Hampton v Marinov [2015] NTSC 6

PARTIES:	HAMPTON, Geraldine v MARINOV, Ivan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 28 of 2014 (21355922)
DELIVERED:	21 JANUARY 2015
HEARING DATES:	25 AUGUST 2014
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION (DARWIN)

CATCHWORDS:

CRIMINAL LAW – Justice Appeal – Appeal against sentence – Exercise of discretion to record a conviction – Consideration of enumerated factors in s 8(1) of *Sentencing Act* – Relevant sentencing factors – Sentence that is "just in all the circumstances" – Recording of a conviction and minimum mandatory sentencing provisions – Appeal dismissed – *Sentencing Act 1995* (NT), s 8(1).

Justices Act 1928 (NT), s 177(2).
Sentencing Act 1995 (NT), s 5(1)(a), 6(a), 7, 8(1)(a), 8(1)(b), 8(1)(c), 78C.

Carnese v The Queen [2009] NTCCA 8; *Cobiac v Liddy* (1969) 119 CLR 257; *Davis v Hayward* (Unreported, Supreme Court of the Northern Territory, Martin CJ, 5 February 1997); *Dinsdale v The Queen* (2000) 202 CLR 321; *Hesseen v Burgoyne* (2003) NTSC 47; *House v The King* (1936) 55 CLR 499; *Nayidawawa v Moore; Nabegeyo v Middleton* (2007) 178 A Crim R 473; *R v McInerney* (1986) 28 A Crim R 318; *Toohey v Peach* (2003) 143 NTR 1, applied.

Hales v Adams [2005] NTSC 86, referred to.

Freiberg, Arie, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* 3rd Edition (Thomson Reuters, 2014).

REPRESENTATION:

Counsel:

Appellant:	P Hopley
Respondent:	L Brown

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Blo1502
Number of pages:	12

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

Hampton v Marinov [2015] NTSC 6
No. JA 28 of 2014 (21355922)

BETWEEN:

GERALDINE HAMPTON
Appellant

AND:

IVAN MARINOV
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 21 January 2015)

Background

[1] On 1 May 2014, the appellant appeared in the Court of Summary Jurisdiction charged on complaint with: (1) Hindering a member of the police force in the execution of duty, contrary to s 159 of the *Police Administration Act*; and (2) Unlawfully assaulting a police officer whilst in the execution of duty, contrary to s 189A of the *Criminal Code*. In the alternative to Count 2, a further count of hindering police was alleged. The offences were alleged to have been committed on 11 December 2013 at the appellant's place of residence. The appellant pleaded not guilty to both counts.

[2] Following a hearing, the appellant was found not guilty of the first count, (hindering police) and guilty of the second count (unlawfully assaulting a police officer). It was not necessary for the Court to consider the alternative charge in respect of Count 2.

[3] By way of sentence, for the charge of unlawfully assaulting a police officer, the learned Magistrate recorded a conviction and ordered a good behaviour bond for a period of 12 months, in the appellant's own recognisance of $500.

[4] On 21 May 2014, the appellant filed a Notice of Appeal. The single ground of appeal is that the Magistrate erred in recording a conviction.

Proceedings before the Court of Summary Jurisdiction

[5] At the hearing, evidence was given that in response to information received about an altercation between the appellant and her uncle, police officers attended the appellant's residence. The primary motivation of police was to speak with the appellant and to execute an outstanding arrest warrant on Mr Baden Clarke, who they understood to be present at her premises.[1] The Court was informed Mr Clarke was the appellant's cousin.

[6] One of the police officers proceeded to the rear of the premises in anticipation that Mr Clarke would attempt to evade arrest. The victim in respect of Count 2, Senior Constable Stephen McWilliams, approached the

[1] Transcript, 1 May 2014, 5.

front door and knocked. The door was answered by the appellant. With the front door ajar, Mr Clarke was in clear sight of Officer McWilliams.[2] Officer McWilliams sought to enter the premises, in an effort to arrest Mr Clarke.

[7] The evidence was unclear as to the exact conversation that took place between Officer McWilliams and the appellant. There was some contact between the appellant and Officer McWilliams. As a result, the appellant's head struck the wall. The impact resulted in what Officer McWilliams described as a "serious scratch", about one centimetre in length, in the middle of the appellant's forehead, that was bleeding.[3] The evidence was ambiguous as to exactly how the injury was caused.

[8] Officer McWilliams continued through the residence and outside to the small grassed area at the back of the property in pursuit of Mr Clarke who was attempting to scale the back fence.[4] Officer McWilliams gave chase and also attempted to jump the back fence. When doing so, he was pulled from behind in a downwards motion by his accoutrement belt. This caused him to fall back from the fence, but he landed on his feet. Officer McWilliams described the assault as having insufficient force to pull him down to the ground and knock him over, but sufficient to prevent him from jumping the

[2] Transcript, 1 May 2014, 5.
[3] Transcript, 1 May 2014, 7.
[4] Transcript, 1 May 2014, 6.

fence and continuing the chase. He immediately turned around. His evidence was that the appellant was the only person present in the vicinity.[5]

[9] In his reasons, the Magistrate explained why he had a reasonable doubt in respect of Count 1, and in relation to Count 2, his Honour said the evidence left him in no doubt that he could not rely on the appellant's evidence. He said he was left with the evidence of Officer McWilliams (summarized above). His Honour noted the appellant did not deny that she was standing next to Officer McWilliams at the relevant time and that her explanations for her movements were "clearly circuitous, inadequate, couched in speculative terms and in the context of extreme drunkenness". His Honour found beyond reasonable doubt the appellant was the person who pulled Officer McWilliams back from the fence. Her conduct constituted the offence of assault a police officer. There is no challenge to that finding.

[10] In relation to the findings of fact, of further relevance to sentencing, his Honour rejected the appellant's submission to the effect that she was angry or upset that a police officer had run through her house. He found that the appellant was assisting her cousin to escape and that although she may not have understood initially why police were present, she knew "perfectly well" by the relevant time that police were in pursuit of her cousin. His Honour regarded the fact that the matter proceeded to hearing as an indication of a lack of remorse. He also found that the "more appropriate" charge would have been hindering police, but that the elements of the charge

[5] Transcript, 1 May 2014, 7.

of assault police were made out, albeit "at the lowest possible end of an assault charge" and that the assault had the effect of hindering.

[11] The learned Magistrate made reference to the appellant's criminal history, noting she had no history of violent offending; her last offence (namely, possess a thing to administer a dangerous drug) was dealt with in 2009. His Honour also noted the appellant was a young woman, 30 years of age and the mother of three children.

Relevant Principles

[12] After making a finding of guilt, a Court may impose an order without recording a conviction, pursuant to s 7 of the *Sentencing Act*. Any one factor enumerated in s 8(1) of the *Sentencing Act*, or any combination of those factors, may be sufficient to warrant the exercise of the discretion.[6] Section 8 provides that the Court "shall" have regard to the circumstances of the case, including the character, antecedents, age, health or mental condition of the offender; the extent to which the offence was trivial in nature; and the extent to which the offence was committed under extenuating circumstances. It has been observed that judicial minds may well differ as to the significance to be placed upon any one or more of these factors, as well as the other circumstances of the case. There may be differences of opinion in

[6] *Cobiac v Liddy* (1969) 119 CLR 257, 276.

ultimately deciding whether or not to record a conviction. The particular sentencer is exercising a judicial discretion.[7]

[13] The sentencer bears no obligation to apportion certain weight to any one factor. Each of the factors, and the overall circumstances of the case, need only be given due consideration when determining whether the discretion should be exercised.[8] The primary focus of attention is to be upon all of the relevant circumstances. A Court is not constrained to consider the matters enumerated in s 8 of the *Sentencing Act* alone.

[14] When considering whether or not the Court below ought to have imposed a conviction, the appellant must establish error in the exercise of the Magistrate's discretion. Establishing that the discretion may have been exercised in such a way as to effect a different result is insufficient. An appellate court will only interfere, "if there is some reason for regarding that the discretion conferred upon the Magistrate was improperly exercised and that the Magistrate fell into error".[9] It may not be obvious how the sentencer fell into error, but if the sentence is unreasonable or plainly unjust, the appellate court may interfere.[10]

[15] The Court's disapproval of an offender's wrongdoing is marked by the formal and solemn act of a conviction.[11] The recording of a conviction is a

[7] *Hesseen v Burgoyne* (2003) NTSC 47, [20].
[8] *Davis v Hayward* (Unreported, Supreme Court of the Northern Territory, Martin CJ, 5 February 1997), [14]; *Toohey v Peach* (2003) 143 NTR 1.
[9] *Hesseen v Burgoyne* [2003] NTSC 47, [20].
[10] *House v The King* (1936) 55 CLR 499; *Dinsdale v The Queen* (2000) 202 CLR 321.
[11] *R v McInerney* (1986) 28 A Crim R 318, 329.

component of the sentence, to be accorded weight in considering whether or not the sentence is proportionate to the offence.[12] As Professor Freiberg notes in *Sentencing: State and Federal Law in Victoria*, the recording of a criminal conviction is a "significant act of legal and social censure".[13] As such, it is "a judicial act by which a person's legal status … is officially and – subject to any provisions relating to expungement – irretrievably altered".[14]

Discussion

[16] Counsel for the appellant submitted that the Magistrate erred in not attributing proper weight to the character, age and antecedents of the appellant, as required by s 8(1)(a) of the *Sentencing Act*. As noted, the Magistrate accepted that the appellant was a 30 year old woman, a mother of three children, two of whom were "very young ones".[15] It was accepted that she had no prior convictions for violent offending and had not come before the Court for some five years. His Honour acknowledged the appellant's personal circumstances and character, remarking that he was "satisfied that this behaviour was not in character".[16]

[17] In weighing the appellant's character, the Magistrate's remarks accord with the factors enumerated in s 6 of the *Sentencing Act*: that a Court may

[12] *Carnese v The Queen* [2009] NTCCA 8, [14] - [16].
[13] Freiberg, Arie, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* 3rd Edition (Thomson Reuters, 2014), 85.
[14] Ibid.
[15] Transcript, 1 May 2014, 48.
[16] Transcript, 1 May 2014, 48.

consider the "the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender". According to the "Information for Courts", as a juvenile (which would have marginal or no bearing at all on the disposition), the appellant received non-conviction orders for two offences of unlawfully using a motor vehicle and three offences of criminal damage. The appellant was also convicted and moderate fines were imposed in relation to two drug related offences in 2009.

[18] It is accepted that the appellant's criminal history dates back some five years ago. In *Hales v Adams*,[17] mature age offenders, who had led previously blameless lives, were held to potentially benefit from the exercise of the discretion not to record a conviction. His Honour was clearly aware of the appellant's antecedents. The appellant was not completely without previous Court matters. In my opinion, the Magistrate gave the appellant's antecedents appropriate weight and did not overvalue her earlier convictions. His Honour could not be said to have been in error in his assessment of the appellant's personal circumstances and character.

[19] It was submitted that the Magistrate erred in not having proper regard to the triviality of the offending. Consideration as to the level of seriousness of offending, under s 8(1)(b) of the *Sentencing Act*, does not require that an offence be found to be trivial, rather it requires that an assessment be made

[17] [2005] NTSC 86, [17].

as to the extent that the offence is of a trivial nature.[18] His Honour clearly made an assessment about this factor.

[20] The evidence before the Court below was that the assault involved little force, the police officer landed on his feet and thus there was no appreciable risk of injury, no physical, psychological or emotional harm was suffered, and the incident did not significantly impede police from arresting and detaining Mr Clarke. The Magistrate accepted the submissions made on behalf of the appellant, holding that the assault fell "at the lowest possible end of an assault charge".[19]

[21] His Honour was still obliged to weigh this factor against the broader circumstances of the case. It is apparent this was the approach taken. This is evident when his Honour commented as to:

> "…the importance in our community of police officers being able to carry out their duties, if not with the full support of members of the public, at least without being assaulted by them or interfered with by them".[20]

His Honour found this to be a powerful countervailing factor in recording a conviction against the appellant. He clearly embarked upon the balancing process required.

[22] It is accepted that the level of force used to constitute the offence was minor, and that the offence itself was at the lower end of the scale, however,

---

[18] *Nayidawawa v Moore; Nabegeyo v Middleton* (2007) 178 A Crim R 473, [15].
[19] Transcript, 1 May 2014, 47.
[20] Transcript, 1 May 2014, 48.

it must also be remembered the appellant committed the offence to assist her cousin in the face of an arrest. The appellant's motivation also falls to be assessed, adding to the overall assessment of the seriousness of the offending.

[23] It was submitted that his Honour erred in failing to ascribe proper weight to the extenuating circumstances of the case, as delineated in s 8(1)(c) of the *Sentencing Act*. The assault was committed directly after Officer McWilliams had gained entry to the premises, and there was contact with the appellant that caused an injury to her forehead. Counsel for the appellant emphasised that the events unfolded rapidly in circumstances where the appellant may have had grave concerns for the welfare of her cousin. It was submitted that the appellant had cause to question the legitimacy of the police officer entering her premises, and that she may not have been given an explanation as to the execution of the outstanding arrest warrant for Mr Clarke.[21] Further, the appellant was intoxicated at the time, thus her ability to process the events and respond accordingly, was likely to be affected. I understood the appellant's submission to be that the learned Magistrate did not give sufficient consideration to the reason for the offending, namely the suggestion of the appellant's distress and incapacity to appreciate why Officer McWilliams had entered her premises.

[24] Having conducted a hearing, his Honour was in the best position to assess the evidence relevant to these matters. His Honour did not accept that the

[21] Transcript, 1 May 2014, 10.

reason the appellant assaulted Officer McWilliams was because she was angry or upset that police had entered her premises. As noted, it was concluded that the appellant was assisting her cousin in making his escape from the premises.[22] Any uncertainty the appellant may have initially felt as to the police officer's attendance was held to have dissipated by the time Officer McWilliams ran through the house to the rear fence of the premises in pursuit of Mr Clarke. I see no reason to disturb his Honour's findings of fact, nor do I consider the discretion miscarried for any failure to appreciate the circumstances the appellant found herself in.

[25] The appellant submitted the Magistrate erred in not assigning adequate weight to s 5(1)(a) of the *Sentencing Act*: "to punish the offender to an extent or in a way that is just in all the circumstances". Counsel for the appellant submitted on appeal that the recording of a conviction would mean the appellant would be liable to mandatory sentencing provisions, should she reoffend in the future. Any subsequent conviction for assault would enliven the mandatory minimum sentencing regime established under the *Sentencing Act*, specifically s 78C of the *Sentencing Act*. It was submitted that the appellant would essentially be subject to a "quasi suspended sentence" for life.

[26] His Honour took an open approach to this matter, having invited counsel to address him on whether the potential existence of the mandatory sentencing regime operating in the Northern Territory was relevant to the question of

[22] Transcript, 1 May 2014, 47.

the imposition of a conviction. Save for indicating consideration should be given to this issue, counsel for the appellant in the Court below did not develop that submission.[23] In my opinion, there may be cases where such a consideration is relevant. It is not clear, however, why it is a factor that should have influenced the exercise of the discretion in any significant way in this particular case.

Orders

[27] The appeal is dismissed. The conviction imposed by the Court of Summary Jurisdiction on 1 May 2014 is confirmed. The good behaviour bond for a period of 12 months and own recognisance of $500 remains in force.

****

[23] Transcript, 1 May 2014, 45.