Scrubby and Mattiuzzo (1999) NTSC 110

PARTIES:	CLIFFORD JAMES SCRUBBY Appellant AND DANIELLA MATTIUZZO Respondent
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 56 of 1999 (9909253)
DELIVERED:	18 October 1999
HEARING DATES:	12 October 1999
JUDGMENT OF:	Bailey J

REPRESENTATION:

Counsel:

Appellant:	Ms M Little
Respondent:	Ms J Whitbread

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

Judgment category classification:	C
Judgment ID Number:	bai99018
Number of pages:	8

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Scrubby and Mattiuzzo (1999) NTSC 110
No. JA 56 of 1999
(9909253)

BETWEEN:

CLIFFORD JAMES SCRUBBY
Appellant

AND:

DANIELLA MATTIUZZO
Respondent

CORAM: Bailey J

REASONS FOR JUDGMENT

(Delivered 18 October 1999)

[1] This is an appeal against a sentence passed on 30 July 1999 by the learned magistrate, Mr Trigg. The appellant was convicted upon his own plea of an offence of "offensive behaviour in a public place" contrary to s.47 (a) of the *Summary Offences Act* His Worship sentenced the appellant to a term of fourteen days imprisonment and ordered that the sentence be suspended forthwith for a period of twelve months.

[2] The circumstances of the offence, summarised by the prosecution and admitted on behalf of the appellant, were as follows:

> "On the morning of Tuesday, 27 April 1999, at approximately 1030 hours, the defendant entered the Commonwealth Bank at Katherine, in the company of his wife. The defendant demanded service and stated that he wanted to go to the toilet. The defendant was advised

> that there was no public toilet in the building, and then again he demanded service.
>
> Whilst the bank employee was obtaining the appropriate paperwork the defendant walked to the rear corner of the customer service area and unzipped his pants and began urinating on the wall and the floor. The staff removed the defendant from the building.
>
> At the time of the offence there were approximately 20 other customers in the building, within sight of the defendant's actions.

[3] The maximum penalty for an offence contrary to s.47(a) of the *Summary Offence Act* is a fine of $2,000 or imprisonment for 6 months, or both.

[4] The learned magistrate took a serious view of the offence. His Worship described it as "one of the worst examples of offensive behaviour" that he had seen during his seven years on the bench and as "totally unacceptable behaviour". The learned magistrate stressed the need for general deterrence and said there was a need "to send a very strong message to the community, and to drinkers in particular, that if they are going to drink and get themselves to such a state of intoxication, and come into civilized areas and commit these sort of acts, they can expect to be dealt with harshly".

[5] The learned magistrate expressly took into account the appellant's plea of guilty, the fact that it had been seven years since the appellant had offended previously and after the offence, had voluntarily sought and successfully completed treatment for alcohol abuse (CAAPS). These factors persuaded the learned magistrate that the sentence of imprisonment should be suspended forthwith.

[6] The appellant's criminal history disclosed convictions for liquor and traffic matters in 1992, an assault in 1988 and a stealing in 1987. In 1991, the appellant had been summonsed to appear in the Court of Summary Jurisdiction to face a charge of 'disorderly behaviour' but no action was taken in relation to this matter after $100 bail money was estreated. The learned magistrate expressly noted that this was not to be treated as a similar offence to the matter before him.

[7] Ms Little for the appellant relied on a number of grounds of appeal which in practical terms might also be subsumed under the single ground that the sentence was "manifestly excessive". The specific complaints made by Ms Little were that the learned magistrate had given undue weight to principles of general deterrence, had ignored commonly accepted tariffs in similar cases and paid insufficient regard to the appellant's lack of relevant prior criminal history and the efforts that he had voluntarily undertaken to tackle his addiction to alcohol.

[8] For the respondent, Ms Whitbread emphasised the principles applicable to an appeal against sentence by reference to such well known authorities as *Salmon v Chute* (1994) 94 NTR 1 at 24-25, *R v Tait* 24 ALR 473 at 476 and *Cranssen v R* (1936) 55 CLR 509 at 519-20. In particular, Ms Whitbread stressed that it is not sufficient that an appellate court would have imposed a less or different sentence or considers the sentence over severe. An appellate court interferes only if it is shown that the sentencing court was in error in acting on a wrong principle or in misunderstanding or in wrongly

assessing some salient feature of the facts. In order for an appellate court to intervene, the sentence must not just be excessive, it must be "manifestly" so: *Fuller v Hayward* JA 20 of 1996, unreported, per Angel J, 25 June 1996.

[9] In Ms Whtibread's submission, the learned magistrate was correct to take a serious view of the offence and his reasons for sentence demonstrate no error of principle nor any misapprehension of the facts.

[10] In the course of submissions, Ms Little referred me to a schedule of sentences which have been imposed for offences contrary to s.47(1) of the *Summary Offences Act*. The schedule demonstrated that a range of sentences from fines, with no conviction recorded, to imprisonment for periods up to eight and a half months have been imposed during the past two years. However, the schedule is of very limited utility because only two of the matters summarised deal with cases of offenders urinating in public places. In both cases, no conviction was recorded and fines ($180 and $250) were imposed. The brief facts given of these cases are far less serious than those of the present case. In one, a male urinated in a public street within sight of five persons at a taxi rank. In the other matter, an intoxicated male urinated on a tree growing on a median strip in front of passing traffic. The schedule of past sentences tends to indicate that custodial sentences for offences against s.47(a) have resulted only where the circumstances of the offence include some sexual aspect, for example, masturbating in a public place or deliberate exposure of male genitals to passing females.

[11] I consider that there can be no argument that the learned magistrate was correct in assessing the circumstances of the appellant's offence as falling within the upper range of seriousness for an offence constituted by urinating in public. The offence took place at 10.30am in a bank with twenty customers (and undoubtedly several employees) present. Someone would have had the unpleasant task of cleaning up the appellant's urine. There can be no doubt that it must have been a repulsive experience for those present to witness a drunk behaving in the obnoxious manner adopted by the appellant. However, the essential issue is whether the appellant's action, taking into account relevant subjective factors, merited a sentence of imprisonment.

[12] I agree with the submissions on behalf of the respondent that the learned magistrate's reasons for sentence disclose no error of principle or misapprehension of the relevant facts. His Worship did not take into account irrelevant considerations and he expressly took into account all the relevant mitigating factors. Nevertheless, I consider that the sentence was "manifestly excessive".

[13] Section 5 of the *Sentencing Act* provides guidelines for the imposition of sentences by reference to the purposes for which sentences may be imposed and matters to which a sentencing court is to have regard in achieving such purposes. The guidance offered by section 5 does not extend to provision of assistance in choosing between imprisonment and a non-custodial sentence.

[14] In the appellant's case, the sentence of fourteen days was suspended forthwith. However, in imposing a suspended sentence, a court must first take into account that a suspended sentence should be used only if a sentence if imprisonment of the relevant length, if unsuspended, would be appropriate in all the circumstances. A suspended sentence should be no greater then 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. Accordingly, the fact that a sentence of imprisonment is fully suspended is not relevant in considering whether the sentence is manifestly excessive.

[15] It is not necessary or desirable (if indeed possible at all) to formulate comprehensive and specific rules as to when imprisonment should be preferred over a non-custodial sentence. Some factors which are relevant in deciding to impose a sentence of imprisonment include:

(a) the seriousness of the offence; in particular whether the life or personal security of another has been put at risk;

(b) the seriousness of the impact of the offence on victims;

(c) the need to protect the community from future similar conduct by the offender;

(d) whether a sentence other than imprisonment would be inadequate having regard to the seriousness of the offence;

(e) the criminal history (or lack of criminal history) of the offender and in particular whether he has previously been guilty of similar offending;

(f) the youth of an offender; and

(g) whether the offender suffers any intellectual disability.

[16] In the appellant's case, the offence was not serious in the sense of placing persons' lives or personal security in danger. The appellant's criminal record showed no history of similar offending. While those present in the bank may have found the appellant's conduct extremely distasteful and outrageous, it was unlikely to have a long-lasting or serious impact on them. There is an obvious need to deter conduct of the type indulged in by the offender. However, for a person without a history of such offensive behaviour, I do no consider that a non-custodial sentence could be characterised as "inadequate", particularly in light of the substantial (seven year) period since the appellant's last conviction and his voluntary efforts to tackle his alcohol abuse.

[17] Ms Little submitted that the appellant's sentence should be set aside and replaced with a fine. In the course of submissions, I suggested that a sentence requiring some more positive contribution to society, such as a community service order, might be a more appropriate punishment for

offences of the present character. Consideration of a CSO as a sentencing option would require a report as to the offender's suitability for participation in an approved project and availability of such a project. Consideration of a fine would necessitate an assessment of the appellant's ability to pay.

[18] In the light of these reasons, I will quash the sentence imposed by the learned magistrate. I will hear counsel as to whether the case should be remitted for re-sentencing before the Court of Summary Jurisdiction or be dealt with in this Court.

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