Warlapinni v Cumming & Moore [2001] NTSC 39

PARTIES:	STUART JAMES WARLAPINNI Appellant and PETER MAXWELL CUMMING and DAVID STEVEN MOORE Respondents
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA86 of 2000 (20016585) JA87 of 2000 (20015549)
DELIVERED:	29 May 2001
HEARING DATES:	23 APRIL 2001
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	Mr S Johns
Respondent:	Ms T Austin

Solicitors:

Appellant:	NORTH AUSTRALIAN ABORIGINAL LEGAL AID SERVICE INC
Respondent:	DIRECTOR OF PUBLIC PROSECUTIONS

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

Warlapinni and Cumming & Moore v [2001] NTSC 39
No. JA 86 of 2000 (20016585) and JA87 of 2000 (20015549)

BETWEEN:

STUART JAMES WARLAPINNI
Appellant

AND:

PETER MAXWELL CUMMING and DAVID STEVEN MOORE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 29 May 2001)

MILDREN J*:*

[1] The appellant pleaded guilty in the Court of Summary Jurisdiction to three charges for which he was convicted and sentenced as follows:

File No: JA87 of 2000 (20015549) – Date of offences: 11 September 2000

Count 1: Aggravated unlawful use of a motor vehicle (s218(1) and (2)(a) of the *Criminal Code).*

Sentence: Imprisonment for 14 days.

Count 2: Drive unlicensed: (s.32(1)(a) of the *Traffic Act).*

Sentence: Convicted and fined $100

File No: JA86 of 2000 (20016585) – Date of offence: 26 September 2000

Count 1: Aggravated assault.

Sentence: Convicted. Imprisoned for 3 months and 17 days cummulative on File No. 20015549.

[2] The total sentences of four months were suspended after two months upon conditions. The appellant has appealed against the sentences which resulted in prison sentences upon a number of grounds as appears hereafter.

[3] The facts as alleged by the prosecutor and admitted by the accused in relation to the aggravated unlawful use charge are that on the morning of Monday, 11 September 2000, the appellant had had an argument with his wife at their house in the Nguiu Community, Bathurst Island. After the argument, the appellant walked to the airport to calm down. Parked on the edge of an access road to the airport was an unattended white Toyota Hilux dual-cab utility, the property of the Nguiu Community Government Council, with the keys left in the ignition. The appellant got in, started the engine and drove back towards the township. As he drove past the church, he saw his wife standing in a nearby park. He stopped to speak to her and the argument continued. After a short time had passed he returned to the vehicle, drove it towards the township, then turned around and drove back to the airport. He left the vehicle where he had found it. When later asked by police about this matter, he admitted to those events and told the police he took the vehicle because he was "cranky" and hungry. He had no permission

to take the vehicle which was valued at $30,000. No damage was done to the vehicle which had been taken for about ten minutes.

[4] The facts in relation to the aggravated assault matter were that at midday on Tuesday 26 September 2000, the appellant was at his house when he saw the victim alight from a bus. He took a fishing spear from the roof of his house and ran towards the victim whilst holding the spear in both hands. The victim, who was walking away from the appellant, heard warnings from people nearby and turned towards the appellant. As he did so, the appellant threw the spear at him. The victim moved to avoid it but the handle of the spear caught his shoulder deflecting the spear away. The appellant ran towards the victim with clenched fists and punched him three times to the face. The victim retaliated. The appellant desisted when called upon to stop fighting by family members nearby.

[5] The defendant called evidence as to his character. Mr Victor Punguatj, an assistant teacher, said he was the appellant's uncle and had known him since he was a child. He said that the appellant was "usually quiet", had never got into a fight before and was looked upon by the younger members of the community as a football role model. Some evidence as to his prowess as a footballer was given and the Court was told that he got along well with the "kids around the footy field". Mr Punguatj said he had, in effect, counselled the defendant about the assault matter and that he had claimed to have been teased by the victim in that matter over the result of the grand final, in which the victim was a member of the victorious team and the appellant had

played for the loser and this had made him angry. He said that he had spoken to the victim who had said that the appellant had apologised to him. He said that the appellant had recently become a father and was nervous about coming to Court because he had never been to a court before. He also said that the appellant, since his daughter's birth, had changed and had settled down. He said that the appellant was looking for work and that he hoped to help him to obtain a position as a groundsman. He also said that he had heard that the appellant was an occasional user of cannabis and he had warned him against smoking it before playing football.

[6] In submissions, it was put that the appellant was nineteen years of age and had no prior convictions. As to the unlawful use matter, it was submitted that the appellant was angry because his wife had given away all the food in the house to members of her family who were in difficult financial circumstances and he was hungry and had had nothing to eat. In relation to the assault matter, it was put that both the victim and the appellant had apologised to each other and that matter was settled as between them. It was put that the appellant was remorseful and accepted he had down the wrong thing. It also transpired that the appellant's daughter had only just been born, was still in Darwin and that he had not yet seen her. It is obvious that the appellant is a Tiwi Islander, but nothing more is known about his cultural background.

The appeal relating to the unlawful use charge

[7] In relation to the unlawful use charge, this was a property offence which carried a mandatory minimum sentence of fourteen days' imprisonment. The appellant's submission before the learned Magistrate was that exceptional circumstances existed which authorised the imposition of a lesser penalty, *vide* ss78A(6B) and (6C) of the *Sentencing Act*.

[8] Section 78A(6C) provides as follows:

> (6C) For the purposes of subsection (6B), exceptional circumstances will only exist if the offender is before the court to be sentenced in respect of a single property offence, the offender has not on any previous day been dealt with by a court under subsection (6B) and the court is satisfied of all of the following:
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> (a) that the offence was trivial in nature;
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> (b) that the offender has made, or has made reasonable efforts to make, full restitution;
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> (c) that the offender is otherwise of good character and that there was mitigating circumstances (which it is noted do not include intoxication due to alcohol or the use of illegal drugs) that significantly reduce the extent to which the offender is to blame for the commission of the offence and demonstrate that the commission of the offence was an aberration from the offender's usual behaviour;
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> (d) that the offender co-operated with law enforcement agencies in the investigation of the offence,
>
> the onus of providing the existence of the matters referred to in paragraphs (a), (b), (c) and (d) being on the offender.

[9] The learned Magistrate was satisfied as to subparagraphs (a), (b) and (d) of s78A(6C) and appears to have been satisfied that the appellant is otherwise of good character, but his Worship was not satisfied that there were mitigating circumstances which significantly reduced the extent to which the offender was to blame for the offence, nor was he satisfied that there were mitigating circumstances which demonstrated that the commission of the offence was an aberration from the offender's usual behaviour. Ground 1 of the appellant's notice of appeal contends that his Worship erred in failing to be satisfied that the elements of subparagraph (c) had been made out. It was submitted by the respondent that it was not entirely clear whether his Worship made a formal finding that "the appellant is otherwise of good character", given some of the observations his Worship made elsewhere in his remarks on sentencing, viz:

> I have to say the evidence of good character here seems to be scanty and it consists of a statement that he is usually quiet, never been in a fight except on the footy field and that he is a footy role model for young kids with whom he is talkative and he is a footy role model because he spent three months in Cairns recently, playing football.

Because this issue has been raised, it is necessary to consider that question as well.

Was the appellant otherwise of good character?

[10] As Martin CJ observed in *Stephensen v Trennery* [2000] NTSC 92, the appellant's character fell to be considered at the time the assessment is made after the finding of guilt for the offence in question. His Honour, after

referring to a number of decisions as well as to s6 of the *Sentencing Act* said at para [18]:

> The legislature clearly did not intend that prior criminal convictions would be determinative of the question of character. If that were intended, then it would have been clearly spelt out. Nor do I consider that the presence or absence of prior criminal convictions is the only factor to be taken into account, particularly given that the assessment is to be made as at the time of the finding of guilt for the property offence.

I respectfully agree with these observations.

[11] Nevertheless, a person's lack of prior convictions, particularly in the case of a youthful first offender if nothing that is adverse is known, may still be enough to establish good character because inferences may be able to be drawn from the circumstances. If one looks at the circumstances of this case at the time of sentencing, the appellant was a nineteen year old Aboriginal, married with a recently born daughter, unemployed and living in Nguiu where employment is hard to obtain. He appears to be very poor to the extent that there was no food for him to eat because his wife had given it all away to her family. Clearly he is not to be blamed for his poverty and lack of work. Whilst there are no doubt many young Aboriginal persons living in remote communities who reach the age of nineteen without a criminal record, it is the experience of the courts that young Aboriginals who are troublemakers or lawbreakers usually have come before the courts by this time. Here, not only was the appellant without any prior convictions, but the prosecutor had advised the Court that nothing was known, i.e. he had not

been dealt with before even to the extent of proceeding without recording a conviction and the Court had been told that he had never been to Court before. This bespoke highly of his good character, but there was in fact more information available. I also think that what was said of the appellant's reputation as a sportsman should be afforded some weight. In many Aboriginal communities, skilled footballers are highly regarded. It is well recognised that team sports are character building. Skill in a sport bespeaks good character because it indicates that the person has worked hard at it to learn the skills and in the case of team sports, has learned the value of teamsmanship. In this case, the appellant was looked upon by the younger members of the community to whom he related well as a role model which implies that he had learned the character-building traits which organised sport is supposed to engender. There was evidence that he was looking for work which suggests that he wanted gainful employment if he could find it. The fact that Mr Punguatj was prepared to speak on his behalf and prepared to assist him to find work, is in itself helpful in arriving at a conclusion in his favour. In addition there is evidence that he has never got into a fight (except on the football field) and is usually quiet. On the other hand, there is little known about his reputation, other than his football prowess and that he is reputed to be an occasional cannabis smoker. Whilst general reputation is a matter to be considered (see s6(B)) one would not expect a nineteen year old Aboriginal to have had much opportunity to develop much of a reputation, good or bad, other than perhaps as to his

moral qualities. Much the same might be said about the extent of any significant contributions made to the community: see s6(C). The only other matter to be considered is the subsequent offending on 26 September. I accept that courts have said in relation to offenders who have no prior convictions but who are facing sentence on multiple charges committed over a period of time that a subsequent offence or offences may have relevance as operating to impair the offender's good character: see for example, *The Queen v McInerney* (1986) 42 SASR 111 at 112 per King CJ. However, this was a charge of a different character and although of some seriousness, I think on balance a finding that the appellant was a person of good character at the time of the hearing was the correct finding.

Were there mitigating circumstances which significantly reduced the extent to which the appellant was to blame for the commission of the offence?

[12] The learned Magistrate found against the appellant on this issue. His Worship said:

> When is it to be considered that the circumstance of mitigation, that is; the offending as a result of an impulsive, spur of the moment, emotionally fuelled act which normally entitles a person to leniency, be considered to significantly reduce the extent to which the offender is to blame?
>
> In this case I see nothing out of the ordinary. I see a compulsive, spur of the moment offending, fuelled by anger which is common to many crimes. I do not see how it significantly reduces the extent to which the offender is to blame.

[13] Ms Austin, counsel for the respondent, in her very valuable submissions, argued that this did not demonstrate error and relied upon a passage from the judgment of Anderson J in *Woods v The Queen* (1994) 14 WAR 341 at 350-51

> When emotional stress is put forward in mitigation, the court must be persuaded that the offending is connected to the emotional condition in a way that to some sensible degree lessens the offender's culpability or the criminality of his/her behaviour, or makes retribution less imperative, or positively indicates that the offending is out of character and therefore may not be repeated, so as to perhaps lead to the conclusion that there is no need, in the particular case, to place emphasis on personal deterrence or so as perhaps to lead to the conclusion that the case is not one in which it is appropriate to emphasise general deterrence.

Ms Austin submitted that the appellant's anger and hunger did not provide a sensible explanation for his behaviour because there was no apparent connection between it and the offending. It is not clear from the evidence how far the airport was away from the appellant's home, or how much time had elapsed between the argument and the offending, but the facts show that the appellant was still upset with his wife when he stopped and spoke to her in the park. The inference is that he took the vehicle in order to return to his wife and have it out with her as he appears to have done and I think there is a connection.

[14] In *Gorey v Winzar* [2001] NTSC 21, Martin CJ took into account as factors under this heading, the lack of any planning in the offence and the fact that the offender was only eighteen years of age, "thus attracting the special mitigating consideration available in the sentencing of young offenders were it not for the mandatory sentencing requirements", as well as some of the

other factors relevant to the conclusion that the offence was trivial: see para [26] of his Honour's judgment. His Honour observed at para [25]:

> The expression "mitigating circumstances" is normally understood as relating to circumstances which operate so as to moderate the severity of the sentence. Here, attention is firstly directed to those that can be advanced to **significantly** reduce the offender's blameworthiness (emphasis added). There may be one or more such circumstances, but whether standing alone or in combination, they must produce the result if the offender is to succeed. The word "blame" introduces the concept of responsibility of the offender for the commission of the offence.

[15] Those considerations were also present here in that the appellant was only nineteen years of age, the offence was not planned but a spontaneous response to the anger he felt towards his wife for giving away all the food and in addition, the vehicle was returned undamaged after only ten minutes. I consider that his Worship erred and should have found in the appellant's favour on this issue.

Were there mitigating circumstances which demonstrated that the commission of the offence was an aberration from the appellant's usual behaviour?

[16] His Worship decided that the mitigating circumstances did not demonstrate that this was an aberration from his usual behaviour because his subsequent offending, which was a show of anger, demonstrated that the anger leading to the offending on 11 September with the motor vehicle was not "one-off". Counsel for the appellant, Mr Johns, submitted that his Worship erred in relying on the subsequent offending to demonstrate that this was not an aberration from his usual behaviour. Counsel for the respondent, Ms Austin,

submitted that his Worship had not fallen into error and relied upon a number of authorities to the effect that a sentencing court may have regard to subsequent offending where it is relevant. However, I consider that Mr Johns' submission is correct. Section 78A(6C)(c) is drafted with an important change of tense in the verbs used. Whilst the subsection required the offender to show that he "is otherwise of good character", the offender need only show that the mitigating circumstances "demonstrate that the commission of the offence *was* an aberration from the offender's usual behaviour". Further, when the provision refers to mitigating circumstances, it must be referring to the circumstances relevant to the offence concerned and it is difficult to see how subsequent offending can be said to be a *mitigating* circumstance, in the ordinary use of language.

[17] I consider that what his Worship failed to do was to consider what were the mitigating circumstances and if they demonstrated that the commission of the offence was an aberration from defendant's usual behaviour. The relevant mitigating circumstancs were his lack of prior convictions or of any trouble with the law, his age, the lack of planning or premeditation and the fact that the offender acted impulsively as a result of the anger he felt towards his wife giving away all of his food. I consider that these circumstances clearly demonstrated that at the time of the offence, this was an aberration from his usual behaviour and that his Worship should have so found.

[18] It follows that I consider that his Worship erred in concluding that the appellant had not established "exceptional circumstances" within the meaning of s78A(6B) of the Act.

The appeal relating to the assault charge

[19] As to the appeal against the sentence imposed for the aggravated assault charge, his Worship noted that the appellant had been teased by the victim, but he rightly observed that no material had been put to the Court as to when this took place. On the facts presented by the prosecutor, there was no opportunity for this to have occured from the time the victim alighted the bus and it may have occurred at any time after the grand final at the end of the wet season for all his Worship knew. His Worship took into account that the appellant had apologised and the other matters put on his behalf in mitigation, but concluded that the assault was serious because a weapon was used. The information available to the Court about the weapon was only that it was a fish spear, but I have no doubt that his Worship was quite familar with objects of that nature and of their potential to cause serious injury if, for example, such a spear were to become lodged in an eye.

[20] Mr Johns was unable to point to any specific error, but submitted that his Worship's sentence was manifestly excessive and that his Worship failed to give sufficient weight to the appellant's youth, lack of prior convictions and prospects of rehabilitation, the fact that no injuries were in fact caused and the appellant and his victim were now reconciled, whilst much emphasis was

placed upon general deterence. Ms Austin submitted that an actual custodial sentence was warranted , notwithstanding the appellant's youth and the other mitigating circumstances in his favour because the offence was a serious one of its type. It was submitted that the learned Magistrate did not err in applying relevant principles to the facts of the case and that, in order to succeed on appeal, not only must the sentence be excessive, but it must be manifestly so. Ms Austin also pointed to the fact that two months of the sentence was suspended as indicating that his Worship did not ignore the appellant's prospects of rehabilitation and showed a measure of leniency consistent with an acceptance of the mitigating circumstances put on his behalf. It is to be noted also that his Worship indicated that he thought the "starting point" for this offence was eight months imprisonment which he discounted to four months to take into acount his plea of guilty and the abolition of remissions. The four months was further reduced to three months and seventeen days in accordance with the totality principle, to ameliorate the effect of the fourteen day mandatory sentence, given that his Worship said that he would not otherwise have imposed a sentence of imprisonment for the unlawful use offence.

[21] As was said by King CJ in *Yardley v Betts* (1979) 22 SASR 108 at 113, assaults vary greatly in seriousness and the need for deterrent punishment varies according to the circumstances of the offence. Further, as his Honour observed in that case, there is no judicial policy that assaults which could be characterised as "serious" must inevitably call for a sentence of actual

imprisonment. Nevertheless as Bray CJ said in *Birch v Fitzgerald* (1975) 11 SASR 114 at 116-117:

> Nevertheless there are offences in which, as it seems to me, the deterrent purpose of punishment must take priority. When people act under the influence of liquor, passion, anger or the like so as to constitute themselves a physical danger or potential physical danger to other citizens it may well be that a sentence of imprisonment will be appropriate, even in the case of a first offender of good character, in order to impress on the community at large that such behaviour will not be tolerated. Parliament has regarded a second offence of driving under the influence of liquor as falling into that category. A court will often in my view be justified in treating unprovoked violence in the same way in the absence of mitigating circumstances. As I said in *Sellen v. Chambers* (1974) 7 SASR 103 at p106, 'Violence has increased, is increasing, and ought to be diminished, particularly violence by young men towards each other.' It may be that the incidence of such violence will be reduced if it is brought home to those likely to resort to it that if they do they may very well be punching, striking, butting or kicking themselves into gaol.
>
> I am not, of course, saying that all such first offenders ought to be sent to gaol. There is a wide range for the proper application of judicial discretion.

[22] Clearly the use of the fish spear as a weapon in circumstances where the appellant's anger made him a potential danger to the victim was a circumstance that warranted a deterrent sentence. The fact that the spear only just missed its mark was due to good fortune rather than anything else and indicates that the appellant intended to cause his victim physical harm. Even if the spear had hit the victim in the back, some physical harm could have been expected. I therefore do not think his Worship erred in concluding that an actual custodial sentence was warranted. The nub of the appellant's submission was not that there was a head sentence of

imprisonment, nor that the head sentence was too long, but that his Worship should have suspended it fully. I do not consider that it has been demonstrated that his Worship's sentence was manifestly excessive because of this. As to the grounds of appeal relating to the failure to give sufficient weight to the matters referred to by Mr Johns, there is nothing to suggest that his Worship did not give those matters adequate weight in the sense explained by Gibbs CJ in *Mallet v Mallet* (1983-4) 156 CLR 605 at 614, and recently approved by Gaudron and Gummow JJ in *Dinsdale* (2000) 115 A Crim R 558 at 565.

[23] Given that his Worship reduced the head sentence to take into account the totality principle, I think it is plain that his Worship would have otherwise imposed a sentence of four months, to be released after two months, on conditions. In those circumstances, the question arises as to whether, notwithstanding that error has been shown in relation to the sentence of fourteen days for the unlawful matter, the appeals ought to be dismissed on the ground that no substantial miscarriage of justice has actually occurred: see s177(2) of the *Justices Act*. However, s78(6E) of the *Sentencing Act* provides:

> (6E) If an offender who has been dealt with on a previous day under subsection (6B) is before the court to be sentenced in respect of one or more property offences that were committed after the offender was dealt with under subsection (6B) and it is necessary to determine the number of previous days on which the offender has been sentenced to under this section, the day on which the offender was dealt with under subsection (6B) is not to be taken into account as such a day.

Therefore, if the sentence of fourteen days imprisonment is not set aside, the appellant would face a mandatory minimum term of ninety days for any subsequent property offence, rather than one of fourteen days. There is also the question of whether a conviction should be recorded. I do not think it can be said in those circumstances that no substantial miscarrage of justice has actually occurred. That being so, the question is what orders should now be made. In all the circumstances I consider that the appropriate orders are as follows:

1. As to the appeal in relation to No. JA87 of 2000 (20015549) the appeal is allowed. The conviction and sentence are both set aside.

   In lieu thereof, without recording a conviction the appellant is released.

2. As to the appeal in relation to No. JA86 of 2000 (200016585) the appeal is dismissed.

[24] There will be orders accordingly.