

Heath v Armstrong [2017] NTSC 35

PARTIES: HEATH, Andrew

v

ARMSTRONG, Floyd

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: LCA 32 of 2016 (21643281)

DELIVERED: 8 May 2017

HEARING DATE: 13 April 2017

JUDGMENT OF: BARR J

APPEAL FROM: LOCAL COURT

CATCHWORDS:

CRIMINAL LAW – Sentencing – mandatory sentencing – aggravated assault – second or subsequent violent offence – mandatory minimum sentence of three months’ imprisonment – exceptional circumstances exception – Judge found ‘exceptional circumstances’ enlivened on the basis that, but for the mandatory sentencing regime, respondent’s sentence would have been suspended after one month only – Judge applied incorrect test – appeal allowed – sentence quashed – case remitted for further hearing in Local Court

Sentencing Act (NT) s 78CA(3), s 78 DD(2), s 78DI(1)(b), s 78DG
Local Court (Criminal Procedure) Act s 177(2)(c), s 177(2)(d)

R v Kelly [2001] 1 QB 198; *R v Duncan* [2015] NTCCA 2, 34 NTLR 201 applied

Wright v Valladares [2015] NTSC 59 referred to

REPRESENTATION:

Counsel:

Appellant:	M Brennan
Respondent:	No appearance
Amicus Curiae:	D Bhutani

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Not applicable

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Heath v Armstrong [2017] NTSC 35
No. LCA 32 of 2016 (21643281)

BETWEEN:

ANDREW HEATH
Appellant

AND:

FLOYD ARMSTRONG
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 8 May 2017)

- [1] This is a prosecution appeal against a sentence imposed by the Local Court on 21 September 2016. The grounds relied on are (1) error of law in the exercise of the sentencing discretion and (2) manifest inadequacy. Because I propose to uphold the appeal on the first ground, and remit the matter to the Local Court, it is unnecessary to decide the second ground.
- [2] On 21 September 2016, the respondent entered a plea of guilty to a male on female aggravated assault in which the victim suffered harm. The offending took place on 12 September 2016. The respondent was 25 years old at the time. The maximum penalty for the offence, with the admitted circumstances of aggravation, was a term of imprisonment of five years.

- [3] The facts in brief were as follows. The respondent and the victim had been in a domestic relationship for approximately seven years. On 12 September 2016, the respondent and the victim discussed ongoing problems in their relationship. The victim told the respondent she did not wish to continue in that relationship. Without warning, the respondent punched the victim once in the face, causing her lip to split and bleed. The respondent then left the scene.
- [4] The respondent had a number of relevant prior convictions. In November 2009, at the age of 18, he had committed a male on female aggravated assault in which the victim had been threatened with a weapon and suffered harm. He had also engaged in conduct in contravention of a DVO. For the assault, he was sentenced to three months imprisonment, suspended after one month, with an operational period of 12 months. He was also sentenced to 14 days imprisonment for the DVO contravention, cumulative upon the sentence imposed for the assault.
- [5] In December 2010, at the age of 19, the respondent committed a further male on female aggravated assault, in which the victim suffered harm. Before he was dealt with for that offending, he committed a further male on female aggravated assault in July 2011. He was by then 20 years old. In December 2011, he was sentenced to 12 weeks imprisonment for the first aggravated assault and eight weeks imprisonment for the second aggravated assault. The sentences were cumulative, making a total effective sentence of 20 weeks.

That sentence was suspended after the respondent had served 10 weeks in prison. He was then subject to supervision for 12 months.

- [6] In July 2014, the respondent engaged in conduct in contravention of a DVO. He was fined \$250.
- [7] Apart from the matters mentioned, the respondent's prior convictions were largely for motor vehicle driving and regulatory matters, with one conviction for drink driving with medium range blood alcohol, 0.106%, an offence committed in October 2009.
- [8] The offence committed by the respondent on 12 September 2016 was a 'level 3 offence', as defined in s 78CA(3) *Sentencing Act*.¹ Moreover, because the respondent had two prior convictions, for the assaults committed in December 2010 and July 2011, the offence was a second or subsequent 'violent offence'.² As a result, the respondent was subject to s 78DD(2) *Sentencing Act*, which required the court to impose a minimum sentence of three months actual imprisonment, unless satisfied under s 78DI(1)(b) *Sentencing Act* that "the circumstances of the case" were "exceptional". If so satisfied, the court was still required by s 78DG to sentence the respondent to a term of imprisonment, but one which could be partly suspended and which was not subject to any mandatory minimum period of actual imprisonment.

¹ The requirements of s 78CA(3) *Sentencing Act* were satisfied in that the victim suffered harm (s 188(2)(a) *Criminal Code*) and the assault was by a male on a female (s 188(2)(b) *Criminal Code*).

² Relevantly, an offence against a provision listed in Schedule 2 of the *Sentencing Act*, which includes offences contrary to s 188 *Criminal Code*.

[9] After submissions by counsel, the learned Acting Judge made the following statement:³

.... the issue really is, while I agree that three months as a term of imprisonment is probably not an inappropriate disposition, the issue in terms of ‘exceptional circumstances’ is a question of proportionality, and, but for the mandatory sentencing regime, would the court otherwise consider a suspended sentence as an option, and that option is ruled out by mandatory sentencing?

The Supreme Court has said that if it is the case in a particular matter that the court would, but for the operation of the mandatory sentencing provisions, consider a suspended sentence, then that satisfies the exceptional circumstances test.

I find that this is such a matter ...

[10] It thus appears that her Honour formulated the test for the ‘exceptional circumstances’ exemption in s 78DI *Sentencing Act* as whether the sentencing court would otherwise consider the option of a suspended sentence, by clear implication a suspended sentence under which an offender would serve less time in prison than the three months mandatory minimum.

[11] After her Honour obtained a report pursuant to s 103 of the *Sentencing Act* as to the suitability of the respondent to be under supervision on a suspended sentence, she proceeded to sentence. Her Honour’s remarks read, relevantly, as follows (underline emphasis added):⁴

... You pleaded guilty to one count of aggravated assault. You have been before the court previously on an assault matter, but the last one was in 2011, so it has been some time. That is a significant gap in

³ Transcript 21/09/2016, p 8.3.

⁴ Transcript 21/09/2016, p 10.5.

offending. You are young for sentencing purposes, and that is to be acknowledged in sentencing you today.

Violence against women is just not acceptable. You need to get a clear understanding of that ... You are young, and so rehabilitation is a particular focus of my sentence for you today.

Ordinarily, something like this would straight away get three months imprisonment, without any suspension. But in your circumstances, taking into account your plea of guilty, your young age, the gap in your offending, the circumstances of this offence – which was a single punch, and while serious, it is not at the high end of what we see. ...

Taking into account all of that, but for the mandatory sentencing provisions I would ordinarily consider a suspended sentence for someone in your position, albeit a three month disposition, an appropriate one in my view. So that fact alone, the fact ... that I would otherwise give you a suspended sentence but for the operation of the mandatory sentencing provisions, does enliven exceptional circumstances in accordance with previous decisions of the Supreme Court.

I did indicate this morning that I considered exceptional circumstances to have been proven, and so for that reason I will sentence you and allow for a portion of your sentence to be suspended to allow you an opportunity to participate in some violent offender rehabilitation program.

[12] Her Honour then sentenced the respondent to 3 months imprisonment, backdated to 16 September 2016. Her Honour ordered that the sentence be suspended after four weeks, subject to a number of conditions, including supervision of the respondent by a Probation and Parole Officer. She fixed an operational period of 12 months from the date of the respondent's release from prison.

[13] The learned Acting Judge applied an incorrect test for the ‘exceptional circumstances’ exemption in s 78DI *Sentencing Act*. The test is not whether the court would, but for the operation of the mandatory sentencing provisions, impose a suspended sentence requiring an offender to serve a shorter period of actual imprisonment than the mandatory minimum. Nor is the test whether the court would, but for the operation of the mandatory sentencing provisions, consider the option of such a suspended sentence. An approach relying on such tests would be tantamount to ignoring the clear statutory provisions of the mandatory minimum sentencing regime.⁵

[14] While the ‘exceptional circumstances’ exemption is intended to be broad, and the court may consider any matters it considers relevant,⁶ the word ‘exceptional’ describes a circumstance “which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon”. To qualify as ‘exceptional’, a circumstance “need not be unique or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered”.⁷

[15] Her Honour did not make a finding that any circumstances of the case were ‘exceptional’. Notwithstanding particular findings which appear in the sentencing remarks extracted at [11] above (the respondent’s youth, his plea of guilty, the five-year gap in his offending from 2011 to 2016, and the fact that the offence was constituted by a single punch assault), her Honour did

⁵ A similar conclusion was reached by Kelly J in *Wright v Valladares* [2015] NTSC 59 at [14].

⁶ *The Queen v Duncan* [2015] NTCCA 2; 34 NTLR 201 at [24].

⁷ *R v Kelly* [2001] 1 QB 198 at 208 per Lloyd Bingham of Cornhill CJ, approved in *R v Duncan* [2015] NTSCCA2; 34 NTLR 201 at [25].

not find that any one or more of those matters satisfied her that the circumstances of the case were exceptional.

[16] Counsel for the appellant submits that “it is not enough to constitute exceptional circumstances that the mandatory term may be disproportionate to the crime”.⁸ He contends that, if disproportionality of a sentence could be a sole consideration under the ‘exceptional circumstances’ exemption, then the mandatory regime would have no practical effect. He further contends that “proportionality is a sentencing principle, and not a circumstance of an offender”. I do not need to decide whether those submissions are correct in order to decide the appeal. However, I note that s 78DI(1)(b) refers to the “circumstances of the case”, and not the circumstances of the offender, or the circumstances of the offence. The provision does not preclude the court having regard to the result on application of the relevant mandatory sentencing provision, and forming a view as to whether the mandatory term of imprisonment is disproportionate, and, if so, the extent to which it is disproportionate to the offending. However, that did not happen in the present case. Notwithstanding her Honour’s passing reference to proportionality in the passage extracted at [9] above, her Honour did not find that the sentence of three months’ actual imprisonment was disproportionate; rather her Honour found that the ‘exceptional circumstances’ test was satisfied on the basis only that she would have

⁸ Appellant's submissions, 9 December 2016, par 9.

imposed a suspended sentence requiring the respondent to serve less than the mandatory minimum three months' actual imprisonment.

[17] The appellant has established error on the part of the learned Acting Judge.

[18] In the circumstances, I allow the appeal. Pursuant to s 177(2)(c) *Local Court (Criminal Procedure) Act*, I quash the sentence. Pursuant to s 177(2)(d) of the Act, I remit the case to the Local Court for further consideration and sentence.

[19] This decision should not be interpreted as a finding by me that the circumstances of the case before the Local Court were not exceptional. The issue of exceptional circumstances will be a matter for the Local Court to determine on the further hearing.

[20] A warrant should issue for the arrest of the respondent in the event that he does not present himself to the Local Court within 28 days of this decision.
