Matha v White, Burness & Eaton [2003] NTSC 116

PARTIES:	ANDREW DJOKI MATHA v MICHAEL WHITE JOSEPHINE LEAH BURNESS DON JOHN EATON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NOS:	JA 117/03 (9910076), 118/03 (20101680), 119/03 (20204746)
DELIVERED:	28 November 2003
HEARING DATE:	21 November 2003
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Appellant:	S Barlow
Respondents:	S Ozolins

Solicitors:

Appellant:	NAALAS
Respondents:	DPP

Judgment category classification:	C
Judgment ID Number:	bai0306
Number of pages:	17

bai0306

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

Matha v White, Burness & Eaton [2003] NTSC 116
Nos. JA 117/03 (9910076), 118/03 (20101680), 119/03 (20204746)

BETWEEN:

ANDREW DJOKI MATHA
Appellant

AND:

MICHAEL WHITE (JA 117/03)
JOSEPHINE LEAH BURNESS (JA 118/03)
DON JOHN EATON (JA 119/03)
Respondents

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 28 November 2003)

Background

[1] On 6 June 2003, the appellant was convicted upon his own pleas of guilty and sentenced in the Northern Territory Court of Summary Jurisdiction sitting at Darwin in relation to nine offences appearing on three separate files. The nine offences comprised 3 counts of stealing, 3 counts of aggravated assault, 2 counts of criminal damage and one count of unlawful entry with intent to steal.

[2] On file no. 9910076, the learned magistrate sentenced the appellant as follows –

1. Stealing (petrol to the value of $135)	)	Aggregate sentence of
2. Unlawful entry with intent to steal	)	7 months imprisonment
3. Stealing (cash and petrol to the value of $47)	)	
4. Unlawfully damage property (value $500)	:	No conviction – discharged
5. Stealing (petrol to the value of $2.70)	:	1 month imprisonment
6. Aggravated assault (threatened with an offensive weapon)	:	5 months imprisonment

[3] The sentences on counts 1, 2, 3, 5 and 6 were ordered to be served concurrently, resulting in a total period of imprisonment on this file of 7 months.

[4] On file no 20101680, the learned magistrate sentenced the appellant as follows –

1. Aggravated assault (threatened with an offensive weapon):

   5 months imprisonment.

2. Aggravated unlawful damage to property (value $946):

   2 months and 2 weeks imprisonment.

[5] The sentences on these counts were ordered to be served concurrently to each other and cumulatively upon the sentences imposed on file no 9910076.

[6] On file no 20204746, the learned magistrate sentenced the appellant to imprisonment for 6 months for an aggravated assault (male/female, causing bodily harm). The sentence on this file was ordered to be served cumulatively upon the sentences imposed on files 20101680 and 9910076.

[7] The effective head sentence imposed upon the appellant was imprisonment for a period of 18 months. The learned magistrate fixed a non-parole period of 9 months.

[8] The circumstances of the three episodes of offending were summarised by the learned magistrate in the following terms:

> "I'm dealing with a defendant who is now 28 years of age. On file 9910076, when he was 23 years of age, he was involved on Elcho Island in an unlawful entry and stealing. Between 2 pm on 9 December and 8 am on 10 December 1998 he and at least four other co-offenders went to the Marthakal Motor Vehicle workshop on Elcho Island.
>
> The workshop was closed. The defendant and co-offenders walked to the side of the building where the four co-offenders punched a large hole in an external fibro wall causing approximately $500 damage. The co-offenders then entered the building by climbing through this hole. Once inside the building the co-offenders then jemmied open an internal door leading to the office.
>
> The defendant went in eventually. The defendant and co-offenders went into the office where they removed approximately $20 in assorted coins from a desk drawer. They also removed one 20 litre drum of unleaded petrol. He wasn't interviewed until 29 April 1999.
>
> Prior to the interview on 29 April he offended again. Between 4 and 9 am on Friday 8 January 1999 he went to a dwelling house at lot 82, Gallawarra Road, Galiwinku. He went to a boat parked in the yard and syphoned approximately two litres of petrol from the boat's fuel tank, into two separate bottles. The owner of the boat woke up and began to chase the defendant. The defendant jumped over a fence at the side of the house, dropped the two bottles containing the petrol and went to his father's house.
>
> He was followed to his father's house by the owner of the boat. There the defendant sat on the verandah and said: 'My father's the chairman and you'll be sent back to Maningrida'. The defendant then went inside while the victim remained outside, deciding what

action to take. The defendant then emerged from the house and ran towards the victim with his right arm raised and holding a full can of corned beef.

The victim took a few steps backwards and began to turn whilst the defendant ran up to about three metres from the victim and then threw the can, striking the victim on the lower middle of his back. He sustained minor bruising and some slight tenderness.

Once again the defendant was interviewed in relation to this matter by police on 29 April. He declined to answer questions.

Then on 5 December 2000, when the defendant was 25, he offended again. What happened on this occasion was that he was at his sister's place at Darondaru Street, Galiwinku on Elcho Island. He was angry with his sister and her family because they refused to give him any food and any money. At that time he had in his possession a shovel-nosed spear and a woomera.

He said to his sister: 'If you don't give me supper I will kill this car'. At this time he indicated a vehicle travelling along the street, owned by Colin Barron and Elsie Barron. The vehicle was a Toyota Landcruiser station wagon, Northern Territory registration 515.204. The defendant picked up a large rock from next to the roadway. He then threw the rock at the vehicle as it drove past. The rock hit the vehicle on the driver's side door.

Mr Barron stopped the vehicle and alighted to see what had happened. The defendant fitted his spear into the woomera, cocked the spear back over his shoulder as if to throw the spear. He had the spear aimed at Mr Barron. The defendant was approximately 15 metres from Mr Barron at the time.

Elsie Barron got from the car, spoke to the defendant in Aboriginal language. The defendant shifted the spear so that it was aimed at her, but this doesn't form the assault in relation to her. A short time later he broke the spear and threw it on the ground.

He was spoken to by police in relation to this matter on 1 February 2001, where he made admissions. There was a deficiency in those facts but I was told that the driver's side door was damaged when it was hit by the rock.

> Today Mr Matha has pleaded guilty to a charge of assault. That assault occurred on 28 March 2002. It was committed upon his de facto wife, a person with whom, I was told on the last occasion, he was on a – well, enjoying a honeymoon period with. I'll not go over the details of the assault in great detail except to say there was a push to the ground and then at least two kicks to her face while he was wearing shoes. She was taken to hospital and sustained cuts, but no stitches."

[9] In his reasons for sentence, the learned magistrate gave the appellant a discount of 15% in recognition of his guilty pleas. His Worship indicated that he did not give the appellant a greater discount because the appellant had previously pleaded guilty to some of the offences but subsequently failed to appear at scheduled court dates.

[10] The learned magistrate took into account that the appellant was not entitled to the leniency due to a first offender. The appellant had four previous convictions for unlawful entry and five for stealing. His Worship noted that the unlawful entry at and stealing from the Marthakal Motor Vehicle Workshop was committed by the appellant around one month after he had completed a nine month good behaviour bond. The learned magistrate took into account that the appellant was a petrol sniffer seeking to satisfy his habit in relation to the offences disclosed on file 9910076.

[11] With respect to the assault on that file, the learned magistrate emphasised that, while the physical consequences for the victim were not serious, the circumstances of the assault were serious in that the appellant had assaulted a man from whom he had stolen petrol and had threatened his victim with removal from Elcho Island by the appellant's father.

[12] The learned magistrate also considered the appellant's assault (in March 2002) on his then de facto as serious since it involved kicking to the head. Similarly, the appellant's assault (in December 2000) by using a spear to threaten an innocent passerby was a serious matter since it put a victim in fear.

[13] The learned magistrate expressly acknowledged that the appellant had no prior convictions for assault. His Worship considered the appellant was a selfish, spoilt person by reference to his behaviour when refused money and food by his family and by the appellant's reference to his father's position in an attempt to intimidate a person from whom he had stolen petrol.

[14] The learned magistrate considered whether to suspend all or part of the sentence of imprisonment. His Worship declined to do so because of the need for general deterrence in relation to the assaults and because "… the defendant will not stay out of trouble. If he was released with a suspended sentence, it's only a matter of time before he gets into trouble again."

[15] In arriving at the overall sentence of 18 months imprisonment with a non-parole period of 9 months, the learned magistrate expressly indicated that he had taken into account the principle of totality.

Grounds of Appeal

[16] Mr Barlow on behalf of the appellant relied upon the following grounds of appeal:

"1. That the learned Magistrate imposed a sentence that was not proportional to the objective circumstances of the offences.

2. That the learned Magistrate failed to take adequate or any account of the appellant's personal circumstances and prospects of rehabilitation.

3. The learned Magistrate erred in placing undue weight on what he determined to be the appellant's attitude.

4. That the learned Magistrate unjustifiably found an extremely negative view of the appellant and sentenced accordingly.

5. That the sentence of the learned Magistrate was in all the circumstances manifestly excessive.

6. That the learned Magistrate failed to properly consider whether to suspend the sentence of imprisonment.

7. That the learned Magistrate erred by failing to properly consider the pleas of guilty.

8. That the learned Magistrate erred by taking into account or placing undue weight on irrelevant considerations."

Grounds 1 and 5 – Manifestly excessive/not proportional to the objective circumstances of the offence

[17] These two grounds were argued together.

[18] It was submitted on behalf of the appellant that the individual sentences were excessive and the overall sentence of 18 months imprisonment was manifestly excessive.

[19] No statistics were tendered to show that any of the individual sentences was outside the range of a sound exercise of sentencing discretion.

[20] With respect to the unlawful entry, it was put that at least four co-offenders were involved and the appellant received only minimal reward for his participation. The fact that the appellant was one of no less than five persons who unlawfully entered a workshop is an aggravating factor, not a ground of mitigation. The appellant's minimal reward is similarly of little if any relevance to the seriousness of the offending. The gravity of the offending here lay in the unlawful entry itself coupled with the damage caused by a forced entry through a hole punched through an external fibro wall.

[21] Mr Barlow's submissions that the assault of Mr Martin (the owner of the boat from which the appellant stole petrol) fell towards the lower end of the scale of seriousness were similarly misconceived. The learned magistrate expressly acknowledged that the seriousness of the assault lay not in its physical consequences, but in the appellant's choice of victim – a man whose property he had stolen. As if this was not bad enough, the appellant not only assaulted Mr Martin with a can of corned beef but threatened to have him removed from Elcho Island via his father's position as Chairman.

[22] The aggressive behaviour of the appellant was repeated during the next episode of offending – the appellant threatened members of his family with a spear and damaged the vehicle of an innocent passerby. Further threats were made to the occupants of that vehicle.

[23] The fourth and final occasion of the appellant's offending involved a cowardly attack upon his then de facto. After pushing her to the ground he kicked her in the face at least twice.

[24] The learned magistrate expressly took into account the principle of totality. His Worship thoroughly considered all the circumstances of the offences and the offender. The appellant was not a juvenile or immature. The appellant had committed 3 stealings, 3 aggravated assaults, 2 offences of criminal damage and an unlawful entry over an extended period. The appellant had a history of unlawful entries and stealings. While it may be possible to quibble with one or more of the individual sentences imposed by the learned magistrate, the submission that the head sentence of 18 months imprisonment with a non-parole period of 9 months is "manifestly excessive" is without merit.

Ground 2 – Appellant's personal circumstances and prospects of rehabilitation

[25] Mr Barlow submitted (in writing) that a fair reading of the learned magistrate's sentencing remarks indicate that "… not a single paragraph is devoted to any positive aspect of the offences or the offender himself". Mr Barlow submitted that a number of positive aspects of the appellant's personal circumstances were not referred to by the learned magistrate and such mitigating factors deserved significant weight.

[26] In oral submissions, Mr Barlow did not elaborate on any "positive aspect of the offences". For my part, I can see nothing positive in the appellant's criminal conduct. Contrary to Mr Barlow's submissions, the learned magistrate expressly referred to a number of subjective mitigating facts – the appellant's age; his background as a traditional Aboriginal man with a habit of sniffing petrol at the time of the first two episodes of offending; the appellant's lack of prior convictions for offences of violence; and the appellant's pleas of guilty.

[27] Mr Barlow referred to a number of other matters which it was said were mitigating. For example, the assault of the appellant's then de facto was said to be in the context of a "turbulent domestic relationship". Even if it were to be accepted that could be mitigatory for a cowardly assault on a defenceless woman, it was not something advanced in front of the learned magistrate. On the contrary, the appellant's then counsel described the relationship between the appellant and his victim as "sort of like a honeymoon period". Mr Barlow also submitted that the appellant had "been admonished by the Elcho Island community for some of his offending". Again, even if that were accepted to be mitigatory, it was not something put to the learned magistrate. The appellant's then counsel stated that the appellant had been admonished by his parents.

[28] Mr Barlow submitted the appellant had positive rehabilitation prospects – he had overcome petrol sniffing and in the past had held a position of trust and responsibility with the Department of Social Security. Such matters were

put to the learned magistrate, but no mention was made how long it had been since the appellant held that position. At the time of sentencing he was unemployed.

[29] The learned magistrate considered the appellant's rehabilitation prospects and formed a negative view: "I simply do not think that the defendant will stay out of trouble". That was a conclusion open to the learned magistrate on the materials before him. I am satisfied that there is no proper basis for this court to interfere with the learned magistrate's assessment of the appellant. Further, rehabilitation is only one consideration in sentencing and not necessarily the primary consideration. In *Veen v The Queen* (No 2) 164 CLR 465 at 476, Mason CJ, Brennan, Dawson and Toohey JJ held:

> "… sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

Grounds 3 and 4 – Appellant's attitude/negative view of the appellant

[30] These two grounds of appeal were argued together. Mr Barlow submitted that the learned magistrate placed undue weight on what he determined to be the appellant's attitude and unjustifiably formed an extremely negative attitude view of the appellant.

[31] Mr Barlow referred to a number of passages in the learned magistrate's reasons for sentence which indicated his unfavourable view of the appellant:

> "It is very wrong to glare and stand over somebody, especially after you've just stolen from them."
>
> "The defendant, to my mind, is a selfish spoilt person."
>
> "He is a selfish person; he thinks he's special."
>
> "He's a man who stands over people and runs away from his responsibilities."

[32] Similar comments were made by the learned magistrate in the course of hearing submissions.

[33] Mr Barlow submitted that the learned magistrate placed undue emphasis on a "throwaway line" that the appellant would have Mr Martin removed from Elcho Island by his father, the Chairman.

[34] I am in no doubt that the learned magistrate's negative view of the appellant in part stemmed from this threat to Mr Martin. However, there was other material upon which to found the learned magistrate's opinion. Mr Martin had not only been threatened by the appellant, he had been assaulted by the appellant throwing a can of meat at him. The appellant had threatened his sister and family members. The appellant had threatened innocent passersby in a vehicle. The appellant had pushed his de facto to the ground and kicked her in the face. The appellant's then counsel had on three occasions during submissions referred to the appellant as "spoilt". I consider that there was

ample material before the learned magistrate to justify his negative view of the appellant. There is no merit in this ground of appeal.

Grounds 7 and 8 – Pleas of guilty/irrelevant considerations

[35] These two grounds of appeal may be disposed of in brief terms.

[36] The learned magistrate afforded the appellant a discount of 15% for his guilty pleas. His Worship indicated that he would have given the appellant a discount of 20% to 25% but for the fact that the appellant's earliest offences dated back more than 4½ years and the appellant had been responsible for the delay in resolving matters by his failures to attend court. Mr Barlow submitted that the learned magistrate effectively punished the appellant for breaching bail. The submission is misconceived. An offender is afforded a discount for a guilty plea because his plea advances the administration of justice. The administration of justice was advanced by the appellant's pleas – but not to the extent which it would have been if he had attended court as directed for the completion of his various matters. Accordingly, the appellant was not entitled to a "full" discount for his pleas.

[37] The complaint that the learned magistrate took into account irrelevant considerations is a reference to the fact that the learned magistrate noted that the appellant continued to offend after being spoken to by Police for earlier offences. Mr Barlow submitted that the learned magistrate had treated the appellant as if he had been placed on bail for the earlier offending.

[38] A mere conversation with a police officer about an incident is not comparable to a person being placed on bail and then committing a further offence. Persons are often spoken to by Police and released without charge. The difference in the appellant's case, however, was that he knew (as evidenced by his guilty pleas) that he had offended, yet continued to commit further offences. The appellant cannot claim the credit due to a man who is guilty of a single lapse in an otherwise law-abiding life. The appellant's repeated offending dilutes the consideration which may be afforded to him because the repeated offending shows that the conduct is not out-of-character. Personal deterrence may be required in a sentence for a repeat offender.

[39] There is no merit in appeal grounds 7 and 8.

Ground 6 – Failure to properly consider whether to suspend the sentence of imprisonment

[40] In his reasons for sentence the learned magistrate considered whether the appellant's sentence of imprisonment might be suspended wholly or partly in the following terms:

> "Mr Woodroffe, on behalf of the defendant, wants me to suspend the gaol term. I'm not going to. I'm not going to for the very simple – actually there are two simple reasons, but the main one is that I simply do not think that the defendant will stay out of trouble. If he was released with a suspended sentence, it's only a matter of time before he gets into trouble again …

> There's also another reason which is probably a combination of two reasons. One, his behaviour sofaras the assaults are concerned is to be denounced and there's the issue of general deterrence …
>
> So the defendant goes to gaol for basically two reasons. It's too serious, because if it was suspended it's only a matter of time before he gets into trouble again."

[41] In imposing a suspended (or partly suspended) sentence, a court must first take into account that a suspended sentence should only be imposed if a sentence of imprisonment of the relevant length, if unsuspended, would be appropriate in all of the circumstances. A suspended sentence should be no greater than the length of the sentence of imprisonment that would have been imposed if no suspension was permitted: *McKaye* (1982) 30 SASR 312; *Marsh* (1983) 35 SASR 333 at 336, even though the sentencing court is aware that immediate imprisonment is, in practical terms, more severe: *Weetra v Beshara* (1987) 46 SASR 484.

[42] Whether a sentence of imprisonment should be suspended in full or in part will depend upon a number of different factors. Perry J in *Wacyk* (1996) 66 SASR 530 at 537 commented:

> "It will never be possible to isolate any single factor in a given case as being determinative of the exercise of the discretion whether or not to suspend. The exercise of that discretion one way or the other must turn upon a careful evaluation of the overall circumstances of that particular case, which will include consideration of the circumstances of the offending and the circumstances personal to the offender."

[43] The High Court in *Dinsdale v The Queen* (1999) 202 CLR 321 adopted a similar approach in relation to ss 39(2) and 76 of the *Sentencing Act* (WA), ie that the discretion to impose a term of suspended imprisonment required consideration of all of the circumstances of the case (and in particular, not only rehabilitation of the offender).

[44] In the appellant's case, Mr Barlow submitted, the learned magistrate has confined the factors which he considered in exercising the discretion to suspend the sentence to general deterrence and the learned magistrate's opinion that the appellant's rehabilitation prospects were poor ("… it's only a matter of time before he gets into trouble again"). In reaching that opinion, it was submitted the learned magistrate had not given sufficient weight to the 14 months which had passed since the commission of the appellant's most recent offence.

[45] I consider that it is clear that the learned magistrate erred in confining the considerations that he took into account in deciding whether to suspend the appellant's sentence in whole or in part. However, it does not follow that the appellant has suffered any injustice from the approach adopted by the learned magistrate.

[46] In my view, had the learned magistrate given attention to all the relevant circumstances of the case, that is both the objective circumstances of the offence and the circumstances personal to the offender, it is very far from clear that he would have imposed a suspended or partly suspended sentence.

I consider that the learned magistrate, having regard to his sentencing remarks, would in all probability have taken the view that the objective seriousness of the appellant's episodes of offending outweighed the subjective mitigating factors.

[47] At the end of the day, I agree that the learned magistrate erred in failing to properly consider whether to suspend (wholly or partly) the sentence of imprisonment but I consider that no substantial miscarriage of justice has actually occurred. In short, I am satisfied that if the learned magistrate had considered all of the circumstances of the offences and the offender in deciding whether to impose a suspended or partly suspended sentence he would not have imposed a fully or party suspended sentence. In my view, the sentence of 18 months imprisonment with a non-parole period of 9 months was well within the range of a sound exercise of sentencing discretion. There is no basis for this court to interfere with that sentence. Having regard to my view that none of the other grounds of appeal has any merit, this appeal is dismissed.

———————————————