of the police.

[31] The sentencing Judge stated that her starting point was a period of three years imprisonment. Notwithstanding the appellant's youth and previous good character, in my opinion that period is not manifestly excessive. The reduction of 25% in recognition of the plea of guilty was an appropriate reduction. While the sentence of two years and three months imprisonment

is a severe sentence for a young person of good character who through intoxication acted out of character, and is a sentence at the upper end of the range of the sentencing discretion, in my opinion the sentence is not beyond the proper range of that sentencing discretion.

[32] In addressing the question of whether the sentence was manifestly excessive, counsel for the appellant put before the Court a schedule of penalties imposed in the Magistrates Court upon clients of the Northern Territory Legal Aid Commission for aggravated assault in Alice Springs or Tennant Creek since the year 2000. The schedule was limited to cases where the aggravating circumstances included that the victim suffered bodily harm, was under the age of 16 years and the offender was an adult or the victim was threatened with a firearm or other dangerous or offensive weapon. No other details of the offences were provided.

[33] For two reasons the schedule could not provide any meaningful assistance to this Court. First, the information contained in the schedule was inadequate. Secondly, the jurisdiction of a Magistrate is different from that of the Supreme Court. The maximum penalty for the aggravated assault committed by the appellant is five years imprisonment. However, if a Magistrate sentences for a crime of aggravated assault, the jurisdictional limit of the Magistrate is imprisonment for two years. If the Magistrate is of the view that the jurisdictional limit of two years is inadequate for the particular offending, the Magistrate is required to refer the matter to the Supreme Court for sentencing.

[34] In these circumstances, the general range of penalties imposed in the Magistrates Court for the crime of aggravated assault cannot provide any meaningful assistance in determining whether the sentence imposed by the sentencing Judge was so out of line with sentencing standards as to be manifestly excessive.

Specific Deterrence

[35] The appellant submitted that the sentencing Judge erred in taking into account specific deterrence. This complaint is based upon the following passage which occurred at the end of her Honour's sentencing remarks:

> "In addition to taking into account the aspect of rehabilitation it is an offence which involves both general and specific deterrence as an aspect in the sentencing process."

[36] Counsel highlighted the appellant's youth, the absence of prior offending and evidence that on prior occasions the appellant had not shown any disposition to be violent when affected by alcohol. In addition counsel emphasised that the appellant had been on bail for almost a year during which he had conscientiously complied with his conditions of bail and had altered his drinking habits in order to avoid exposing himself to heavy consumption.

[37] The sentencing Judge accepted that the appellant was remorseful and that he had taken steps to moderate his own behaviour. Her Honour found that with the skills developed by the appellant in recent times, in the light of his previous good character there were good prospects of rehabilitation.

[38] The sentencing Judge did not place any particular emphasis on specific deterrence. Her Honour referred to it as "an aspect in the sentencing process". In my opinion, notwithstanding the good prospects of rehabilitation and prior good character, the sentencing Judge was not in error in taking specific deterrence into account. Although the appellant had previously been of good character and by reason of intoxication acted out of character, the appellant perpetrated a very serious attack upon a young female person walking alone late at night. The attack was not limited to striking the victim. The nature of the violence applied by the appellant is an unexplained and disturbing feature of the crime. In addition, during submissions counsel informed the sentencing Judge that as a child the appellant had been the "shortest, skinniest, poorest kid in the class" and was a target for bullying from the very beginning of primary school. Counsel put to the sentencing Judge that the appellant had been taught that if he was pushed, he should push back and that when the appellant was bullied by other children who learnt "how to push his buttons", the appellant "would lose control of himself on occasion and go off". Counsel concluded that particular submission in the following terms:

> "There's an element, it would appear, of uncontrolled behaviour in this particular offending. That's why I draw attention to that [the history]."

[39] The combination of the circumstances to which I have referred provide an ample foundation for the view that specific deterrence was an aspect of the sentencing process. While the material before the sentencing Judge did not

justify a finding that the appellant was likely to reoffend, the appellant had not made out a case for a finding that he was so unlikely to reoffend that specific deterrence was not a relevant consideration.

Suspension

[40] In addressing the question of suspension of the sentence, counsel for the appellant advanced the uncontroversial submission that in considering the question of suspension the sentencing Judge was required to have regard to all matters concerning the circumstances of the offence and the offender which were taken into account in determining the appropriate head sentence. However, counsel then contended that her Honour was obliged to give specific reasons for being satisfied that the sentence be suspended. As I understood the submission, in addition to sentencing remarks concerning facts and matters taken into account in arriving at a head sentence, the sentencing Judge was obliged to specifically address those matters as they related to the issue of suspension. Counsel argued that as a consequence of her failure to specifically address those matters, her Honour overlooked proper consideration of suspension.

[41] I am unable to agree with the submission. The sentencing Judge set out in detail the facts of the offending and matters personal to the appellant. Her Honour specifically referred to all the matters of mitigation. The comprehensive reasons set out her Honour's relevant findings and demonstrate that she took into account all matters relevant both to the fixing

of the head sentence and to the issue of suspension. It was not incumbent upon her Honour to specifically relate particular features to the issue of suspension. Plainly her Honour did not overlook the issue of suspension or those factors relevant to that question.

[42] In substance, behind this submission lay a complaint that the failure to suspend the sentence entirely resulted in a sentence that is manifestly excessive. In essence counsel advanced the proposition that by reason of matters personal to the appellant, particularly his youth, prior good character and steps towards his own rehabilitation, it was beyond the range of the sentencing discretion not to suspend the sentence entirely or, alternatively nine months was beyond the range and some lesser period should have been imposed.

[43] In my opinion, requiring the appellant to serve nine months did not result in a sentence that was manifestly excessive. The objective criminality of the appellant's conduct more than justified her Honour's decision.

[44] Subject to a minor adjustment to reflect time spent in custody, for these reasons I am of the opinion that the appeal should be dismissed. By reason of time spent in custody which does not appear to have been taken into account by the sentencing Judge, I would adjust the sentence to the limited extent of directing that the sentence commence on 26 June 2004.

Angel J:

[45] My reasons for dismissing this appeal concur with those of the Chief Justice.

Southwood J:

[46] I concur with the reasons of the Chief Justice.
