PARTIES:	M v HILL, Maxwell John And M v CHUTE, John Henry
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	SUPREME COURT (NT)
FILE NO/S:	No 21 of 1993 No 22 of 1993
DELIVERED:	Darwin 17 June 1993
HEARING DATES:	19 May 1993, 17 June 1993
JUDGMENT OF:	Martin CJ.

CATCHWORDS:

Justices - Jurisdiction - Complaint on information - Procedure - Time limits - Defence

Justices Act (NT), s52

Parisienne Basket Shoes P/L v Whyte (1938) 59 CLR 369, applied.
Adams v Chas. S. Watson P/L (1938) 60 CLR 545, applied.

Justices - Appeal from - Sentence - Nature of Offence; assault - General principles - Juveniles - Purpose of Juvenile Justice Act - Mitigating factors

Gadatjiya v Lethbridge, unreported Mildren J, 28 February 1992, referred to.
Yardley v Betts (1979) 1 A Crim R 329, applied.
Noddy (1980) WAR 132, applied.
Simmonds v Hill (1986) 38 NTR 31, applied.
M v Waldron (1988) 56 NTR 1, applied.
R v Homer (1976) 13 SASR 377, applied.
Bell (1981) 5 A Crim R 347, applied.
P v Hill, unreported Mildren J. 9 October 1992, referred to.

REPRESENTATION:

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Applicant: J Blokland and W Sommerville
Respondent: D Caine

Solicitors:

Applicant: NAALAS
Respondent: DPP

Judgment category classification: B
Court Computer Code:
Judgment ID Number mar93011
Number of pages: 17

DISTRIBUTION: LOCAL

mar93011

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 21 of 1993

BETWEEN:

M

Appellant

AND:

MAXWELL JOHN HILL

Respondent

No. 22 of 1993

BETWEEN:

M

Appellant

AND:

JOHN HENRY CHUTE

Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 17 June 1993)

These are appeals against sentences of detention imposed upon the appellant by a stipendiary magistrate sitting as a Juvenile Court at Darwin on 22 January 1993. At the conclusion of the hearing of the appeal on 19 May 1992, the sentences were quashed with reasons to be given later

along with the decision as to the appropriate sentence to be imposed. That procedure was adopted to relieve the appellant of continuing concern that she faced being placed and held in custody.

The first offence in time was committed on 10 October 1991 in Darwin. The defendant and several of her friends were on a school bus, she sitting behind another young female. As the bus was on its journey the victim felt her hair being pulled from behind and accused the appellant of doing so. The appellant denied being responsible, but the hair pulling continued and an argument broke out during which racial name calling broke out, the appellant being of Aboriginal descent and the victim of Asian descent. When the victim got off the bus the appellant did likewise, she got in her way and prepared to fight, and challenged the victim to do so. The victim said she did not want to fight and the appellant then punched her in the head with her fist. The victim grabbed hold of the appellant's hair trying to stop her from continuing her assault, but was unsuccessful in that; upon letting go of the appellant's hair the victim fell to the ground, tried to protect herself, but was nevertheless kicked around the head and body by the appellant. The appellant stopped her assault after a short while. The victim received a bloody nose and bruises. The appellant was spoken to briefly by the police about this incident and later went to live in the Alice Springs region. About eight months later an audio interview was carried out and the appellant admitted the facts, but a complaint was not laid until 8 September 1992, the day upon which the appellant came before the Court in relation to

the second matter. The complaint was obviously not made within six months from the time when the matter of the complaint arose (s52 *Justices Act*). The point was not taken before the Juvenile Court, but it has been held that provisions to similar effect do not deprive a court of jurisdiction, but amount only to a defence (*Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 and *Adams v Chas. S. Watson Pty Ltd* (1938) 60 CLR 545).

The second offence, to which the appellant also pleaded guilty, took place in April 1992 in Alice Springs. The appellant apparently believed that the victim in that case had poked fun at the appellant's aunt, and a few days later she approached her victim and after vilifying her, commenced to physically assault her; she grabbed her by the hair, kneed her several times in the head and the victim fell to the ground. The appellant then kicked her until she was pulled away by an intervener. The victim later attended hospital where X-rays were taken, and according to the prosecutor: "The jaw was broken and fractured in a few places. Seven teeth were broken. The next day the victim was flown to Adelaide by the Royal Flying Doctor Service where she was treated for her injuries".

The facts as put in each case were admitted by counsel for the appellant. There was no medical report, but the bare description of the injuries suffered on the second occasion, and the fact that the victim was taken to Adelaide for medical treatment, would indicate that the injuries were of a serious nature. It is obvious that that factor weighed heavily upon

his Worship immediately the facts were put before him, as he contemplated remitting the matter to this Court to be dealt with at first instance. He had it in mind that it would be more probable that there would be publicity given to a sentence imposed upon the appellant if she were dealt with here, thinking that that may be of great assistance to the community and the courts in the light of publicity concerning violence amongst juveniles. It seems that even at that early stage of the proceedings, no submissions of substance having been made on the part of the appellant, that his Worship had general deterrence in mind as a factor to be taken into account in the sentencing process. Counsel for the appellant outlined some of the material then available to assist his Worship, particularly a report from the Tamarind Centre, and his Worship indicated he would be seeking a pre-sentence report and also a report from the Department of Education, indicating that in so doing he was "restricting my mind" to past incidents of violence at school and "whether there had been suspensions for violence in school". His Worship requested a pre-sentence report, a psychological report from the Tamarind Centre and a report from the Minister for Education setting out instances of school violence involving the appellant, suspensions for school violence and details of counselling programmes initiated by school counsellors for the appellant. It was apparently not thought appropriate to seek information from the Minister which might be of benefit to the appellant.

Before adjourning to enable the reports to be prepared, his Worship told the appellant that the fact that the matters were being adjourned and that she would be released on bail did not mean that when she returned to Court she would not be put into custody. He reiterated the seriousness of the second assault. The matter was mentioned again on 23 October but all the reports were not to hand, and it was further adjourned, his Worship again clearly indicating that the appellant must understand that notwithstanding the further delay she was still at risk of being placed into custody.

Submissions commenced on 22 January 1993. Counsel for the appellant addressed the Court in relation to the reports that had been received including correcting some errors. Addressing the report provided by the Minister for Education in which there were details of the appellant's misconduct at school, counsel asked the Court to treat the contents as being second and third hand accounts. He did not, however, seek to deny the substance of the comments of those reports, he conceded that his client's behaviour was not good, but said that he did not wish to "rehash those old issues in a non-constructive way". He also drew attention to the positive aspects of the other reports touching upon his client's contrition, her efforts since the latter offence for rehabilitation, including counselling and re-enrolment in secondary school arising from her own wish to further her education. During the course of that address, his Worship again indicated that he was directing his mind to imposing a term of detention which would

not be suspended, upon the basis that it was a serious assault. Counsel submitted that that would not be an appropriate course, bearing in mind a number of factors, including the time which had elapsed since the second assault and what had been done in the meantime by the appellant and her family to rehabilitate herself. As contemplated by the legislation, relatives of the appellant were in Court at all stages of the proceedings, and on this occasion his Worship invited her grandparents to address the Court. The transcript discloses that "a person unknown", whom it would be safe to infer was one of the appellant's grandparents, indicated to the Court that the appellant had been behaving herself, that locking her up would not do her much good and that some children who are placed in detention get worse when they come out. Another relative, probably an aunt, told the Court that the appellant had been sorry for the things that she had done, had told her that she recognised she needed counselling which had taken place, and that she had improved one hundred percent; the whole family was supporting her. The aunt also indicated that school reports had been "really good" and that she had become ambitious to do something worthwhile with her life. When his Worship asked the appellant if she wished to say anything, she said: "I'm sorry - sorry for what I've done". Asked as to her plans, she said she wanted to go back to school. Counsel for the appellant stressed that although she had had a difficult time and had been involved in the actions which brought about the charges, she had, since the second of them, applied herself to improving herself and submitted, in effect, that to have her sentenced to detention would break the chain of improvement and not be of

any benefit to the appellant. His Worship adjourned for further consideration, saying that he had a delicate balancing act to perform because: "On the one hand I have to pay attention to a sentence which will show you and others in the community that you cannot assault and kick people and badly injure them, but I've also got to look at your personal circumstances and the progress that you are making and I just need more time than the time which I've had in which to consider the situation".

The matter resumed on 29 January when counsel for the accused put authorities to his Worship as to sentencing principles concerning juveniles. His Worship proceeded to sentence acknowledging the difficulty in the matter and noting that the appellant was around the age of fifteen when the offences were committed (she was born on 27 December 1976). Detailing the circumstances of each offence, his Worship again stressed the seriousness of the second assault as it involved kicking and the injuries sustained, and added that although he had no evidence as to cost to the community, it must have been extensive in view of the injuries and the fact that the victim had to go to Adelaide for treatment. He then turned to the personal circumstances of the appellant including her background, upbringing and family support, but noted the difficulties which she had had notwithstanding those factors, including misconduct at school and the efforts that were made to assist her behaviour and emotional difficulties in that context. He reviewed the various reports noting in particular the problem she had in controlling her anger, but that she was trying to overcome her

difficulties through counselling. A theme running constantly through his Worship's reasons was the conflict between the requirement for general deterrence in relation to serious assaults on the one hand, and the fact that he was dealing with a juvenile on the other, but took the view that although he was aware that detention may have a bad effect upon a juvenile, he was not sure that that would be the case here because the appellant had a loving family. "I'm directing my mind in proposing detention to a disposition that shows the community that assaults, whether they are by 15 year old girls or others, will not be tolerated. The seriousness of the second assault overweighs the possibility that her rehabilitation might be threatened. I do not think in any event that her rehabilitation will be threatened because of her family support. However, even if she lacked family support, I would not be deterred from the action that I am shortly to take".

In relation to the first offence, it was ordered that the appellant be detained in a detention centre for a month, and in relation to the second, that she be detained for a period of three months cumulative on the first; ordered her release after serving two months upon condition that she be of good behaviour for two years in her own recognizance in the sum of $500, and that for a period of twelve months she accept supervision on probation and to obey all reasonable directions as to reporting, residence, education, training, associates and psychological counselling, and recommended that she receive psychological counselling whilst in detention. An appeal was immediately lodged and the appellant released on bail, but ironically during

the course of argument his Worship thought it would be cruel to the appellant to release her on bail pending the hearing of the appeal since she would have the sentence hanging over her in the meantime and would have to go into detention thereafter if the appeal were not successful. In granting bail, he noted in particular that since the matter had been before him there had been no criminal behaviour that had come to his attention which strongly indicated that other behaviour would be likely to continue.

As mentioned, there were before his Worship a number of reports. It is unnecessary to go into them in detail. The pre-sentence report was compiled from information gathered from the accused, a number of relatives and the Education Department. She was raised from infancy by her grandparents and the appellant claims to be very close to them. She saw her mother occasionally, either in Darwin, when her mother visited the city, or when she travelled to central Australia to stay with her. There have been difficulties in the relationship with the mother who has had a de facto husband for the past fourteen years and two children. The appellant believes that her mother and de facto husband always favour those children over her. Suffice it to say there have been tensions in that household and the appellant continues to reside in Darwin with her grandparents. She also has an aunt living in Darwin and she often visits her and her husband and children. Difficulties arising from the appellant's Aboriginality and confused family background have apparently led to a loss of self esteem and confidence. It is clear upon all the information available that the grandparents, the aunt and

her family offer a caring environment and they are very supportive of her, notwithstanding that she has of recent times displayed a lack of control over her temper, been involved in reasonably serious misconduct at school and in the behaviour which brought her before the Court. According to the pre-sentence report, the main difficulty experienced by the appellant in recent times is "in handling race issues .... the offender has admitted to getting upset if people make racist remarks to her, she's aware of this problem and is taking steps to avoid such situations in the future. The offender will require some assistance in regard to addressing this issue".

Mention has already been made of her efforts of recent times to better herself, particularly by resuming her secondary education where she seems to be making reasonable progress. The senior case worker of the Juvenile Justice Unit in the Department of Correctional Services, who prepared the pre-sentence report, said that the appellant was willing to participate in community service work if ordered to do so and that a project in an Aboriginal child care centre had been identified as suitable work for her. She also said that the appellant was willing to enter into a bond under supervision of the Correctional Services Department and was quite confident that she could cope with a suspended period of detention. She added that a short supervised bond with community work may be of benefit to the appellant. In conclusion, the case worker said that whilst the offences were serious and may warrant a period of detention, the detrimental effects this would have on the appellant would have to be taken into consideration. An

updated report received by his Worship immediately prior to proceeding to sentence disclosed that the appellant's mother had recently arrived in Darwin, was residing at the family property at Berry Springs and intended to remain there for two years. The assessment of the case worker was that the appellant and her mother were getting on quite well at that stage. It was also then disclosed that the appellant had had some difficulty in coping with the death of an uncle when she was aged 13 and the members of her family believe that that incident had had a lasting effect upon her.

A detailed psychologist's report was also before his Worship which disclosed that she showed no signs or symptoms suggestive of major mental disorder, although she had experienced feelings of depression. The appellant has expressed a willingness to the psychologist to cease her behaviour, that since committing the offences she had consciously endeavoured to control it, and had been able to do so. The psychologist recommended that she undergo counselling in the areas of anger management and assertion training which may provide her with an opportunity to develop a more open and trusting relationship with her counsellor and others. The appellant has indicated a willingness to undergo counselling which is available at the Tamarind Centre. His Worship also had available some references which spoke very highly of her family, particularly the grandparents who have been responsible for her upbringing to date.

Turning first to the nature of the offence, assault. It is well to recall that even in cases of what might be regarded as serious assaults, there are a large variety of circumstances in which assaults takes place and it cannot be that all assaults regarded as being serious must be visited with imprisonment. The general principles relating to the sentencing of offenders must be applied to each case. A sound starting point, and one which has been adopted in this Court for example by Mildren J. in *Gadatjiya v Lethbridge* unreported 28 February 1992, lies in what was said by King CJ. (with whom Mitchell J. agreed) in *Yardley v Betts* (1979) 1 A Crim R 329 at 332-334:

> "The question underlying the first point reserved is whether this court should lay down or approve as a matter of principle that there is or ought to be a presumption in favour of imprisonment as the punishment for assault or for certain types of assault.
>
> 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 C.J. in *Birch v Fitzgerald* (1975) 11 SASR 114 at 116-117 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] SASR 65 at 66:

'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 to do 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."

The last paragraph is particularly instructive.

Furthermore, it is well entrenched in the criminal law that there is an essential difference between children and adults when they come before a court exercising criminal jurisdiction. It is often the case, as here, that the offending is explicable, in part, at least, by difficult personal circumstances, immaturity and the growing up process (see the remarks of Burt CJ. in *Noddy* (1980) WAR 132 at 133). To all that is to be added, in respect of this appellant, a particular intolerance to racial slurs. Judges of this Court have often had occasion to reiterate the relevant portions of the preamble to the *Juvenile Justice Act* which says that it is an Act relating to "..... the punishment of juvenile offenders ..... with the intention that juveniles be dealt with in the criminal law system in a manner consistent with their age and level of maturity (including their being dealt with, where

appropriate, by means of admonition and counselling) ....". Having referred to that purpose of the *Act* Maurice J. in *Simmonds v Hill* (1986) 38 NTR 31 went on at p33 to observe that:

> "In the Juvenile Court the retributive aspect of sentencing is, at best, of secondary importance. Even lower in the scale, if, indeed, it has any place at all, is deterring others. The overwhelming concern is the young offender's development as a law abiding citizen. The court should be at pains to ensure that its sentences do not alienate its young clients. Particularly is this so in the case of a first offender. Here there is a real risk that an incentive to good behaviour has been removed, namely the desirability of a clean record in what for young people just leaving school is a very difficult labour market indeed."

These remarks were adopted by Kearney J. in *M v Waldron* (1988) 56 NTR 1. His Honour also referred to *R v Homer* (1976) 13 SASR 377 at 382:

> "... in the case of a juvenile .... the court is trying to find out what is the best means of turning this delinquent juvenile into a responsible law abiding adult and that has really nothing to do with the seriousness of the crime .... and no useful comparison can be made between an order made under an non-punitive system and a sentence imposed on an adult".

In a case such as this where the juvenile has loving and caring support and encouragement from members of her family, the relationship should be preserved and strengthened. That consideration becomes of even greater import when it has been demonstrated that the juvenile has set out upon the rehabilitation process without the imposition of court orders in relation to direction and supervision. What could possibly be achieved in the

interest of the further progress in the rehabilitation of this appellant by removing her from the family environment and disrupting her chosen efforts to further her education, by placing her in detention? The punitive and deterrent aspects of the sentencing process should not be allowed to prevail so as to possibly destroy the results of that process of rehabilitation (*Bell* (1981) 5 A Crim R 347). His Worship erred in imposing a custodial sentence upon the appellant. The best protection for the community lay not in placing the appellant into detention for two months, but rather, in encouraging her rehabilitation by other available means. It cannot be said that her prospects were not good unless a custodial sentence was imposed (as Mildren J. put it in *P v Hill* unreported 9 October 1992).

The fact that there were two offences before the Court has not been overlooked. Surely the first, if dealt with shortly after it occurred, would have attracted no more than an admonition and counselling.

Much as been done already to assist the appellant in overcoming the problems and attitudes which led to her offending. She and her family, who have already given her a great deal of care and support, are to be encouraged to continue in their joint efforts which have already shown substantial progress. As the pre-sentence report demonstrates, there are further means whereby that process may be enhanced and the appellant must appreciate, if she does not appreciate it already, that there is assistance

available which will enable her to further cope with the things which tend to make her angry and lash out.

The sentences imposed by the Juvenile Court are quashed. In lieu thereof there will be an order that the appellant be placed under probation for a period of one year from this date subject to conditions that she be under the supervision of the Minister and report to a person nominated by the Minister at a place and time determined by that person, and that she obey the lawful directions of that person or Minister as the case may be. Those directions may relate to further counselling including as to anger management.