PARTIES:	CHRISTINE JOSEPHINE CASEY
	v
	GILLIAN RUTH HAYWARD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA51 of 1996
DELIVERED:	12 March 1997
HEARING DATES:	29 November 1996
JUDGMENT OF:	Kearney J

CATCHWORDS:

Criminal Law - Judgment and Punishment - Justices' appeal against severity of sentence - Assault police officers in execution of duty, offensive weapons - Whether sentence of imprisonment the 'norm' for this offence -Young first offender - Suspended sentence of 2 months imprisonment - Correct approach to sentencing for this offence -

Heatlie v S.A. Police (1993) 172 L.S.J.S. 94, followed.
Miller v Huffa (1980) 24 SASR 595, considered.
R. v Hill, R. v Chute, (unreported, Supreme Court (NT) (Martin CJ), 17 June 1993), referred to.
Yardley v Betts (1979) 1 A Crim R 329, applied.
GDP (1991) 53 A Crim R 112, followed.
Birch v Fitzgerald (1975) 11 SASR 114, distinguished.

REPRESENTATION:

Counsel:

Appellant:	G.M. Dooley
Respondent:	M.J. Fox

Solicitors:

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

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kea97008

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA51 of 1996

IN THE MATTER OF the Justices Act

AND IN THE MATTER OF an appeal against the severity of sentences imposed by the Court of Summary Jurisdiction at Darwin

BETWEEN:

CHRISTINE JOSEPHINE CASEY
Appellant

AND:

GILLIAN RUTH HAYWARD
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 12 March 1997)

This is an appeal, pursuant to s163(1) of the *Justices Act*, against the severity of certain sentences imposed by the Court of Summary Jurisdiction at Darwin on 29 May 1996.

The proceedings in the Court below

(a) The offences charged

The appellant was convicted on her plea of guilty on 29 May 1996 on 3 charges, viz:

> (1) and (2): assaulting two Police Officers, Senior Constables Gokel and Whitlock, on 10 February 1996 whilst they were in the execution of their duty; and
>
> (3): being found armed with offensive weapons - a fishing spear and a 12 inch carving knife - and failing to give a satisfactory and valid reason for being so armed, when required to do so.

Offences nos.(1) and (2) are punishable under s189A of the Criminal Code by 5 years imprisonment (2 years upon summary conviction). Offence no.(3) is punishable under s56(1)(d) of the Summary Offences Act by a $500 fine, or imprisonment for 3 months, or both.

(b) The relevant facts

The following facts were admitted by the appellant. At 8.38pm on Friday 10 February 1996, Senior Constables Gokel and Whitlock attended an incident in Rocklands Drive, Tiwi. The appellant was standing in the middle of the road outside No.54, armed with a 12 inch carving knife. She was shouting to her boyfriend, one Marcus Kirkman, to come outside 'so I can cut your balls off'. The two police officers attempted to speak to her. She began to threaten them, saying: 'If you come near me, I'll kill you - I'll kill you." Constable Gokel then left. The appellant continued to hold Constable Whitlock at bay, verbally threatening to stab him if he approached her. He approached her, and came within 2 to 3 metres of her. She began to back off and walk away. About

20 minutes later she began to walk up Rocklands Drive in the direction of the hospital. She was followed by the two Police officers. She ran off, eluding them in the darkness. In fact, she returned to No.54 Rocklands Drive, where she continued to argue with her boyfriend. She then ran off to scrubland, armed with a spear taken from the house, and the knife. A few moments afterwards, the two Police returned to the scene. While they were escorting Mr Kirkman to their vehicle, the appellant walked out of the scrub, carrying the spear and knife; when the Police asked her to drop these weapons, she did so immediately, and surrendered. She was taken to the Berrimah Police Complex where she took part in an interview in which she made admissions. She had no permission to threaten or assault the Police. When asked why she was armed, she said that her boyfriend had told her that he had just had sex with another woman, one of her girlfriends, who was 'a better root' than she was. Her boyfriend declined to make a formal complaint against her, once the situation had been resolved by Police.

(c) The appellant's personal circumstances

The appellant, aged 17 years and 3 months at the time of these offences, was then in a relationship with Mr Kirkman. By the time she appeared before his Worship some 3½ months later, they had separated and a restraining order was in force against Mr Kirkman. Mr Dooley of counsel for the appellant submitted to his Worship that since Mr Kirkman's departure from the appellant's life, she had been making significant progress in it.

She was born and raised in Darwin. Her mother died when she was 6 years old. She was educated to Year 10, by 1993. She was then employed in a local supermarket, and thereafter was constantly employed until she appeared before his Worship in May 1996. Meanwhile, she had undertaken further training through Skillshare in 1994, to improve her office and computer skills. Shortly before the hearing, she had commenced a new job, carrying out administrative and property management duties for a real estate firm, and was hoping to apply for a provisional real estate agent's licence in the near future.

Mr Neil Harrison, who had known the appellant since she was about 18 months old, told the Court that she was a pleasant girl with an even temper and an ability to remain calm, even when provoked; and that what she had done was "out of character" for her.

(d) The submissions in mitigation

Mr Dooley submitted as follows. The appellant's "vitriol" had been predominantly directed at Mr Kirkman, as a consequence of his remarks (p3). While she had waved the 12 inch knife as she verbally threatened the Police (p2), they clearly did not think they were under sufficient threat to contemplate using a weapon to subdue her. She had not approached the Police; Constable Whitlock had closed in on her to within a distance of 2 to 3 metres, before she withdrew and trotted off. She had later returned to the scene, armed with a spear as well as the knife (p3), but surrendered both weapons when Police told her to put them down. She was thereafter "very co-operative" with Police. She was a young person of previous good character,

had never been in trouble before, had learned from this incident, and at the time had been in "emotional turmoil". She was outside Mr Kirkman's house at the time because he had just been around to her house, taunting her along the lines mentioned on p3, an "extremely provocative statement". She was now on the way to becoming a "plugged-in" member of the community and this "very regrettable incident" was "a temporary aberration". Mr Dooley submitted that placing her on a bond, without conviction, might facilitate her contributing to the community, whereas a suspended term of imprisonment might impede her good future prospects, since she would then have a criminal history, and "a stain on [her] character".

(e) The sentencing

His Worship noted the appellant's age, her good work record, good character and "excellent prospects". He considered that she deserved "one last chance to show that she can stay out of trouble", and was unlikely to reoffend. He considered she should receive leniency for her guilty plea, the lateness of which had been satisfactorily explained.

Nevertheless, his Worship rejected Mr Dooley's submission that the appropriate disposition was a discharge pursuant to a non-conviction bond under s4 of the *Criminal Code (Conditional Release of Offenders) Act*, "for this very simple reason, that the charges are too serious" to do so, since "the use of an offensive weapon" was involved, even though "there was no lunging or attempting to stab", and the knife was "simply waved around" to warn the Police "to just stay away", "to ward them off", "to prevent an immediate

disarming". He emphasized that the offences charged as Nos.1 and 2 (p2) were "serious" because they involved "the use of an offensive weapon whilst that weapon is in view", as opposed for example to a case where a weapon was concealed, and not in use at the time of arrest. He concluded that a term of imprisonment was required by way of general deterrence, to deter others from "holding police at bay" by "taking up a knife". However, he considered that the factors in the appellant's favour (p5) merited suspension of service of the term of imprisonment, and her release on a bond under s5(1)(b) of the Act, as "one last chance to show that she can stay out of trouble". Accordingly, he sentenced the appellant to concurrent terms of imprisonment of 2 months on each of the 3 charges, but directed that service of those sentences be suspended forthwith upon the appellant giving security in the sum of $500 that she would be of good behaviour for a period of 12 months. The appeal is against the severity of this sentencing, including the proceeding to conviction.

The grounds of appeal

The grounds of appeal ultimately relied on were that the learned Magistrate erred in that he -

(a) gave undue weight to the need for general deterrence, when formulating the sentence; and (correlatively)

(b) failed to give due weight to the personal circumstances and antecedents of the appellant.

The submissions on appeal

(a) The appellant's submissions

Mr Dooley submitted that while the need "to discourage people [generally] from taking up weapons and warding off police" was a relevant sentencing factor, his Worship gave "undue weight" to the need for general deterrence, and this had "overwhelmed" his consideration of other relevant sentencing factors, resulting in his giving insufficient weight to the particular facts of the offences and the circumstances of the appellant, including her age and antecedents.

He submitted that *not all* charges of assaulting Police officers require the imposition of a sentence of imprisonment, while acknowledging that such offences "are taken very seriously by the courts". For this proposition he relied generally on *Yardley v Betts* (1979) 1 A Crim R 329, per King CJ at 334:

> "The need for deterrent punishment will vary according to the circumstances of the offence."

He submitted that a distinction should be drawn between the *facts* of assaults such as this and assaults involving a battery - where actual force was applied to the Police - as in *Bowditch v Pryce* (unreported, Supreme Court (NT) (Kearney J), 29 April 1986). He noted that in *Miller v Huffa* (1980) 24 SASR 595 at 598 Walters J indicated that persons deliberately assaulting police "must ordinarily expect an immediate custodial sentence", *except where the circumstances of mitigation are wholly exceptional;* he submitted that the facts of the present assaults and the circumstances of the offender drew this

case within that exception, and no custodial sentence (immediate or otherwise) was warranted.

(b) The respondent's submissions

Mr Fox of counsel for the respondent submitted that his Worship had correctly assessed the facts, and that the need for general deterrence when sentencing in cases such as this is well established and accepted.

His Worship's stress on the need for general deterrence was supported by a passage in *Birch v Fitzgerald* (1975) 11 SASR 114 at 117, viz:

> "*When people act under the influence of* liquor, *passion, anger* and 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*." (emphasis added)

I note that Bray CJ said "*may well be"* and went on to say:

> "As I said in *Sellen v Chambers* (1974) 7 S.A.S.R. 103, at 106: "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."

Clearly, his Honour had in mind different factual circumstances to those which obtained here. Further, Mr Fox submitted that the facts attracted the approach to sentencing indicated in *Miller v Huffa* (supra) at 598, per Walters J:

> "Where Police are trying to do their duty of maintaining public order, *persons who deliberately assault them in order to impede them in performing their work, must ordinarily expect an immediate custodial sentence*." (emphasis added)

He submitted that to depart from this "ordinary" expectation that a sentence of immediate imprisonment would be imposed, the circumstances of mitigation must be "wholly exceptional", as his Honour had said. The starting point in sentencing in the present case, the norm, was as expressed by Walters J in *Miller v Huffa* (supra) - "an immediate custodial sentence". He submitted that his Worship had nevertheless recognized the favourable circumstances of mitigation of the appellant and had taken them into account appropriately by wholly suspending service of the terms of imprisonment imposed.

Conclusions

It is well established that the need for general deterrence is particularly relevant, when sentencing for assaulting Police in the performance of their duty. See, for example, *Sumner v Fingleton* (unreported, Supreme Court (SA) (Mitchell J), 25 June 1973); and *Barry v Samuels* (1975) 10 SASR 376 at 377-8. It is also illustrated by the dispositions in *Bowditch v Pryce* (supra) and *Miller v Huffa* (supra), where appeals against sentences of immediate imprisonment of 1 month (with release after serving 14 days) and 2 months, respectively, were dismissed. The former case arose from football hooliganism in which the appellant, on being arrested, grabbed a constable by the testicles; in the latter, a woman of 19, a young mother with no priors, ran at a Police officer attending a disturbance at night "yelling offensive expressions and brandishing a table knife which she was moving backwards and forwards in a slashing motion across her body", eventually lunging at him from about 3 feet "thrusting the knife in the direction of his stomach". I

consider that the facts of the present case are not 'on a par' with those cases, in terms of seriousness.

In general, the authorities and statistics (eg pp14, 16) show that in order to protect Police officers from assault, as far as it is possible to protect them, a sentence of imprisonment is *often* considered to be appropriate, even though the defendant has no previous criminal record. Nevertheless, normal sentencing principles apply in such cases, and imprisonment should *not* be ordered unless the Court first considers that no other form of punishment or disposition available, is appropriate. In other words, the need for general deterrence must be considered in *all* the circumstances of the particular case, and this consideration must be undertaken *before* the appropriate disposition is decided on. There is no "norm" when sentencing for an assault on a Police officer.

Here, his Worship clearly recognised the appellant's "good character, apart from this incident"; acknowledged that she "had never got into trouble or had never been in trouble", and "does not shy away from work and has just started a good job". He believed that "the chances are that she would not offend again", and concluded that she had "excellent prospects", and was a person who "strongly deserves a chance". He accepted that "she was feeling intense emotional upset" at the time, and considered that her offence could be distinguished from those where an actual battery on Police had occurred; he noted that she had made no stabbing or lunging movements, and the Police had sustained no physical injury. His Worship considered that the case was "a sad" one.

Nevertheless, he concluded the charges were simply too serious to allow anything other than the imposition of a term of imprisonment, so as to impress "upon the community [not the appellant] they must not do as she had done". A gaol term was necessary "to discourage people from taking up weapons and warding off Police"; it did not "really make much difference" that the offender was "a person of good character or a person of bad character", because "the warning has to be sounded", and deterrence was necessary "even for people who possess a good character". It was "not a matter so much of impressing upon her [that she must not act in the way she had], it's a matter of impressing upon the community that they must not do as she has done". He said that "the cold hard fact is that people have to learn to control themselves".

It can be seen from these remarks that his Worship based the need for the imposition of a term of imprisonment squarely on the need that the sentencing be such as to deter others; and in deciding on that disposition he did *not* give weight (or gave very little weight) to the particular facts of the case or the circumstances of the offender. He took account of the appellant's favourable personal circumstances and antecedents, in deciding immediately to suspend service of the terms of imprisonment imposed, *but not* in his initial decision to impose that type of sentence.

There is no sentencing "tariff" for assault. The sentence in each case of assault has to be determined on the basis of the facts of the particular case, and the circumstances of the particular offender. In particular, not all assaults on Police officers are so serious as to warrant the imposition of a sentence of imprisonment. There is no presumption that the punishment for assault should

be a sentence of imprisonment. See, for example, what was said in *R. v Hill, R. v Chute*, (unreported, Supreme Court (NT) (Martin CJ), 17 June 1993), not a case of assault on Police, but instructive generally. It involved sentences of detention imposed upon a 15-year old female juvenile who had punched and kicked 2 other girls on separate occasions; one victim received a bloody nose and bruises, the other a fractured jaw and seven broken teeth. In quashing the sentences, and substituting a period of supervised probation, his Honour affirmed what King CJ said in *Yardley v Betts* (supra) at 332-4:

> "It is necessary to keep firmly in mind the fundamental principle that the criminal law exists for the protection of the community. This protection is achieved primarily, in my view, by making the punishment fit the offence and the offender, thereby promoting respect in the community for the justice of the criminal law. The aspect of deterrence of the particular offender and of others must not be overlooked. The courts must assume, although evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime. Deterrence possesses particular significance in cases of unprovoked violence. The observations of Bray CJ in *Birch v Fitzgerald* (1975) 11 S.A.S.R. 114 at pp116-117 are in point.
>
> …
>
> *The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders* and others *who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced.*
>
> To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm. Times and conditions change, and the approach of judges to their task must be influenced by contemporary conditions and attitudes. But public concern about crime, however understandable and soundly based, must never be allowed to bring about departure by the courts from those fundamental concepts of justice and mercy which should animate the criminal tribunals

of civilised nations. They are summed up, in the aspects relevant to the present discussion, by Napier CJ, in *Webb v O'Sullivan* [1952] S.A.S.R. 65 at p66:

> "The courts should endeavour to make the punishment fit the crime, and the circumstances of the offender as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest."

The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion, assist another human being to avoid making ruin of his life, we ought surely do to so.

How are these principles to be applied to offences of assault? *Assaults vary very greatly in seriousness*. Some result in injury to the victim and some do not. Some are committed under provocation in the heat of the moment and others are wanton and premeditated attempts to impose the offender's will on the victim by force. Some are mere man-to-man altercations and others are terrifying and cowardly examples of mass violence. Many other variations could be mentioned. *The offenders vary from the normally law abiding person who is caught up in a situation of stress which erupts into violence*, to the habitual bully and thug. In some cases a term of imprisonment may enhance rather than diminish the prospects of the offender avoiding crime in the future. In other cases, a term of imprisonment may turn a usefully employed person into a frustrated unemployed person, may deprive the offender of the best and most stabilising influences in his life by disrupting a good family situation and may increase a propensity to crime by placing him in the company of criminals. The need for deterrent punishment will vary according to the circumstances of the offence.

A consideration of these factors leads to the conclusion that *cases of assault require individual assessment and treatment*. In my opinion *there can be no presumption one way or the other as to whether imprisonment is the appropriate way of dealing with any particular case*. A judicial policy which were to embody such a presumption in respect of assaults generally, or assaults which could be characterised as "serious", or assaults where "some injury is caused to the victim", would not, in my view, be justified. It is worth pointing out that the degree of injury suffered by the victim is not in every case a satisfactory measure of the gravity of the offence or the culpability of the offender". (emphasis added)

R. v Hill (supra) involved a juvenile, and, as his Honour said at p8:

> "… there is an essential difference between children and adults when they come before a court exercising criminal jurisdiction".

Nevertheless, particularly in the case of a young offender with a clean prior record, such as the 17-year old appellant, the major aim in sentencing should be her development as a law-abiding citizen. See *GDP* (1991) 53 A Crim R 112 at 116, where the Court also observed that "consideration of general deterrence should not be ignored completely when sentencing young offenders". The need for general deterrence when sentencing a young first offender for assaulting Police, can point to a different disposition. Frequently, the resolution of these conflicting sentencing objectives leads to a sentence of suspended imprisonment (as in this case), as the next 2 cases illustrate.

In *Ferguson v Chute* (unreported, Supreme Court (NT) (Mildren J), 3 June 1992), the defendant aged 17 was sentenced to 3 months immediate imprisonment for assaulting and resisting a Police officer in the execution of his duty, by biting him. That amounted to a battery. His Honour was referred to the sentencing in 47 cases of assaulting and resisting Police in the previous 18 months and said at pp4-5:

> "A careful study of this material indicates that *in all cases where there has been a sentence of actual imprisonment, and that sentence has not been suspended, there have either been prior convictions for violence or there has been some aggravating circumstance relating to the commission of the offence.*
>
> In no case have I been able to find any occasion when the Court of Summary Jurisdiction has ordered immediate imprisonment, unless either

> one or both of those circumstances exist. By "aggravating circumstance" I do not mean that in the technical sense as that expression is used in the Code; but *in the sense that there is an aggravating circumstance by the use or threatened use of an offensive weapon, such as a knife,* or something of that kind. In all other cases where there have been no use or attempted use of an offensive weapon, or no recent priors for violence, the range [of sentence] appears to be between a fine and that of a suspended sentence." (emphasis added)

His Honour concluded, on the material before him, that there was "a fairly wide range of sentence for this type of offence", ranging to "short custodial sentences in bad cases"; since sentences of immediate imprisonment were "reserved only for "bad cases" - those involving use or attempted use of an offensive weapon, or recent priors for violence, neither of which obtained in the case before his Honour - he considered that the sentence of 3 months immediate imprisonment was manifestly excessive. As there had been "a recent trend to gradually increase the level of sentences", his Honour imposed an effective sentence of 2 months imprisonment, but suspended its service.

In *Dadleh v Police* (1996) 66 SASR 352 the defendant, a 20-year old first offender, caused an abrasion to a Police officer's head, by hitting him with a bottle. Again, a battery. On appeal, it was ordered that service of his sentence of 1 month imprisonment, be suspended. The Court emphasized that young first offenders should be given at least one opportunity towards rehabilitation, unless the offence was so serious as to require an immediate custodial term.

The correct general approach to sentencing young offenders for assaulting Police is I think spelled out in *Heatlie v S.A. Police* (1993) 172 L.S.J.S. 94. In that case the 20-year old intoxicated female

defendant had minor priors, and was sentenced to a suspended aggregate term of 2 months imprisonment for resisting one Police officer, and assaulting another (by kicking him on the knee), while they were in the execution of their duty. An appeal was allowed, the term of imprisonment and the bond were quashed, and in lieu she was sentenced to 60 hours of community service. Mullighan J said at 95-97:

95 "Police officers have a very difficult job to do. Quite unexpectedly they may be faced with sudden danger and the courts must do what they can to protect police officers in the execution of their duty by imposing penalties which will deter those who are minded to attack them. …

…

It would be quite wrong, in my view, to regard [the] observations [in Sumner v Fingleton (supra), Barry v Samuels (supra) and Miller v Huffa (supra)] as the statement of a sentencing principle that first offenders who assault police officers in the execution of their duty must expect immediate imprisonment regardless of the circumstances. The correct approach to sentencing for the offences of 'assault police' and 'resist arrest' is the same for any other offence. In accordance with the well established principle, *a sentence of imprisonment is only imposed when all other sentencing options have been eliminated* and upon being imposed, consideration must be given as to whether it should be suspended in the circumstances of the particular case: *R v O'Keefe* [1969] 2 QB 29 per Lord Parker LCJ at p.32 and *Wood v Samuels* (1974) 8 SASR 465 at p468 …

96 In the year 1991 there were 345 offences [of assaulting Police] considered by Courts of Summary Jurisdiction [in South Australia]. In 45 cases a sentence of imprisonment was imposed and not suspended. In 86 cases there was a sentence of imprisonment but suspended. In 129 cases a fine was imposed and in 40 cases an order was made for community service. So, in 131 cases, about 38% of all cases [45 + 86], there was a sentence of imprisonment. In the remainder of cases, some other sentencing option was adopted. Whilst it must be accepted that this type of information is of limited assistance, as the facts and circumstances of each offence and each offender and other relevant information is not known, it is useful to the extent that it may be said that *in the majority of cases imprisonment was not thought to be necessary.*

…

Some error in the exercise of the sentencing discretion must be demonstrated.

… the principles discussed in [*Yardley v Betts* (supra)] were applied by von Doussa J in *Clarke v Baehnk* (1987) 134 LSJS 229 and *Freeman v Binnekamp* (1987) 44 SASR 114 where, in both cases, the charge was assaulting a police officer. In the former case [involving a successful appeal against a sentence of 6 weeks immediate imprisonment for a sudden punch to a Police officer's eye following arrest, the sentence being reduced to the 16 days which had already been served, though otherwise a suspended sentence would have been appropriate] von Doussa J accepted the distinction [drawn in *Faehrmann v Edwards* (unreported, Supreme Court (SA), (Olsson J), 22 December 1986] between an assault which occurs in the course of a struggle with police, and acts of gratuitous thuggery of the kind considered in *Yardley v Betts* (supra) and *Miller v Huffa* (1980) 24 SASR 595 and went on to say at pp231-232:-

97 "I respectfully agree that frequently there will be a marked distinction between the two types of cases. This distinction reflects among other things, that the necessary proximity between the police officers in the execution of their duty and the offender may give rise to a *highly charged emotional situation where spontaneous and stupid acts of aggression on the part of the offender occur which may not necessarily reflect the true character of the offender*. This is not to say that such acts of aggression are not to be deplored, or to belittle the importance of the proposition that police officers going about their duty must have the full protection which the law can offer them. In my opinion, the emphasis on a heavy fine reflected in the penalty which now applies to the offence of assaulting a member of the police force in the execution of his duty [a maximum of a fine of $8000 or imprisonment for 2 years] reflects a legislative perception that the community interest may not necessarily be best served by imprisoning such an offender, and that *a substantial fine may often provide the requisite deterrent effect".* (emphasis added)

Mullighan J considered it generally desirable in the case of a first offender that a sentencing Magistrate indicate his reasons for rejecting a fine as the appropriate sentencing options, where that was his decision. This appears to

be rooted in the particular emphasis on a fine, in the statutory maximum penalty in South Australia. His Honour continued:

> "In *Freeman v Binnekamp* (supra) [where concurrent sentences of 6 and 3 months immediate imprisonment for assaulting (by punching backhanded) and resisting Police in the execution of their duty, had been imposed, and were suspended on appeal], von Doussa J, after referring to the observation of the learned Special Magistrate that police officers are entitled to the protection that the courts can give them, said at p117:-
>
> > 'I fully agree. The increased penalties effected by the Police Offences Act Amendment Act 1985 recognise the need for police officers to be protected. However *a stern deterrent warning to the offender and to others generally, can often be achieved by the sentencing package short of actual imprisonment, or even a term of imprisonment which is then suspended*. A heavy fine, particularly in the case of a first offender, or an offender without a very relevant prior offence, could achieve that purpose. *There is no presumption in favour of imprisonment in respect of* assaults generally, "serious" assaults, assaults where injury is caused to the victim, or, *I would venture to add, assaults to police officers in the execution of their duty. Every case will require individual assessment and treatment. Yardley v Betts* (1979) 22 SASR 108 at 112-113.'" (emphasis added)

I respectfully agree with these observations. I consider that the present case was one where in "a highly charged emotional situation" a "spontaneous and stupid act of aggression" by the appellant towards the Police occurred, an act "which may not necessarily reflect the true character of [the appellant]". There is no suggestion that anyone other than the appellant was present, so there was no chance of others being drawn into violence against the Police; there is no suggestion that the Police were outnumbered; and in no real sense was this a protracted assault. These common features of aggravation were absent in the present case; cf the facts in *Miller v Huffa* (supra) at p9.

An illustration of the application of the correct general principle is provided in *Warrell v Kay* (1995) 83 A Crim R 493 (W.A.). In that case the 41-year old appellant, who had a criminal record (mainly disorderly conduct) was convicted of assaulting a Police officer, by first throwing a piece of concrete which narrowly missed him, and then holding a brick above her head in a threatening manner, refusing to put it down, lunging at him and hitting him in the shoulder with it, and attempting to hit him again; she was sentenced to 24 weeks imprisonment. On appeal, this was held to be manifestly excessive. The combined effect of the place that her conduct occupied in the scale or seriousness for offences of this nature, her antecedents, her own ill-health and the fact that she was caring for her 7-year old granddaughter who was ill, should have tipped the balance in favour of a non-custodial sentence; she was released on 6 months probation.

In the present case it is an important factor that the appellant was aged 17 years and 3 months. As was stressed by King CJ in *Yardley v Betts* (supra) at p12 the rehabilitation of an offender is intrinsically linked to the primary sentencing aim of protecting the public; when an offender is rehabilitated, the danger to the public which that offender previously presented, is removed. If the offender is young, the danger is removed for a long time. Further, it is now well established that imprisonment does *not* lead to a diminution in crime, either by way of deterrence or rehabilitation of those imprisoned. Imprisonment punishes, but it does not deter; it protects the community by

removing the offender from it, but only temporarily. Its effect on the offender imprisoned is more likely to be negative than positive; his reintegration into the community is less likely to be successful.

I pay due regard to the fact that Magistrates deal with offences of this type much more frequently than this Court, and thus are often better able to assess the comparative weight to be given to the various sentencing factors; see *Najpurki v Luker* (unreported, Supreme Court (NT) (Martin CJ), 6 August 1993) at 11. Further, it is clear that the mere fact that his Worship did not mention sentencing options other than imprisonment does *not* mean that he did not consider non-custodial options; see *Napper v Samuels* (1972) 4 SASR 63 at 74, and *Blacksmith v Materna* (unreported, Supreme Court (NT) (Mildren J), 30 August 1996) at p6.

This court does not allow an appeal on the basis that, had it heard the charges, it would have imposed a different sentence. Some error by the learned Magistrate in the exercise of his wide sentencing discretion must be shown; see generally *R v Tait* (1979) 46 FLR 386 at 388, *R v Ellis* (1993) 68 A Crim R 449 per Hunt CJ at CL at 460. If error is shown, this Court may exercise its own discretion in sentencing, in substitution for that of his Worship; see *House v The King* (1936) 55 CLR 499 at 504-5.

Bearing these matters in mind I consider, with respect, that the sentencing discretion miscarried in this case, in that normal sentencing principles were not applied. His Worship gave no reasons for not considering

a non-custodial disposition, to achieve the aim of general deterrence. There was a failure to consider the matters personal to the appellant, particularly her age, and to balance those matters against the need for general deterrence, in the light of the objective circumstances of the case, *before* deciding that a sentence of imprisonment was the appropriate disposition (all other sentencing options having been first eliminated), rather than merely as factors going to the decision whether or not *to suspend* service of the term; see p11. I consider that in the circumstances of the offence and the offender the outcome was a sentence - a term of imprisonment (albeit suspended) - which was manifestly excessive. Too much weight was given to the accepted need for general deterrence in cases of assaults on Police officers, in the abstract, and insufficient weight was given to the facts of *this* particular assault, and to the circumstances of *this* particular youthful first offender. The need for general deterrence is always a significant sentencing consideration in cases of this type, but must always be weighed against the consideration of achieving the rehabilitation of a young first offender. For these reasons, I consider that Mr Dooley's submissions at p7 are correct. I reject Mr Fox's submission at p9, as to the existence of a "norm" of immediate imprisonment in sentencing for all assaults on Police; see pp10, 12. Insofar as Walters J may have suggested such a norm in the 'gratuitous thuggery' case of *Miller v Huffa* (supra) I respectfully disagree; the correct approach is as set out in *Heatlie v S.A. Police* (supra) - see pp16 and 18. In the light of these errors, I proceed to sentence afresh.

Orders

The appeal is allowed, the convictions and sentences (p6) are quashed, and the order suspending service of the sentences is set aside. In lieu thereof, bearing in mind s130(5) of the *Sentencing Act*, the implicit finding that the 3 offences charged (p2) have been proved is affirmed; as I consider that in light of the character, antecedents and age of the appellant it is inexpedient on the objective facts of the case to inflict any punishment, I direct, without proceeding to conviction, that she be discharged upon giving security by her own recognizance within 14 days in the sum of $500 that she will be of good behaviour for a period of 2 years from 12 January 1997.

Orders accordingly.

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