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| PARTIES: | HERBERT, Rodney |
| | AND |
| | MATERNA, Robert Bruce |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | JA50 of 1995 |
| DELIVERED: | Darwin, 12 July 1996 |
| HEARING DATES: | Katherine, 27 March 1996 |
| JUDGMENT OF: | Martin CJ. |

**CATCHWORDS:**

Appeal - Justices - Penalty of imprisonment "manifestly excessive" - Assault upon wife with a beer bottle - Weight to be given to Appellant's prior criminal record - Prior criminal history of assaults - No attempt by Appellant to overcome his continuing dangerous propensity to violence - Sentence of imprisonment warranted in the circumstances.

Criminal Code Act (NT), s188 -

*Veen (No. 2)* 164 CLR 465, followed.
*Baumer v The Queen* (1989) 40 A Crim R 74, followed.

**REPRESENTATION:**

*Counsel*:
Appellant: Mr Batten
Respondent: Mr R Noble

*Solicitors*:
Appellant: KRALAS
Respondent: DPP

Judgment category classification: No Distribution
Judgment ID Number: mar96014
Number of pages: 7

mar96014

IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No. JA50 of 1995

BETWEEN

**RODNEY HERBERT**
Appellant

AND:

**ROBERT BRUCE MATERNA**
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 12 July 1996)

On 22 December 1995 the appellant, having pleaded guilty to a charge of aggravated assault under s188 of the *Criminal Code*, was sentenced to imprisonment for two months. This appeal against sentence is upon the grounds that the penalty of imprisonment of itself was manifestly excessive. If such a penalty was not so, then no complaint is made as to the period of imprisonment imposed. It is also alleged that his Worship made a number of adverse findings in the course of his sentencing remarks which were not justified on the

material before him; that too much weight was given to the appellant's prior record of criminal conduct, and insufficient weight was given to mitigating circumstances.

The nature of the offence is, unfortunately, not uncommon. The appellant, a 26 year old Aboriginal man, went to the Woolworths shopping centre in Katherine looking for his de facto wife, Sarah Blitner. He was intoxicated and told the police that he was angry because he found her drinking outside the shopping centre. She was sitting down, he picked up a 750ml bottle of beer, which was lying next to her, and struck her on the shoulder with it three times. Police were called, he was arrested and brought before the Court of Summary Jurisdiction the next day. In the meantime, the victim, had been taken to the Katherine hospital where it was found that the only injury sustained was bruising.

To those agreed facts it was put by way of submission by counsel on his behalf on the plea that the appellant had gone looking for his de facto wife because she had failed to prepare a meal for him, and it was that, as well as the fact that he found her drinking, that made him angry. It was said on his behalf that the assault was measured, in the sense of being restrained, in that he did not bring the bottle down from a great height or thrust it down with full force upon her shoulder. His version of the assault,

consistent with the agreed facts, was that he held the body of the bottle in his hand and that he had "whacked down on her three times on the front of the shoulder area". It was put that there was no risk of causing grave harm. It was also put that although the assault was not appropriate or in any way an acceptable course of conduct, it needed to be seen in the true light of the nature of it, deliberate but restrained.

The relationship with Sarah Blitner had commenced in about August or September 1995 and apparently ceased as a consequence of this event. It was submitted to his Worship that an appropriate penalty might be by way of a community service order, but his Worship was not in the least interested in considering that option. The reason for that clearly lay in the appellant's criminal record involving convictions for aggravated assault in 1987, 1988 and 1989, assault with a weapon in 1989, aggravated assault in 1990 and for manslaughter in October in 1991 (backdated to 1990). Upon that last conviction he was sentenced to imprisonment for nine years and a non-parole period of four years was fixed, so that he was released from prison on parole in 1994. The offence here under consideration happened about thirteen months later. He had not offended in the meantime. The sentence to imprisonment would automatically lead to revocation of his parole period.

His Worship's remarks on sentencing, which I will come to in a moment, must be seen in the light of the appellant's record and the guidance provided by the High Court in *Veen (No. 2)* (1988) 164 CLR 465 and as applied in this Court in *Baumer v The Queen* (1989) 40 A Crim R 74. To quote from *Veen*:

> "The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties". (At pp477 - 478)

At p85 in *Baumer*, Kearney J. said:

> "The rationale is that by his persistence in criminal conduct he may be regarded as not having responded to previous punishment, his prospects for rehabilitation may thus be regarded as poor and the deterrent effect of some more moderate punishment negligible. An accused's criminal record may also be treated as evidence of his character - a matter always in issue - and thus indicative of the extent to which society needs to be protected from him; it

> may also be treated as evidence of the nature and extent of any relevant intention."

In his sentencing remarks his Worship first noted the plea of guilty and the elements of the offence, that is, the assault upon a female with an offensive weapon, namely a beer bottle, which carries a maximum penalty of five years imprisonment. He went on to note that although no bodily harm was suffered there was bruising, and the submission that the assault was a measured one. It objectively called for a term of imprisonment, he said. His Worship considered that it warranted a stronger penalty than a community service order and then turned to consider the prior convictions noting there was nothing mitigatory about that which would incline him to suspend any part of a term of imprisonment. That effectively was his Worship's approach to the task of sentencing before him. He went on to express his concern that despite having spent four years in gaol, the appellant had done nothing to control his anger

> "It seems that when you are confronted with situations which aren't to your liking, you resort to physical assaults. The resumption of this sort of behaviour is of concern. In my view, its appropriate that you go back into prison."

That, I think, was by way of amplification of his reasons to not suspend any part of the term of two months imprisonment imposed. The attitude expressed by his Worship

was open to him upon the material available. There was nothing to suggest that the appellant had undergone any form of counselling or treatment with a view to overcoming his propensity to violence and by his own admission he was angry on this particular occasion.

That the assault was said to have been a measured or restrained one, has two sides to it. In the appellant's favour it could be said that he had not lashed out recklessly and without thought to the consequences of what he was doing. On the other hand, his attack on his defacto wife, being measured, can be seen as having been planned albeit at the last minute. He picked up a bottle and deliberately and measuredly struck his wife on the shoulder with it on three occasions. It is reasonable to accept that he may have been provoked to anger to some extent, but that could not possibly justify what he did. His behaviour was not uncharacteristic; he manifested a continuing attitude of disobedience to the law and thus retribution, deterrence and protection of society all indicate that a more severe penalty is warranted than if he had not manifested such an attitude. He showed by these events a continuing, dangerous propensity.

It has not been shown that his Worship erred in any principle nor that his discretion otherwise miscarried. The

sentence to imprisonment was not manifestly excessive. The appeal is dismissed.

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