Bara v Balchin & Ors [2006] NTSC 79

PARTIES:	BARA, Roderick v BALCHIN, Vivien Lynette and McGARVIE, Renae Moana and CHAMBERS, Kim Trevenan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 33 to 35 of 2006 (20504853, 20514853, 20600041)
DELIVERED:	11 October 2006
HEARING DATE:	11 October 2006
EX TEMPORE JUDGMENT OF:	RILEY J
APPEAL FROM:	Court of Summary Jurisdiction sentences, Mr D. Trigg SM, 17 May 2006

REPRESENTATION:

Counsel:

Appellant:	P Bellach
Respondents:	N Browne

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	ril0615
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bara v Balchin & Ors [2006] NTSC 79
Nos JA 33 to 35 of 2006
(20504853, 20514853, 20600041)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF appeal against sentences handed down in the Court of Summary Jurisdiction at Alyangula

BETWEEN:

BARA, Roderick
Appellant

AND:

BALCHIN, Vivien Lynette
First respondent

McGARVIE, Renae Moana
Second respondent

CHAMBERS, Kim Trevenan
Third Respondent

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 11 October 2006)

[1] The appellant in this matter has a history of violence against his wife. On 11 August 2005 he was sentenced in relation to offences which occurred on

25 February 2005, 16 March 2005 and 3 May 2005. It is instructive to briefly consider the circumstances of the offending on each of those occasions.

[2] On 25 February 2005 there was an altercation between the appellant and his wife during which both parties were violent. In the agreed facts it was revealed that the appellant punched his wife around the head, face and arms, and hit her on the head with a saucepan and a large empty metal tin. He pursued her with a nulla nulla and threw the nulla nulla at her vehicle as it drove away. Subsequently he armed himself with a star-picket and went to her place of employment, the Angurugu Health Clinic, calling out that he was going to kill her. A duress alarm was sounded and he walked away. He was charged and granted bail which included conditions that he not consume alcohol and not approach his wife.

[3] On 16 March 2005, contrary to his bail conditions, he became intoxicated and went to the residence of his wife where he again assaulted her. The assault was nasty and prolonged. He was intoxicated after consuming approximately 11 cans of rum and cola. He asked his wife where she had been during the night. He threw a set of multigrips at her. She ran from him and he chased and caught her. He slapped her three times. He then ripped her dress from her causing scratches to her breasts and leaving her naked. He continued to punch and kick her. He forced her into a bedroom where he continued to punch her. All of this occurred in the presence of her 14-year old son. Eventually she escaped and ran from the residence. The

appellant armed himself with a broomstick and chased her and struck her three times with the stick. He then left but returned and again punched her several times. Her son intervened and the two of them were able to escape. As a result of the assault she suffered scratching to the breasts and bruising and swelling to the face, legs, back and arms.

[4] The appellant was charged and remained in custody until 21 April 2005. He was then released on bail and shortly thereafter, on 3 May 2005, again assaulted his wife.

[5] The offending on 3 May 2005 arose out of an argument between the appellant and his wife. By that time she had obtained a domestic violence order which had been served upon the appellant. During the course of the argument she said that she was leaving to stay with a friend. The appellant obtained a 37-centimetre axe and climbed into the rear of the vehicle in which his wife was intending to depart. He then got out of the vehicle with the axe and struck the rear right-hand corner of the vehicle. He then threw the axe at the passenger's window and it smashed the window as his wife drove off in fear for her safety. In a subsequent record of interview he acknowledged that he was aware of the domestic violence order and said that he "got angry, got upset, just made me do it". He was charged with breaching a domestic violence order and with aggravated assault of his wife.

[6] These matters were dealt with together on 11 August 2005. In respect of the offending of 25 February 2005 he was sentenced to imprisonment for four

months for the aggravated assault and a concurrent term of four months for the offence of going armed in public. In relation to the offending of 16 March 2005 he pleaded guilty to an offence of unlawful assault aggravated by the use of a weapon and by the fact that it was an indecent assault. He was sentenced to imprisonment for four months. In relation to the offending of 3 May 2005 he was fined $500 for breaching a domestic violence order and sentenced to six months imprisonment in respect of the assault. This term of imprisonment was directed to be served cumulatively upon the sentence for the offending of 25 February 2005. The total term of imprisonment imposed on that occasion was for a period of 14 months. The sentence was deemed to have commenced on 23 February 2006.

[7] In those circumstances the sentence imposed in relation to the offending of 16 March 2005 had already been served, the balance of the sentence was suspended and the appellant was released on that day, being 11 August 2005.

[8] He again offended against his wife on 17 December 2005. It is the sentence imposed in relation to this offending which is the subject of this appeal. On that occasion he was again affected by alcohol. He had an argument with his wife. He armed himself with a 15-centimetre steak knife and a 127-centimetre branch of a tree. He chased her with those weapons and she ran into a bedroom and locked the door. An uncle intervened and eventually restrained the appellant and calmed him down. Some time later the victim approached the appellant and abused him. He became enraged and armed

himself with a mattock. The mattock was described in the sentencing remarks as a "significant weapon, it was some three and a half foot long and had a sharp end and a spade-like end". He chased her with the mattock and she ran inside again. Police were called and the appellant left. On this occasion there was no physical contact between the appellant and his victim. He pleaded guilty to an offence of aggravated assault and was sentenced to imprisonment for a period of five months. He also pleaded guilty to breaching a domestic violence order and was sentenced to a period of imprisonment of three months which was to be served concurrently with the sentence imposed in respect of the aggravated assault. His actions in assaulting his wife on 17 December 2005 placed him in breach of the partially suspended sentences imposed on the earlier occasion in relation to the offences of 25 February 2005 and 3 May 2006. His Honour restored the whole of each of those sentences, although it was effectively one sentence, and ordered that he serve the balance. Those sentences were to be served cumulatively upon the sentence of five months imprisonment imposed in respect of the later offending. The period of imprisonment which the appellant was required to serve amounted to 13 months and his Honour set a non-parole period of eight months dated from 17 May 2006.

[9] The appellant appeals against that sentence and the restoring of the suspended sentences although I note in the course of submissions Mr Bellach did not pursue the issue of the restoration of suspended sentences. In summary terms, the submission was that the total time to be

served was manifestly excessive. In support of that contention the appellant submitted that:

(i) the learned magistrate gave undue weight to the prior convictions of the appellant when sentencing him;

(ii) the learned magistrate gave undue weight to the fact that the appellant was on two suspended sentences at the time of the offending;

(iii) the learned magistrate imposed a sentence of imprisonment which was not proportional to the objective circumstances of the offending;

(iv) the learned magistrate placed undue emphasis on the need for punishment;

(v) the learned magistrate failed to properly consider the appellant's prospects of rehabilitation and the wishes of the victim;

(vi) given the restoration of the suspended sentences the total term of imprisonment imposed was in all the circumstances manifestly excessive.

[10] The consequences of breaching an order suspending a sentence are set out in s 43 of the Sentencing Act. In circumstances such as the present, the obligation upon the court is to restore the sentence or part-sentence held in suspense and order the offender to serve it unless the court is of the opinion that it would be unjust to do so in view of all of the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state

its reasons. In this case the learned sentencing magistrate expressed the view that:

> "Not only do I not find it would be unjust to restore it, I find it would be erroneous not to restore it fully."

[11] His Honour noted the continuation of the violence by the appellant upon his wife over a period of time notwithstanding the intervention of the authorities and the opportunities given to him to change his ways. Assaults occurred after he had been charged with the initial assault. Assaults occurred in breach of bail conditions which had been imposed upon him. He assaulted his wife in breach of the terms of the domestic violence order. He assaulted her after he had spent time in custody for the earlier assaults. His Honour correctly identified the offending of the appellant as serious and of increasing concern.

[12] In the circumstances, and contrary to the submissions made on behalf of the appellant, there was little evidence of rehabilitation. The evidence all pointed to a continuation of the violent conduct of the appellant towards his wife and no basis upon which it may be concluded that any change had occurred was placed before the court. That is not to say that the appellant is without prospects for rehabilitation. However, positive evidence of prospects of rehabilitation was, at the time of sentencing, difficult to find. It may be that a period of imprisonment would enhance his prospects for rehabilitation in all of the circumstances.

[13] In my view the sentences imposed upon the appellant in respect of the offending in December 2005 were well within the range of sentences available to his Honour. The restoration of the suspended sentences was, in the circumstances, required. Indeed, I note that Mr Bellach now acknowledges this to be so. The learned sentencing magistrate gave appropriate weight to the criminal history of the appellant. That history illuminated the moral culpability of the appellant and demonstrated his dangerous propensity. It showed a need to impose condign punishment in order to deter the appellant and other offenders from committing offences of this kind: *Veen v The Queen [No 2]* (1988) 164 CLR 465. The conduct of the appellant displayed a continuing attitude of disobedience of the law.

[14] The learned sentencing magistrate was provided with a victim impact statement pursuant to the provisions of s 106B of the Sentencing Act. In this case the victim expressed a wish that the appellant not be imprisoned. Complaint is made that insufficient weight was given to that wish and to the acknowledgment from the victim that "the trouble was not all Roderick's fault". By that I take it she was acknowledging that her conduct contributed to the strained relationship between herself and the appellant. Those matters were addressed by his Honour in his sentencing remarks and were taken into account. Notwithstanding the views expressed by the victim, the circumstances of the offending demanded a sentence of actual imprisonment.

[15] I have given consideration to each of the grounds of appeal addressed on behalf of the appellant. In my opinion they are without foundation. The appeal must be dismissed.

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